

# ***TOWARDS EFFECTIVE LEGAL REGULATIONS AND ENABLING ENVIRONMENT FOR AWQAF***

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## **1. Introduction**

The institution of waqf is a *sunna* established by the Prophet (pbuh) that became the base upon which the Islamic socio-economic development model was built. Awqaf was the main provider of many services that the modern welfare state today strives to offer. Awqaf was the nation's main provider of education, healthcare, and non-medical welfare. However, over the years, due to a variety of reasons including the legacy of colonisation of Muslim countries, the role of the waqf as an effective tool for socio-economic development became neglected and often forgotten. This is evident by the fact that not only much less new awqaf are donated, but also in the dormant nature of many awqaf assets. A large number of awqaf properties were expropriated, lost, or remained undeveloped or under-utilized and the latent wealth of awqaf remains largely untapped.

One of the major impediments to growth is the lack of proper legal environment. In order to rediscover awqaf and reverse the trend of neglect and to enhance their role in social and economic development, it is imperative that an enabling legal environment is in place. To create such an environment, a number of issues must be addressed. How should the regulatory framework operate? Should the regulation help or hinder the development of awqaf and the creation of new waqfs? Is uniformity needed? And how will this help? What is an ideal model for corporate governance? Is that model workable within the parameters imposed by other features of the business and political environment? What about sustainability and profitability and shouldn't awqaf be profitable in order to be sustainable? Do we see a conflict between awqaf as a not-for profit sector and the pursuit of growth and profitability?

## **2. The Third Sector**

Awqaf (singular, waqf) is an Arabic word meaning assets that are donated, bequeathed, or purchased for the purpose of being held in perpetual trust as ongoing charity (*sadaka jariya*) or for a general or specific cause that Islam regards as socially beneficial. This condition of perpetuity has led over the years to a considerable accumulation of societal wealth such that awqaf has become an important sector dedicated to the social and economic improvement of the Muslim society.

The importance of the awqaf sector is seen in terms of the huge assets it controls, in its social expenditure, in the number of people it employs, and in its significant contribution to the economy which accounts for as much as 10 per cent of the GDP of some countries.

With such a significant economic output, and growth in the number, size and diversity of non-profit organizations entrusted with awqaf properties for their social programs, awqaf as a faith-based charitable institution is no longer seen as exclusively religious. Awqaf has generated interest well beyond the confines of philanthropic activists and *fiqh* and *Shariah* scholars. With a broader business focus, it became clear that the sector is in fact an industry and is being subjected to increased scrutiny by governments and regulatory authorities.

Awqaf organizations are Islamic not-for-profit entities that represent a vast array of social, cultural and economic activities. They are not part of government even though many perform a public service. Their operations dovetail into all sectors of the economy and include a wide range of industries including but not limited to real estate, education, healthcare, social services and recreation. Awqaf constitute a distinct sector, neither public nor private – a sector with its distinctive rules and characteristics. Awqaf institutions come in different structures and include government agencies, non-government organizations, incorporated and unincorporated associations. Being an awqaf organization does not necessarily mean being small. A considerable number of them are large-scale organizations operating in different countries, controlling substantial assets, and employing significant number of people. Major hospitals, universities, museums, and many NGOs are waqfs.

### **3. Legal Status and Ownership of *Awqaf***

The concept of ownership in awqaf can be quite complex and somewhat confused. There are differences among the four schools of Islamic jurisprudence (*mazhabs*) on who owns the waqf assets. The *Shafeis*, argue that ownership of awqaf belongs to God and what appears to be human ownership is in fact a matter of trusteeship. The *Hanafis* and *Hanbalis* view that the waqf belongs to the beneficiaries although their ownership is not complete in the sense that they own only the benefit or usufruct and are not permitted to dispose of the property or use it in any way different from what was decreed by the founder. *Maliki* jurists are of the view that a waqf remains in the ownership of the founder and is inherited by his/her legal heirs. Thus the *Malikis* do not insist on the perpetuity of the waqf like the *Shafeis*, *Hanafis* and *Hanbalis*. Ibn Arafa, a *Maliki* scholar defines perpetuity “as long as the property lasts” to include such perishable assets as livestock, trees, items of furniture and mobile assets. Other jurists argue that the ideal awqaf model contains within it mechanisms by which it can perpetuate itself, such that perishable assets can be held in perpetuity. For example, non-human or biological assets such as farm animals, crops and orchards are self-generating and regenerating assets. On the other hand, there are methods by which inanimate assets can refinance themselves and therefore can be renewed or replaced by proper provisioning. According to Sheikh Zarqa “everything in waqf is subject to *ijtihad* [legal interpretation] and there is no single ruling in it that gained unanimity except that the waqf purpose must be benevolent (*birr*)”.

The fact that a waqf outlives the founder, the Nazer and the beneficiary, it has a separate and independent personality “*thimmah*” of its own. This is akin to the concept of the

continuing legal entity which was developed in the west over the last three centuries. This however differs from the corporate entity since the corporate entity can dispose of its assets and can imminently be terminated by its shareholders. The perpetuity of awqaf is protected by a series of Shariah rulings some of which relate to non-disposal of awqaf assets through sale or transfer. The waqf is conceived as a sacred trust which means that even if the original purpose of the waqf ceases to exist, the benefit can be assigned to another purpose and the property remains in the domain of the waqf.

#### **4. Family *Awqaf***

Some of the earliest awqaf were founded for the benefit of the poor members of the family. Family awqaf were later established to reduce the exposure of the property to risk and to protect it from falling into the wrong hands. As a waqf, the property cannot be sold and is not available as collateral to creditors. From a legal point of view, the beneficiaries of the family waqf are family members who are regarded as ‘objects’ having only a ‘contingent interest’ in relation to the waqf property.

Many family awqaf are created as testamentary trusts, arising upon the death of the founder. This has cast a shadow over family awqaf as they gave rise to disputes that brought them under heavy attack in several Muslim countries. Some countries enacted laws that dissolved existing family awqaf and prevented establishing new ones as happened in Egypt, Syria and Lebanon where family awqaf properties were quarantined as inherited assets and then distributed or liquidated to the benefit of the beneficiaries according to Shariah inheritance rulings and in some cases under the intestacy laws of the country.

The dissolution of family awqaf in some countries is attributed to many factors including the exponential increase in the number of beneficiaries after few generations to the point where the benefits accruing to an individual were insignificant; breakdown of the relationships among family members; disputes arising between the beneficiaries and the nazers; and the conflicts of interest arising from nazers who control the waqf and are also beneficiaries of the waqf property.

#### **5. Regulating Awqaf – Historical Perspective**

Throughout Islamic history, governments considered awqaf as a national resource and therefore should fall under state control. The first attempt by the state to control awqaf took place during the period of Mamluk Dynasty (1250 -1517) in Egypt. This was strongly objected to by Muslim scholars that it was quickly withdrawn. The change came with the Ottomans (1281 - 1918) who established a directorate for awqaf and enacted laws for registration, control and certification of titles. This came as a sweeping reform to the prevailing chaos and corruption in the management of awqaf. During the first half of the 20<sup>th</sup> century many Muslim countries issued awqaf laws that were based on the Ottoman laws. After independence, Muslim countries began to enact their own awqaf laws and established ministries and directorates to manage awqaf the same way other branches of the public sector are managed and controlled.

In Egypt, the first leader to bring awqaf under state control was Mohammad Ali Pasha (1805-1848). Awqaf were considered as part of the state when Nasser nationalized them in 1952 as part of the policy of land reform. The nationalization of awqaf transferred the responsibility from private nazers to the Ministry of Awqaf which is perceived as an instrument of government policy.

In recent years, many Muslim countries embarked on reforming the administration of awqaf by separating the management function from custody services by establishing autonomous entities. They recognized that awqaf are a separate entity and that awqaf funds are not to be commingled with public funds. Egypt in 1971 established the “Egyptian Awqaf Authority” to take over the management of awqaf properties from the Ministry of Awqaf. In Sudan, the “Federal Corporation of Awqaf” was established in 1987. Kuwait in 1993, founded “Awqaf Public Foundation”. In Jordan, the Ministry of Awqaf, Islamic Affairs and Holy Places established “Awqaf Properties Investment Corporation”. The latest is the establishment of “Qatar Awqaf Authority” in 2007 to take over the activities of the former Awqaf Department at Ministry of Awqaf and Islamic Affairs.

## **6. Custody and Management of Awqaf**

In principle, the founder of the waqf (*waqif*) determines the type of management of the waqf. The waqf manager (*nazer/mutawalli*) holds the title of the waqf property, exercises legal control and is bound by fiduciary duty to protect and administer the waqf for the benefit of the beneficiaries and in accordance with the terms of the waqf deed. Nazers are expected to comply with both the letter and spirit of the waqf condition. The importance of the conditions of the waqif is indicated by the often quoted maxim: “The conditions of the waqif have the same legal force as the edicts of the legislator”. However, some flexibility is afforded through the differences of the schools of jurisprudence. Abu Hanifah, for example, allows changing the conditions of the waqif when the beneficiaries or the purpose of the waqf come to an end.

The authority of nazers to act and make decisions on behalf of the waqf carries an immense responsibility and their duties are wider and more onerous than they were assumed to be. As trustees, nazers have the primary responsibility for prudent management of assets in their custody. As such, nazers are expected to have a certain level of business skills and investment knowledge to support their role in monitoring the safety and performance of assets in their custody. However, because of the nature of awqaf, its religious message and social application, it seems logical that those who are entrusted with the custody and management of awqaf properties are more religiously conscious and therefore employ their faith when managing. But the operating environment is rapidly changing and as a result the role of the nazers is also changing. Nazers are not only required to act diligently for the best outcomes for the waqf, but also to be seen to be acting in a principled manner and build trust among those they deal with. They need to develop competence and behavioural characteristics in order to change the traditional image of the nazers as “male, pale and stale” who live in mosques and are only

concerned with the social aspects of their business. Nazers have the responsibility to safeguard and grow assets in their custody and produce returns rendering it harder to act solely on their beliefs.

## **7. Enabling Legal Environment**

One of the major impediments for the development and growth of awqaf is the lack of constructive legal and regulatory environment. Awqaf is a voluntary sector built on voluntary contribution of assets and on mostly voluntary contribution of services. Therefore, the regulatory environment should be conducive to stimulate the sector, encourage donors and assist nazers to be more ethical and proactive. Donors usually are generous and feel more comfortable with organizations whose operations are governed by generally accepted standards of accountability and transparency. Financiers also are more willing to provide capital for projects of organizations that adopt best practices of corporate governance.

Unlike commercial organizations, the services delivered by awqaf may often be intangible and difficult to measure. Commercial organizations have clear delineations about shareholders, with all reporting geared towards profits. The position is not so simple for awqaf organizations. Regulated mainly by Shariah and by waqif conditions, many awqaf organizations consider regulatory and compliance issues of corporate governance as costly and unnecessary administrative burdens. Unlike commercial organizations, staff in an awqaf organization is comprised of low-paid professionals or volunteers who have chosen to work in awqaf for less tangible rewards. Their loyalty is more to the cause than to the Waqf as an organizational unit. They are mainly concerned with the social aspects and pay little attention to financial efficiency or accountability. They claim that by legislating what is effectively an issue of faith, the very fabric of awqaf will be undermined.

Strategy formulation in an awqaf organization can be subject to a unique and complex set of influences. What is deemed to be appropriate strategy will be conditioned by concern not to violate the conditions of the waqif, the wishes of the donors and the legal environment. The consideration of the concerns of non-beneficiary stakeholders should also form part of awqaf organizations' responsibilities and as such nazers should have the duty to act in the interest of the entire community. These days no organization is immune to public scrutiny, not even a shelter or an orphanage that does not have a blemish to its name. Therefore the impact of awqaf's performance on the community must be positive and the organization must be seen to be operating in compliance with community standards and expectations.

The major challenge faced by awqaf is ensuring that the huge treasure of awqaf is preserved, developed, continues to grow and contributes in the social and economic development of the *Ummah*. This can be met only by creating an enabling legal environment – one that creates a level playing field for awqaf nazers and members and causes them to be transparent and accountable and enables them to strengthen their

operations in order to fulfill their obligations to donors, beneficiaries and all other stakeholders.

## **8. Flexible and Efficient Awqaf Law**

Awqaf is a global sector and many awqaf organizations have international presence acting as trustees and custodians (nazers) of a plethora of assets, cash flows and cross-border investments. It is not unusual to find the waqf property in one country and the beneficiaries in another while the waqf organization is based in a third country. Thus, awqaf may fall under different jurisdictions depending upon the type of connection to the jurisdiction: the connection of the waqf asset with the jurisdiction, the connection of the awqaf organization (or trustee) to the jurisdiction, and the connection of the beneficiaries to the jurisdiction. Accordingly, the same waqf may be subject to different laws depending upon the type and degree of connection to the jurisdiction. What is needed is an awqaf law that gives a strong but flexible legislative framework that aligns with Shariah, but accommodates the particular needs and circumstances of the individual jurisdictions.

Awqaf are regulated by the country's local awqaf law, if there is one, or are subject to laws which are designed for other sectors. In general, the existing awqaf laws are not written to operational requirements. They mainly define relationships among stakeholders but fall short of addressing the developmental needs of the sector. On the other hand, regulating awqaf by applying other laws puts the sector at a disadvantage inasmuch as the sector's specific requirements would not be considered by such laws. The harmonization of awqaf laws across national boundaries is essential for the development and growth of the sector. However, there is no unanimous agreement on developing awqaf laws with global application. Some jurisdictions consider that their existing laws are adequate for regulating their awqaf. To be acceptable internationally, the global awqaf law should provide only the conceptual framework and should be broadly stated to allow individual governments to modify it taking into account the social structure and ethnic composition in the country.

The ideal awqaf law should be a principle-based framework that provides an authoritative benchmark for awqaf organizations across jurisdictions. The intention is not to substitute a local law by another or to morph all the different national awqaf laws into one global law. A model awqaf law should identify the characteristics of the sector and be designed to stimulate awqaf development and initiatives and protect awqaf properties in the country. It should be flexible and efficient. If it is too strict, then it will be met with less satisfaction and more resistance. Like the 'corporations act' in common law countries, the awqaf law should have a system of replaceable rules, so that awqaf organizations can design their by-laws to fit their needs and circumstances more closely. From a juridical point of view, the awqaf law should be interpreted less strictly than other laws and more attention should be given to the intent of the law than its formal expression.

The sector shows great concern for ethics based on fundamental values such as honesty, integrity, fairness, trust and commitment. These values are especially important for awqaf as it is through this sector where social impacts are more visible. While standard

regulations play an important role in protecting all stakeholders, in these areas, awqaf organizations are better placed to regulate their own activities, and can produce more social cooperation and better economic outcomes than government-mandated rules.

## 9. Corporate Governance

A key issue to awqaf is the need for transparency and assurance of the way assets and resources are managed in the interests not only of the beneficiary groups but of all stakeholders. The lack of uniformity in reporting and the failure of many awqaf organizations to produce financial reports, does limit their accountability to the waqifs, to beneficiaries, and other stakeholders. Most awqaf organizations use their annual reports as public relations tools that are designed to present themselves to potential donors and supporters as an attractive entity for donors' funds. This type of reporting is largely unregulated leading to problems of comparability and reliability. Confusion, uncertainty and sometimes unscrupulousness are perceived in the texture of awqaf organizations. Therefore, in order to correct this image and to bridge awqaf culture of philanthropy and issues of organizational management, a suite of internationally recognized standards of corporate governance must be established.

The establishment of sector-specific standards requires time to evolve, and for awqaf the setting of standards faces higher hurdles. Based on awqaf fundamental values, the standards should consider the legal, ethical and human issues and deal with how awqaf organizations should act to be transparent and accountable in their program operations, asset and resource management, fund raising, financial management, and non-financial performance. To be effective, these standards should be given the force of law, such that breaching the standards is a breach of the law.

Contrary to popular belief, awqaf organizations have many similarities to private sector organizations. In some ways, it seems like there is very little difference to the corporate world – assets need to be managed, revenues to be earned, bills to be paid and reports to be made. They also undertake wide range of activities such as project management, raising of finance and maintenance of key banking relationships. Therefore, awqaf may adopt some of the concepts of corporate governance from commercial corporations.

Corporate governance standards may initially be introduced as a ‘*good practice guide*’ for awqaf. The ‘Guide’ can be designed as a working tool for nazers to improve accountability, transparency and waqf management. It might include provisions covering qualifications, appointment and responsibilities of awqaf nazers, such as administering *waqf deeds* and the conditions of the *waqif*, procedures to be followed for allocating contributions, procedures that help ensure that waqf assets are invested with due care, skill and diligence.

The perpetuity of the waqf creates issues of *nazara* succession and highlights the need for the corporate nazer. It also underlines the need for licensing regulations where nazers or waqf administrators need to be certified and licensed. The certification of nazers sets a process that will see standards of appropriate qualification and personal competence to ensure that awqaf nazers possess the highest level of transparency, accountability and professionalism. Just as company law provides that public companies appoint an auditor,

awqaf governance laws should also make it mandatory for nazers and administrators to be audited. A perceived conflict between the nazer and his obligations to the waqf or non-compliance with the regulations could lead to revoking of the nazer's license.

## **10. Issues of Sustainability and Profitability of Awqaf**

Awqaf organizations, like all organizations, have to generate revenues to fund their operations. They need to generate sufficient cash from the assets in custody, or appeal to donors who may have their own particular view of what objectives and services and the organization should be providing. However, donations are uncertain and unpredictable and as a result of the looming financial crisis and the mounting pressure on charities to declare their funding sources, corporations and individuals are now giving less. Many awqaf organizations have reported that there has been noticeable reduction in donor funds. Thus, awqaf organizations are finding it necessary to expand their revenue base to include steadier forms of income from commercial activity and investments. Their orientation towards social services is getting more intimately enmeshed with the pursuit of business interests. This spills over into the increasingly competitive environment where awqaf have to compete in the marketplace with the commercial sector.

Awqaf organizations have different purposes and processes for generating revenues. Profitability is not their only credo. Their obligation for asset custody and perpetuity emphasizes ongoing viability rather than pursuing short-term profit maximization. Stakeholders include donors (*waqifs*), nazers, beneficiaries, clients, employees, volunteers and government. In responding to this list of stakeholders, awqaf organizations may face a problem of balancing financing and operational objectives. The financial objectives can be readily expressed in quantitative terms, while operational objectives are more conventionally expressed in qualitative terms. There is the risk of overemphasizing the financial objectives at the expense of the operational objectives, thereby inducing a form of role-reversal – operational objectives supporting financial objectives, rather than the financial objectives supporting the organization's operational objectives. Thus awqaf organizations must seek a balance between being financially efficient and socially effective. There is little use in being a highly cost efficient operation if the organization is proving to be ineffective in delivering successful outcomes in operational terms. Likewise, an awqaf organization that is highly effective in meeting its operational objectives, but which is inefficient financially soon finds itself unable to continue delivering its services as resources drain to critical levels.

The dichotomy between sustainability and profitability is false. There is a misconception among some that because an organization is a waqf, it should not seek profits. Some stakeholders believe that awqaf organizations should break even or distribute the surplus if there is one. Responsible awqaf organizations, however, do try to have profitable operations to ensure their long term sustainability and ability to realise their mission well into the future. Imagine, for example, an orphanage operated by a waqf organization. If it does not have any surplus funds to meet ongoing operating and future capital costs, the orphanage may be forced to close down. The inability to access any surplus funds from its own reserves may result in the withdrawal of much needed community service.

## **11. Policy Implication**

With the rise of popular movements like “human rights” and “economic equality”, governments in Muslim countries assumed responsibility for the welfare of their citizens and the role of awqaf was marginalized. However, the state has been unable to serve efficiently all of the welfare purposes, especially the delivery of speedy aid and humanitarian support to vulnerable groups. Survey evidence indicates that faith-based charity institutions such as waqf and zakat enjoy a high degree of popular trust having grassroots knowledge and much better access to people in need of support than any government agency.

Given the apparent support for awqaf at the local and national levels, the sector needs not operate at the periphery of socio-economic activity, but should rather be mainstreamed within the state legal, social and economic systems. The waqf has relations with all areas of social and economic development such as housing, employment, social amenities, investment and commercial activity. Therefore, a great deal of thought should go into government policies which impact on the awqaf as it intersects with other sectors of the economy. Awqaf is now getting more attention from the private sector and is entering into various types of partnerships where disputes are likely to arise and frustrate such arrangements particularly in the areas of “business versus charity”.

It has been argued that awqaf is a business sector, albeit not-for-profit and that despite its role as a welfare mechanism, or perhaps because of it, the awqaf sector has an unfair advantage over other sectors. Awqaf is now competing commercially in a wide range of business activities such as real estate, healthcare, trade, industry and agriculture. Awqaf organizations, however, are resistant to market forces because they control donated assets, have access to free funds and services, enjoy tax exemptions and low overheads, can turn social projects into cash-flow projects and exercise considerable discretion in their operations. Yet, because of awqaf’s private and usually secluded nature, and lack of certainty about which standards govern their operations, the sector appears to work in isolation from other sectors.

Legal reforms concerning awqaf have loomed large in comparative studies of law and society. Enacting an awqaf law will invariably involve striking a balance between protecting awqaf assets, developing the sector, maintaining equitable relationship with other sectors and examining the effect of other laws on awqaf. In an economic, social and governance context, the law should assist in restoring faith in awqaf and in creating a more efficient sector.

There are concerns about extending regulatory control across countries. Applying the same rules to control organizations under different jurisdictions is always a challenge from a regulatory point of view. One set of international standards for awqaf, such as IAS for accounting or Basel II for banking, is for the most part a good thing, ultimately creating more efficient sector. However, we have to recognise that different circumstances and disparate cultures exist in different countries and that each country

may have to do its own thing in terms of the form of its awqaf standards. However, as the international standards gain acceptance, governments will be encouraged to use them directly as their national standards in regulating awqaf organizations when operating in and from their territories.

## **12. Concluding Remarks**

Awqaf institutions are effective organizations for the socio-economic, cultural and religious development of a country. They have no direct political involvement, although they exercise considerable influence on the country's political and social life. Governments now realise awqaf's significant contribution to their economies and consider the development of this sector as a strategy to boost the economy and complement government's social initiatives.

One of the most critical problems facing the efforts to develop the awqaf sector is the widespread lack of regulations prescribing acceptable norms of corporate governance. As charitable institutions, awqaf organizations are perceived to lack the organizational discipline of for-profit corporations. This has resulted in a very slow pace of developing awqaf properties, hence the reason we see many awqaf properties often in prime locations remaining vacant, under-developed, or under-utilized. Some are even lost due to squatting, encroachment or sheer neglect.

The issue of corporate governance is central to the idea of 'sustainable development'. Awqaf must be transparent and accountable in respect of their funding and operations. Today, awqaf organizations have a broad business focus. They are taking responsibility for a wider range of activities in the commercial, industrial, agricultural and services sectors. Areas where guidance is required include institutional, legal and regulatory disciplines. This involves gate keeping and stewardship of awqaf properties and the empowerment of nazers and managers of awqaf properties to enable them to charter the continued growth of their organizations.

The renewed interest in awqaf offers an opportunity to learn from the mistakes of the past and to construct a modern legal and regulatory framework. There needs to be cooperation among regulators to develop a global awqaf law that rationalises legislation among jurisdictions. Recognising that awqaf organizations are non-profit entities holding key valuable assets such as land, and providing essential services such as relief work, the law should offer adequate protection for awqaf assets and to nazers and donors.

The size of the sector as well as its growing economic importance clearly qualifies it for serious attention by standards setting bodies of the Islamic financing industry. Institutions like IFSB and AAOIFI, together with IDB and IRTI and other interested parties, should embark on a comprehensive study of awqaf. The ultimate goal is to have succinct, relevant, understandable and implementable standards that optimise efficiency and effectiveness of the sector and the knowledge, expertise and leadership of awqaf professionals.

With the right transparency, stability, long term planning and guidance, the prospects for awqaf are great and the more we delay this important concept, the more the awqaf sector is placed at disadvantage progress-wise.

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