

Optimization of Philanthropic Waqf: The Need for Maqasid-based Legislative Strategies

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Abstract

Waqf institution was most central in financing socio-religious and public welfare systems during the early days of Islam. More importantly, the contribution of philanthropic waqf effectively sponsored and maintained the social welfare of the Muslim Ummah. Gradually, however, the creation of this type of *waqf* degenerated and today, by and large, the *waqf* consists of religious kind. Accordingly Muslim economy lost one of the most essential tools in the area of public financing. To remedy this situation, we believe that we not only need to rethink of the regulatory cum institutional structures but also to seriously earmark jurisprudential strategies for the revival of *waq khairi*. Accordingly, in this paper we primarily focus on this issue with the purpose of identifying some practical legislative measures relevant to the Malaysian context.

Introduction

During the glorious days of Islam, *waqf* (Islamic endowment) played considerable part in socio-educational, cultural and life-saving aspects of the Muslims. Early Muslims gifted with divine bounties were sensitive towards the plight of their downtrodden brothers and sisters in Islam. They dedicated numerous properties to uplift the lots of the unfortunate among them aside from parting with their wealth for other religious institutions, such as *zakah* and cemeteries. However, today *waqf*, by and large, is understood as a dedication made for purely religious causes. To us this narrow understanding of philanthropic endowment (*waqf khairi*) is symptomatic of the larger ritualization of Islam and its institutions as whole. To remedy the situation, we propose that there is a need to move beyond the literal understanding of the *waqf*. To do this, first we offer a brief overview of the concept, followed by a sketch of its application in the early days and lastly by looking at the issue from *maqasid* perspective with the idea of proposing some legislative strategies.

Conceptual framework

Literally *waqf* means to stop, to hold, to restrain , to detain , or to prevent, such as saying , ``preventing from disposition.``¹ In Islamic law , *waqf* refers to irrevocable dedication of a

¹ Wahbah al-Zuhayli, *al-Wasaya wa al-waqf fi al-fiqh al-Islami*, P.133.

portion of ones wealth for the purpose of expending its usufructs to legitimate causes or *charitable and righteous ends with the overriding objective of getting closer to Allah.*²

Waqf derive its validity from the general directives of the Qur'an exhorting Muslims to be benevolent and charitable towards the social causes. For instance, the Qur'an says: "What you can spare of your wealth as should benefit the parents, the relatives, the orphans, the needy, the wayfarers for Allah is not unaware of the good deeds that you do".³ Again it states: By no means shall you attain righteousness unless you give of that which you love; and whatever you give, of a truth God knows it well."⁴ Or the verse which states: "O you who believe! Give of the good things which you have lawfully earned ..."⁵

The Prophet, as the proclaimer of divine legislation, re-emphasised benevolence dedication of one's wealth in anticipation of earning its reward in perpetuity by saying: "When a person dies, all his good deeds ceases except three: the establishment of welfare institutions, the writing of a book and the pious children who will pray for them."⁶ Leading by example, he started building social infrastructure on the basis of *waqf*. For instance, he erected the first mosque (Quba') in Madinah, on a parcel of land made *waqf* by two orphans. These two pioneers in making Islamic *waqf*, in spite of the Prophet's insistence on paying them for their land, refused it and stated that that they would claim its reward from Allah in the next world.⁷ This mosque now stands now on the same lot with a new and enlarged structure.

Impelled by the legislative provisions of the Qur'an and Prophetic traditions as stated above, the companions of the Prophet uphold his tradition which has been followed till our time by devout Muslims. For instance, "Ibn 'Umar reported: 'Umar acquired land in Khaibar. He came to the Prophet, seeking advice about it . He said: "O Allah's Messenger, I have acquired land in Khaibar which is the best of all the properties I ever got" what is your opinion about putting it to use in the name of Allah. Thereupon the Prophet said: If you like, you may keep the corpus intact and give its produce as *sadaqah*(charity). So 'Umar gave it as a charity," declaring that the property must not be sold or inherited or given away as a gift. And 'Umar devoted it to the poor, to the nearest of kin, to the emancipation of slaves, to wayfarers/guests, and in the way of Allah."⁸

Abu Talhah , another companion of the Prophet, also after the revelation of Al-i-'Imran:92, went to the Prophet and said: " O Allah's Messenger in line with Allah's command that I will not attain piety until I (you) spend of what you love, and the most beloved property to me is Bayruha- a garden where the Prophet used to go and sit in its shade and drink from its water. I give it to Allah and His Messenger, hoping for Allah's reward in the Hereafter. So, O Allah's

² Ibid, pp.134-135. CF. Siti Mashitoh Mahamood, *Waqf in Malaysia: legal and Administrative perspectives*, p.1.

³ Al-Baqarah: 215.

⁴ Al-i-'Imran: 92.

⁵ Al-Baqarah: 267.

⁶ Sunan al-Timidhi , vol.3, p.660.

⁷ www.allahswaqf.com(retrieved,17 June 2009).

⁸ Sunan al-Nasa'i, vol.6, p.230.

Messenger use it as Allah orders you to use it. `` Allah`s Messenger said: ``Bravo! O Abu Talhah, it is a fruitful property. We have accepted it from you and now we return it to you. Distribute it amongst your relatives.``⁹ Another companion of the Prophet in the name of Mukhairiq made his will that his seven orchards in Madinah be given after his death to Muhammad. When he died, the Prophet took hold of the orchards and made them a charitable *waqf* for the benefit of the poor and needy.¹⁰

According to Jabir, some who dedicated their fruit orchards as endowment made it a condition that the fruits and revenues of their *waqf* be first given to their own children and descendants and only the surplus, if any, should be given to the poor.¹¹

In the light of the above, Muslim jurists detailed the minutest juridical rules of *waqf* including the following.

- i- Legal value: majority of the jurists regard *waqf* a recommended benevolent act (*tabarru` mundub*) as its *raison de`tre* lies on contributing to righteous philanthropic causes (*jihat al-birr/wujuh al-khayr*) which is recommended by textual sources, namely the Qur`an and Sunnah. The Hanafiyyah, however disagreed by saying that *waqf* in terms of legal value is merely a permissible venture (*mubah*) mainly because it can also be made by non-Muslims.¹² Majority view, we believe, is more authoritative as the Prophet encouraged its institution by companions as well as approved that which were made by them (becomes his Sunnah).

- ii- Types: most of the authorities divide *waqf* into philanthropic (*khairi*) and family (*ahli* or *dhurri*) kinds of endowment. The former refers to ,`` a dedication in perpetuity of the capital and income of an asset, recognized by Islamic law, for philanthropic causes even if it subsequently is dedicated to specific people.`` For instance, dedicating ones a parcel of land initially for a certain school or hospital and later on reverting it to one`s own progeny is an example of this kind.¹³ The family *waqf*, on the other hand, signifies dedicating one`s asset as approve by Shari`ah in favour of ones own and ones children and subsequently dedicating it to philanthropic causes.``¹⁴ Nevertheless, contemporary legal scholars like Zain have taken more pragmatic view by classifying *waqf* into four types: first, is family *waqf* whose sole beneficiaries would be ones near relative and family. Second, is the welfare

⁹ Al-Shawkani, *Nayl al-Awtar*, , vol.2,p.136.

¹⁰ www.allahswaqf.com(retrieved,17 June 2009).

¹¹ Ibid.

¹² al-Zuhayli, *al-Wasaya wa al-waqf fi al-fiqh al-Islami*,pp.136-137.

¹³ Al-Zuhayli, *al-Wasaya wa al-waqf fi al-fiqh al-Islami*,p.140.

¹⁴ Ibid.

(philanthropic) *waqf* whose beneficiaries are members of public or institutions, such as destitute, orphans, hospitals, schools, mosques, cemeteries etc which is regarded as the most pious act by jurists and most popular form made by people in Malaysia. Third is *waqf mushtarak* (combined welfare and family *waqf*) signifying dedication of ones property partly for the welfare of public and partly for the benefit of ones family.¹⁵ We believe this is more accepted view as it clearly demarcates the line of distinction between the beneficiaries and thwart the possibility of lawsuits arising from competing claims over *waqf* properties upon the founder`s death.

- iii- Legal stipulations: subject to stipulations as specified by various schools, the agreed conditions of validity for *waqf* are: first, the maker of *waqf* should be an adult person of sound mind and unrestrained in his power to dispose his property. Second, the property in question (*mawquf*) must be declared as *waqf* with clear intention by the creator (*waqif*). Third, the beneficiary (*mawquf`alayhi*) does not have to be a Muslim. *Waqf* for welfare of non-Muslim is valid provided he/she is not hostile. Safiyah, the wife of the Prophet, made *waqf* in favor of her Jewish brother.¹⁶ Fourth, the property of *waqf* has to be approved by Shari`ah. Fifth, the objective for which *waqf* is created must not be against Islam. Finally, the founder must not dedicate more than one third of his property as *waqf* except with the explicit consent of his legal heirs.¹⁷

- iv- Subject of the *waqf*(*mawquf bihi*): Jurists are unanimous on dedication of immovable properties as *waqf*. The reason is twofold: first, that all the incidents of *waqf* approved by the Prophet pertained to such assets; second, permanent utility of such as assets as the subject of *waqf*. Nevertheless, they were divided as to the dedication of movable properties as *waqf*. Majority approved it and Hanafiyah predominantly do not. The reason is that to Hanafiyah, movable properties could not be utilized in perpetuity which is the basic characteristic feature of *waqf*.¹⁸ However, from a legal proposition

¹⁵ Quoted in Abdul Fatah Bin Haji Kahlid, *Islamic Law and Land in the State of Selangor, Malaysia: Problems of Administration and Islamisation*, a doctoral thesis submitted to the University of Edinburgh, 1988, pp.240-243. see also Siti Mashitoh Mahmood, *Waqf in Malaysia: legal and Administrative perspectives*, p.17.

¹⁶ Al-Zuhayli, *al-Wasaya wa al-waqf fi al-fiqh al-Islami*, p.167.

¹⁷ For details see, Ibid, pp.153-183; Abdul Fatah Bin Haji Kahlid, *Islamic Law and Land in the State of Selangor, Malaysia: Problems of Administration and Islamisation*, pp.234-238.

¹⁸ Ibn Qudamah, *al-Mughni*, vol.5, p.585; al-Dardir, *Sharh al-Kabir*, vo.4, p.76; al-Shirazi, *al-Muhadhdhab*, vol.1, p.440; Ibn `Abidin, *al-Radd al-Mukhtar `ala al-Durr al-Mukhtar*, vol.3, p.408.

put forth by Ibn `Abidin one may gauge the real reason. He says: ``Dedicating of *darahim*(silver coins) as *waqf* was customary among the Romans and the dedication of hatchet and ads were common among ancient people. But they are no more customary in our time, hence no more valid in our time.``¹⁹ This dicta is important which unveils the underlying reason for divergent position of the Hanafiyyah on the issue. If that be the case, we believe that this would lead us to the conclusion, that the law based on customary considerations is changeable on account of changes in time and space. Accordingly, cash *waqf* in our time has emerged as the most viable means by which Muslim can make *waqf* on broader base particularly via modern mechanisms such as Takaful Waqf Plan as practiced in Malaysia.²⁰

v- Exchangeability (*istibdal al-waqf*): There is no disagreement that all *waqf* if cease to serve their objectives could be exchanged with other similar properties and dedicated for the same purposes. However, jurists disagreed on abandoned mosque; majority disallows it but Hanabilah approved its sale or its land and purchasing another one instead. The reason for this divergent position of the Hanabilah is one of purposive interpretation of the law. To them once the mosque does not serve its stated objectives, keeping it in perpetuity would be futile.²¹

vi- Salient features: They are two: First, is the perpetuity of its dedication. The implication is that once a property, often a real estate, is dedicated as *waqf* it remains *waqf* for ever. Subject to divergence of views among the jurists²², such a *waqf* property requires lengthy process to be exchanged against another property of equivalent value with the approval of the local authority. It follows that such an exchanged asset must immediately become *waqf* for the same purpose and beneficiaries of the former one. Second, is the

¹⁹ Ibn `Abidin , Ibid,p.410. It is to be noted that cash *waqf* was explicitly recognized by Malikiyyah and ratified by other renowned jurists belonging to other schools such as Ibn Hajar. See al-Dardir, *Sharh al-Kabir*, vol.4,p.87; Ibn Hajar, *Fath al-Bari*, vol.5,p.475.

²⁰ See Ashraf bin Mh. Hashim , *The Collection of Waqf through Insurance Companies: A Critical Analysis of the Malaysian Experience*, a paper presented in International Conference on Co-operative Insurance in the Framework of Waqf, ,International Islamic University Malaysia, 4-6 March 2008,pp.6-7.

²¹ They also claim *ijma`* of companions on the issue when `Umar ordered Baitu al-Mal in Kufah to be housed in Tamarin mosque which was not objected to by the former. Hence, if that be the case, such an exchange would be valid provided that the future use of the sold mosque structure most be for other activities approved by the Shari`ah. Ibn Qudamah, al-Mughni, vol.5,pp.575-579.

²² This is the opinion of the majority including the two disciples of Abu Hanifah. Abu Hanifah however, differed with them on technical ground by holding that *waqf* is a kind of revocable charitable undertaking where the owner can retract from it during his lifetime. See al-Shirazi, al-Muhaddab, vol.1, p.442; al-Bahuti , *Kashshaf al-Qina`*, vol.4, p.278; al-Dardir, *Sharh al-Kabir*, vol.4,p.101; Ibn al-Humam, *Fath al-Qadir*, vol.5,p.45.

inviolability of the founder's stipulation. Accordingly, as a matter of principle the revenues of *waqf* should exclusively be used for the objective stipulated by its founder thus the managing authority has no any jurisdiction to sway from these objectives so long as they are compatible with Shari'ah. However, this will be waived if such purposes become infeasible, in which case the revenue of this *waqf* should be spent on closest purpose available and if not it should be spent in favour of the poor and needy.²³

Financing significance in retrospect

Against this background, the endowment which according to Imam Shafi'i was an unprecedented system of socio-economic support introduced by the Prophet²⁴, has played pivotal role in financing religious, educational, health care etc of the Muslim states in the annals of the Islamic civilization. For instance, information extracted from the registers of *awqaf* in Istanbul, Jerusalem, Cairo and other cities indicates that lands of *awqaf* cover considerable proportion of total cultivated area. For instance, in the years 1812 and 1813 a survey of land in Egypt showed that *waqf* represents 600,000 *feddan* (=0.95 Acre) out of a total of 2.5 million *feddan*.²⁵

In Algeria the number of deeds of *awqaf* of the grand mosque in the capital Algiers was 543 in the year 1841. In Turkey about one third of land was *awqaf*, and finally in Palestine the number of *waqf* deeds recorded up to middle of the sixteen century is 233 containing 890 properties in comparison with 92 deeds of private ownership containing 108 properties.²⁶

From the financing perspective, religious establishment was funded from the revenues of the *waqf* properties. This usually includes salaries of imam [prayer leader and speaker of Friday religious ceremony], teacher(s) of Islamic studies, preacher(s). With the help of this independent source of financing religious leaders and teachers have always been able to take social and political positions independent of that of the ruling class. For example, upon the occupation of Algeria by French troops in 1831, the colonial authority took control of the *awqaf* property in order to suppress religious leaders who fought against occupation²⁷

²³ That is why the jurists declared the legally valid conditions of the founder as mandatory except as justified by court order or necessity. For instance, if the founder made it a condition that the manager (*nazir/mutawwalli*) cannot be removed but the judge find such as person unfit for the job, in such an instance, he can be removed. Or if the founder stipulates that the endowment property cannot be rented for more than one year but this would make it unattractive for the tenants, which cannot be respected on this account. For details see Ibn Qudamah, *al-Mughni*, vol.5,p.552.

²⁴ Imam al-Shafi'i in asserting so held: "As far as I know, the pagan Arabs never endowed a house or a piece of land before the advent of Islam." Quoted in al-Zuhayli, *al-Wasayah wa al-Waqf*, p.136.

²⁵ www.allahswaqf.com(retrieved,17 June 2009. These historical data with minimum modification have been adopted from the web.

²⁶ Ibid.

²⁷ Ibid.

Aside from religious education, education in general was the second largest user of *waqf* revenues. Since the beginning of Islam, in the early seventh century, education has been financed by *waqf* and voluntary contributions. Even government financing of education used to take the form of constructing a school and assigning certain property as *waqf* of the school. *Awqaf* of the Ayubites (1171-1249) and the Mamalik (1249-1517) in Palestine and Egypt are good examples. According to historical sources, Jerusalem had 64 schools at the beginning of the twentieth century all of them are *waqf* and supported by *awqaf* properties in Palestine, Turkey and Syria. Of these schools 40 were made *awqaf* by Ayubites and Mamalik rulers and governors. The University of al Azhar is another example. It was founded in Cairo in 972 and was financed by its *waqf* revenues until the government of Muhammad Ali in Egypt took control over the *awqaf* in 1812.²⁸

Waqf financing of education usually covers libraries, books, salaries of teachers and other staff and stipends to students. Financing was not restricted to religious studies especially at the stage of the rise of Islam. In addition to freedom of education this approach of financing helped creating a learned class not derived from the rich and ruling classes. At times, majority of Muslim scholars used to be coming from poor of the society.²⁹

The third big beneficiary of *waqf* was the category of the poor, needy, orphans, persons in prisons, etc. Other users of *waqf* revenues included health services which covered construction of hospitals and spending on physicians, apprentices and patients. One of the examples of the health *waqf* is the Shishli Children Hospital in Istanbul which was founded in 1898.³⁰

Waqf was also a source of finance to help people go to Makkah for pilgrimage and for helping girls to get married. Moreover even animals were beneficiaries of Islamic endowment as was the case in providing for cats and unwanted riding animals in Damascus.³¹

Nevertheless, with the advent of colonization of Muslim states, the financing significance of *waqf* was curtailed.³² With the state control of *waqf* properties and introduction of land reform, people started to dedicate their properties solely for religious purposes such as mosques and cemeteries.³³ To revive the lost practice of *waqf*, among others, we need to reinstate the role of *waqaf khayri* which in broad terms not only covers making *waqf* for religious ends but other public welfare aspects such as education, health care, charity establishments, research projects etc. To us to do this we need to take a *maqasid* – oriented approach to the concept of *waqf*.

The Purposes of the Shari`ah (maqasid al-shari`ah)

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid.

³¹ Ibid.

³² Ahmed, *The Role of Zakat and Awqaf in Poverty Alleviation*, p.32.

³³ For instance in the Federal Territories as of 2002, there were 20. 735.61 acres of *waqf* land out of which 71% were for cemeteries, 19% for mosques and 6.9% for suraus. See Sadeq, *A Survey of the Institution of Zakah*, p.97.

Every law is oriented towards certain purposes. The Shari`ah, being a divinely inspired code for human conduct, also has its own aims and objectives. Its primary goal is to free man from the grips of his own whims and fancies so that he may become a true servant of God. As we read in the Qur`an: ``Then we put thee in the right way of religion : so follow thou that way and follow not the desires of those who know not.``³⁴

To enable man to serve Him, God has designed His laws to secure man's interest and safeguard his well-being (*maslahah*) both in this world and the hereafter³⁵-a thesis which was developed by great thinkers like Imam al-Juwayni ,Imam al-Ghazali ,al-`izz ibn `Abd al-Salam , al-Shatibi,Tahir Ibn `Ashur , and some contemporaries like al-Fasi and al-Raysuni ³⁶, to name a few,The discourse on *maqasid* marks a significant departure from traditional literal approach to *ijtihad*.This obtains through a purposive interpretation of the Shari`ah rules, by way of *istiqra*(inductive reasoning) in Islamic jurisprudence.

***Maqasid al-Shari`ah* defined**

Maqasid al-Shariah is a composit of two words : *maqasid* and *al-Shari`ah*.*Maqasid* is the plural of *maqasid*.Literally ,it means ,intent,objective ,purpose, aim, and end-goal.Technically , it signifies the stated purposes of the Shari`ah for the realization of Allah`s servants` interest(*masalih al-`ibad*) .³⁷ Shari`ah³⁸ signifies the sum total of laws and principles that are ordained by Allah and promulgated through his Prophet to mankind.

What Constitutes Human Interest(*maslahah*) ?

According to al-Ghazali ,human *maslahah* has two-faces :

1. *Dini* (promotion and preservation of religious values) or the human interest in the hereafter and,

³⁴ Al-Jathiyah :18

³⁵ Muhammad al-Zuhayli,*Maqasid al-Shari`ah* ,(Damascus : Dar al-Maktabi,1998),p.8

³⁶ www.almujtamaa-mag.com/Detail.asp?retrieveid=29/03/06

³⁷ This is a definition by Ahmad al-Raysuni.Al-Fasi defines it as the purpose and secrets that the lawgiver has set for each rule of his laws. For these and other definition by other authorities on *maqasid* see ,Nur al-Din ibn Mukhtar al-Khadimi , *Ilm al-Maqasid al-Shari`ah*,(Riyad: Maktabat al-`Abikan,2001),pp.16-17

³⁸ This is the definition of the Shari`ah in true sense which distinguish it from the term *fiqh* .*Fiqh* signifies the body of deduced substantive laws that represents the human understanding of divine law (as embodied in the Qur`an and the Sunnah) as well as the operative rules (based on rational methodologies of *ijtihad*) to regulate human conduct within time and space . see www.almujtamaa-mag.com/Detail.asp?retrieveid=29/03/06

2. *Dunyawi* or human interest pertaining to this world.³⁹ These worldly purposes in turn include, the preservation of life, posterity /progeny(*al-nasl aw al-nasab*) or family values⁴⁰, intellect, and wealth.

The two types described above ultimately yield five major purposes of the Shari`ah namely religion, life, progeny, intellect, and wealth. They are called the five⁴¹ basic principles (*kulliyat al-Khams.*)⁴²

The Classification

The human interest in order of priority has been classified into three broad categories. They are:

1. Necessities (*daruriyyat*), consisting of religion, life, progeny, intellect, and wealth. They are essential because upon them the life of man depends and if threatened, corruption, disorder and injustice will result in individual and collective life. As al-Shatibi maintains:

“*Daruriyyat* are vital because they are indispensable in sustaining the *masalih* (sing. *maslahah*) of *din* and *dunya* (the world), in the sense that if they are disrupted the stability of the world is disrupted. Their disruption results in the termination of life in the world, and in the hereafter it results in losing salvation and blessings.”⁴³

2. Needs (*hajiyyat*) consisting of facilities that human need them in order to provide them with ease and relief in situation of hardship and difficulties in life though their non-existence do not disrupt life and give rise to widespread chaos but result in hardship and stress.⁴⁴

3. Embellishments (*tahsiniyyat*)⁴⁵ consisting of all things that enhance human mores and manners. Their disruption though neither disruptive to life nor entail hardship but a people

³⁹ Imran Ahsan Khan Nyazee, *Theories of Islamic Law*, (Islamabad: International Institute of Islamic Thought, 1994), p.240.

⁴⁰ As redefined by Nyazee as such. See *ibid.*

⁴¹ This is the most popular itemization of human vital interest as outlined by al-Ghazali and elaborated by Al-Shatibi. Nevertheless other scholars, such as Ahmad al-Khamlishi, al-Qaradawi, al-Raysuni and some other contemporary authorities such as construction being a result of human *ijtihad* cannot be taken as conclusive (or even exclusive), it can be expanded to include other vital human interests within its ambit such as *ird* (human dignity), justice, equality, freedom, socio-political and economic right of human beings. For details see Jamal al-Din `Atiyah, *Nahw Taf'il Maqasid al-Shari`ah*, (Damascus: Dar al-Fikr, 2001) pp.98-105 and Ahmad al-Raysuni, *Nazariyyat al-Maqasid `ind al-Imam al-Shatibi*, (al-Rabat: Dar al-Aman, 1991), pp.358-359

⁴² Nyazee, *Theories of Islamic Law*, p.240.

⁴³ al-Shatibi, *al-Muwafaqat fi Usul al-Shari`ah*, vol.2, p.8, see also Masud, *Islamic Legal Philosophy*, p.226.

⁴⁴ Al-Shatibi, *ibid.*, p.10

⁴⁵ It is to be noted that *Maqasid al-Shari`ah* has been variously classified based on various considerations, and its division into *daruriyyat*, *hajiyyat* and *tahsiniyyat* as we referred for the purpose of this study represents the main

devoid of them will be lowered in the estimation of right thinking and right natured people. *Tahsiniyat* in this sense denotes the idea of good habits and Islamic code of morality.⁴⁶ Consequently, the Shari`ah rules and regulations on the whole provide practical measures to cater for all three levels of human interests, namely, the vital needs, the complementary needs and the betterment requirement. A day to day example that illustrates the existence of this hierarchy of human *maslahah* in the Shari`ah paradigm is the following:

One of man's vital needs is housing, the existence of windows to allow for ventilation in the house is complementary to it, and to equip the house with facilities, such as furniture and beds are required to enhance the quality of the house.

Analogous situation in the Shari`ah is the case of necessity of having a *din* (religion) for people. To safeguard this very vital *maslahah* for man, the Shari`ah puts practical measures by which *din* can be nurtured and enhanced. For instance, it ordains Muslim to uphold the laws of obligatory *'ibadah* for consolidation of their sense of religious belief. To enable Muslims to perform the *'ibadah* at all times, even if they are sick, various facilitating rules, such as praying in a sitting position, and performing *taymmum* when ablution is impossible, are allowed as part of *hajiyyat*. To enable Muslims to achieve more excellence in worshipping God, Sunnah prayers are recommended as part of *tahsiniyyat*.

Maqasid and waqf

Ibn `Ashur places endowment under the *haji* category of the *maqasid*. *Hajiyyat* constitute the purpose behind those provisions of the Shari`ah which provide ease in case of difficulty and which eliminate or reduce hardship from people's lives. As Ibn `Ashur defines them as, "That which Muslim community needs them for satisfaction of their well-beings and managing their affairs in a better way -because the non-existence of *hajiyyat* though does not lead to the total disruption of social order, it definitely affects its orderly functioning."⁴⁷ For example, if a sick person is required to fast in the month of Ramadan, it will be very hard for him or it may even be impossible for him to do so. Therefore, the Shari`ah affords such a person the option of postponing the days during which he due to illness can not fast.⁴⁸ In business transactions also, the Shari`ah has allowed a variety of contracts and trading practices on the doctrine of *'ulum al-balwa* (inescapable necessity) if an objectionable element in a business otherwise cannot be avoided at all. For instance, a negligible rate of non-*halal* income that an investor gets

one denoting the overall objective of the Shari`ah in taking into account the human need. For details see, al-Raysuni, *Nazariyyat al-Maqasid 'ind al-Imam al-Shatibi*, p.124; al-Khadimi, *Ilm al-Maqasid al-Shari`ah*, pp.71-75

⁴⁶ Masud, *Islamic Legal Philosophy*, p.241-244.

⁴⁷ Muhammad Tahir ibn `Ashur, *Maqasid al-Shari`ah al-Islamiyyah*, Muhammad El-Tahir al-Mesawie (edit.), (Kuala Lumpur: Fajar Ulung Sdn.Bhd, 1999) 1st ed. p.223. ;see also al-Shatibi, *al-Muwafaqat fi Usul al-Shari`ah*, vol.2, p.10

⁴⁸ A-Baqarah:184

by way of dividend is tolerated on account of unavoidable situation.⁴⁹ Similarly in the area of human custom and habit (*adah*), the Shari`ah allows the incorporation of any local custom into the body of Islamic law in meeting human needs so long as it is not otherwise prohibited. It likewise allows divorce in case if a marriage conflict becomes intolerable.⁵⁰

In this context, *waqf* to Ibn `Ashur is one of the major components among the donations (*sadaqat*) whose *raison det`re* is to ease the difficulty faced by destitute and poor on top of realizing other social objectives which needs to be taken care of. The reason is that human greed would not have allowed supporting these causes had Islam not sanctioned them by clearly declaring that the merit for such benevolent acts even does not cease after death. That is why great companions such as `Umar, Abu Talhah and others like `Utham⁵¹ took the lead to make *waqf* for public welfare.⁵² The implications of this theory, for *waqf kahiri* include the following:

First, *waqf* in the scheme of *maqasid*, being a *haji* benefit is fundamental in supporting religion, life, family, human intellect and even property at the societal level. The reason is that *waqf* if not instituted, houses of worship cannot be solely built and sustained on *zakat* fund as it is designated for other social causes besides *fi sabil Allah*. Poverty-stricken people who have no access to education, health care, daily means of sustenance would not expected to be a part of productive and meaningful citizenry among the Ummah. This is the logic behind the organic connection behind the hierarchy of *maqasid* as the demand for *daruriyyat* creates the demand for *hajjiyyat* and *tahsiniyyat* and also the principle that *hajjiyyat* and *tahsiniyyat* are pursued for the sake of *daruriyyat*.

Second, the utility anticipated by *waqf*, namely the socio-economic welfare of the ummah would remedy the deviant economic behavior on the part some Muslims who spend bulk of their wealth on *tahsiniyyat* at the expense of *hajjiyyat* which in turn jeopardizes the necessities desired by Islam. For instance, optional *hajj* and *umrah* more often by wealthy people who never care about the plight of poor and social causes is a case in point. A question is raised here as to which of these voluntary devotions should be given priority, particularly in view of conditions of extreme poverty, hunger and diseases that prevail in many Muslim societies today.

A cursory study of the issue from Islamic sources would provide us with the answer that charity, which is more socially oriented than voluntary pilgrimage, should be given priority. The reasons are: 1) Muslims cannot remain unconcerned and indifferent to other peoples' misery and suffering based on the authority of the Prophet's tradition where he declared:``

⁴⁹ Islamiqmoney.com.

⁵⁰ Abu Yahya, *Ahdaf al-Tashri` al-Islami*, pp.174-175.

⁵¹ `Utham bought the Well of Rumah and made it *waqf* under the instruction of the Prophet.

⁵² ibn `Ashur, *Maqasid al-Shari`ah al-Islamiyyah*, pp.302-306.

The mutual love , kindness and graciousness of Muslims function like a body ;when some of its part are in pain ,then all the other parts of the body become a victim of fever and sleeplessness .⁵³ 2)The governing law of human relationship , in the Islamic view ,is one of sympathy and not antipathy. The Prophet clearly voiced this concern:`` A Muslim is a brother to another Muslim . He shall neither oppress him nor should he usurp his right .He who provides for the needs of his brother, will be helped by God.And for him who removes one difficulty of a Muslim brother , God will remove one difficulty of his on the day of judgement.And for him who covers the defect of a Muslim brother, then on the day of judgement God will cover his defect.⁵⁴ 3) In the event of a conflict between a voluntary worship and social responsibility, the rule is to fulfill the latter. This principle is drawn from the practice of Ibn `Abbas. Ibn Abbas one day was performing *I`tikaf*(spiritual retreat) in the mosque. A man came to him . He saluted him and sat down.Ibn Abbas said to him that he looked worried and inquired what was the matter.The man replied:`` Yes O ! cousin of God`s prophet ; I have to repay some one`s debt but I have no means to do so.`` Ibn Abbas said:`` May I talk to you in this connection ?`` He replied that if he wished to, he might. Ibn Abbas then put on his shoes and came out of the mosque. The man reminded him that he was observing *I`tikaf* ,which was nullified by the act of going out of the mosque .Ibn Abbas replied:``No I have not forgotten .But I have heard from the prophet who said:`` He who walks for the need of his brother and satisfies his need , then his act is better for him than ten years of *I`tikaf* and he who performed one day`s *I`tikaf* for God`s pleasure then God will place three trenches between him and hell , and whose distance will be more than the distance between the East and West.⁵⁵

Hence , the above tradition makes it very clear that spending money for human welfare is more superior than doing the voluntary pilgrimages. Consequently, Muslims who perform the hajj and `um rah repeatedly but do not dispense with a single penny to help the poor and needy have certainly lost sight of the essence of worshipping God and the sense of priority and balance in their acts of devotion to Him.

Third, understanding of this would prevent *israf*(prodigality)⁵⁶ and lavishness spending (*tabdhir*). A person who lavishly spends on *tasiniyyat* , lets say leisure trips, feasts , wedding parties, etc while the poor and the orphans starve in his backyard is committing the offence of *israf* and *tabdhir* as prohibited by Islam. More serious is when such practices become a social

⁵³ Mishkat al-Masabih.vol.1,p.291.

⁵⁴ Mishkat al-Masabih.vol.1,p.296.

⁵⁵Quoted in al-Ghazali,*Muslim` Character*,p.309.

⁵⁶ M.Fahim Khan and Noor Muhammad Ghifari , ``Shatibi`s Objectives of Shari`ah and Some Implications for Consumer Theory`` , in *Readings in Islamic Economic Thought*, Abul Hassan M. Sadeq & Aidit Ghazali (edits), p.198.

custom and widening the *economic* gap between the poor and needy and leads the latter to involve in crimes of theft, burglary etc. The Prophet anticipated this when he said: `` O Abu Dharr ! when you prepare soup put a little more water in it , and see if your neighbour needs some. ``⁵⁷

Lastly, the main objective of *waqf* is benevolence(*al-birr*) as held by al-Zarqa. *Al-birr* according to al-Zuhayli is a collective name embracing all donations dedicated to the destitute, scholars, relatives, mosques, schools, hospitals, welfare homes, *hajj*, striving for promotion of Islamic cause, researches and publications of Islamic books etc. Accordingly, dedication of *waqf* to mosques alone does not take care of other heads of *hajiyyat* for which *waqf* as one of the measures has been instituted in Islam as maintained by Ibn `Ashur.

Conclusion and recommendations

Waqf which involves a process of holding up of the property and devoting its usufruct to the beneficiaries historically was an important source of financing public utilities, education and researches, health care and caring centers for the orphans and disabled aside from providing capital for traders and maintaining mosques and providing space for burial of the dead. Nevertheless, contemporary practice of *waqf* represents somewhat skewed understanding of the concept of *waqf khairi* as it is taken to mean devoting for purely ritualistic causes. This paper, therefore, argued for a paradigm shift on the part Muslims on the basis of the purpose of the Shari`ah and *fiqh* of priority. In this context, dedicating one`s wealth for capacity building of the poor and needy secures life, intellect, creates wealth and increases the number of committed Muslims to uphold religion and go to pray in the mosques, built on *waqf* land. Loss of sensitivity to care for the public welfare, on the other hand, increases poverty which in turn plums up the social ill index.

Accordingly, to optimize contribution towards creation of philanthropic *waqf*(public endowment) in the wider sense as was the case during the glorious days of Islam , we propose the following legislative strategies:

- 1- At the epistemological level, the Religious Council of each States must emphasis the role of welfare type of *waqf* within the frame of other voluntary acts of worship via religious teachers involved in mosque related activities.
- 2- At the juristic level, the idea of cash *waqf* and also temporary *waqf* as reflected by best practices, such as in Kuwait and South Africa should be popularized so as to dispel the notion that *waqf* has to be in the form of real estate or permanent assets.
- 3- Baitulmal in coordination with Tabung Haji and Takaful Malaysia in turn can solicit welfare endowment from those who more often go for voluntary Hajj and `Umarah.

⁵⁷ Al-Nawawi, *Riyad al-Salihin*, vol.1,p.192.

- 4- Baitulmal in coordination with other family members of the founder and non-profit organization could encourage creation of income generating endowments where the proceeds could be spent on social welfare. During Othman Caliphate cash was invested in *mudarabah* and the revenues generated from them were used for charitable purposes.⁵⁸
- 5- Popularize the idea of welfare *waqf* among the employees both in private and public sectors in order to encourage them part with a portion of their salary as tax-deductable *waqf*.

⁵⁸ Ahmed, *The Role of Zakat and Awqaf in Poverty Alleviation* , p.133,