



MANAGEMENT OF *AWQĀF* PROPERTY, ISSUES
AND CHALLENGES: SPECIAL REFERENCE TO
KENYA

BY

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for the degree of Master in
Comparative Laws

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ABSTRACT

This study focuses on the institution of *waqf* from the management perspective with a special reference to Kenya. Because the institution of *waqf* is very much connected to *Shari'ah*, the relevant texts of Qur'an, Sunnah and consensus of the jurists are used to elaborate the *waqf* rulings. The research relies on inductive method of collecting the opinions of the scholars about *waqf*, and uses analytical method to discuss the issues and giving preference to some of these opinions. The research has identified that *waqf* in Kenya faced so many challenges due to poor legal and administrative set-up which may be overcome with sincerity of purpose and a collective responsibility. The researcher calls for implementation of a fully *Shari'ah* compatible administration of *waqf* in the country. Muslim leaders and scholars must be involved in the management of *waqf*. The field study conducted by researcher reveals that *waqf* in Kenya is in a pathetic situation which needs urgent address. Moreover, the researcher calls for the democratisation and decentralisation of the *waqf* institution in the country. The research concludes that the current *waqf* management infrastructure in Kenya is inadequate and insufficient and a collective effort is required for the institution to regain its role of benefiting the *ummah*.

خلاصة البحث

تستهدف هذه الرسالة تسليط الضوء على الأوقاف من المنظور الإداري مع التطبيقات المعاصرة في كينيا. تعني الرسالة أيضا بعرض بعض النصوص الواردة في شأن الوقف من القرآن الكريم والحديث النبوية إضافة إلى إجماع الصحابة رضي الله عنهم. استخدم البحث المنهج الإستقرائي في جمع أقوال الفقهاء في الوقف ثم استخدام المنهج التحليلي في النقاش عن المسائل التي درست وذلك من خلال المناقشة والترجيح. دلت الدراسة على أن الأوقاف في كينيا تعاني من مشاكل عديدة من أهمها مشاكل قانونية وإدارية حيث أن بعض جزئياتها مخالفة للشريعة وقد سعى البحث إلى تعديل هذه المواد القانونية حتى تكون مطابقة للشريعة. يدعو الباحث إلى ضرورة تطبيق الشريعة في إدارة الأوقاف في البلد. تشير الدراسة الميدانية التي قام بها الباحث على أن الأوقاف في كينيا في حالة غير مرضية تحتاج إلى حلول عاجل. تدعو الرسالة إلى ضرورة إستقلال الأوقاف من الناحية الإدارية. قررت الدراسة إلى أن الهيكل الإداري الحالي للوقف في كينيا لا توفي بالغرض والحاجة ملحة للقيام بالجهد المشترك حتى يتسن إعادة منفعة الوقف للأمة.

APPROVAL PAGE

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DECLARATION

I here declare that this dissertation is the results of my own investigation, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

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**MANAGEMENT OF A *WQĀF* PROPERTY, ISSUES AND CHALLENGES:
SPECIAL REFERENCE TO KENYA**

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*This work is dedicated to
the Muslim Ummah*

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All thanks and adoration are due to Allah (s.w.t.), the Un-beginning, Un-ending, the Sole-Manager of the entire universe. May His fathomless bliss be upon the soul of the Giver of the glad-tidings and Warner against indecency, Prophet Muhammad (s.a.w.). I humbly exalt Allah (s.w.t) who has given me the opportunity and strength to complete this research. I am indebted in showing my appreciations to different personalities who in one way or the other contributed to the completion of this research.

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LIST OF ABBREVIATIONS

S.A.W	Ṣallallahu ‘Alayhi Wassallam
S.W.T	Subḥana Wata‘āllā
P.C	Provincial Commissioner
SIRCS	State Islamic Religious Council
G.K	Government of Kenya
R.A	Raḍiya Allahu ‘Anh’
W.C.K	<i>Waqf</i> Commission of Kenya
N.C.C.K	National Christian Council of Kenya
K.A.P.F	Kuwait <i>Awqāf</i> Public Foundation
A.H	After Hijrah
K.N.A	Kenya National Archives
IRTI	Islamic Research and Training Institute
KES	Kenya Shillings
USD	United States of America Dollars
NAMLEF	National Muslim Leaders Forum
A.D	Anno Domini
I.B.E.A.CO	Imperial British East African Company
Ph. D	Doctor of Philosophy
K.L.R	Kenya Law Report
IIUM	International Islamic University Malaysia
Ibid	Latin short for <i>ibidem</i> , meaning <i>the same place</i>
Id	Latin, short for "idem", "the same"
N.d	No date of publication
N.p	No publisher
Etc.	Et cetera
MEWA	Muslim Education and Welfare Association
Trans.	Translated

TABLE OF TRANSLITERATION

Table of the system of transliteration of Arabic words and names used by the International Islamic University Malaysia

CONSONANT

أ = A	ر = R	ف = F
ء = ' (Alif Ma'adhiyah)	ز = Z	ق = Q
ب = B	س = S	ك = K
ت = T	ش = Sh	ل = L
ث = Th	ص = ṣ	م = M
ج = J	ض = ḍ	ن = N
ح = ḥ	ط = ṭ	ه = H
خ = kh	ظ = ḏ	و = W
د = D	ع = ' (Ayn)	ي = Y
ذ = dh	غ = Gh	

VOWELS

Short Vowels: a = ا ; i = ي ; u = و

Long Vowels: ā = آ ; ī = يي ; ū = وو

Diphthongs: ay = أي ; aw = أو

Doubled: uww (final: ū) = وو ; iy (final ī) = يي

CHAPTER ONE

BACKGROUND OF THE STUDY

1.1 INTRODUCTION

*Waqf*¹ is one of the most important institutions of Islam, and it is actually as old as Islam itself. The history of Islam traces *waqf* institution to the golden period of the Prophet (s.a.w), his Companions and the rightly guided caliphs after him.² From those days, the institution of *waqf* developed in the Muslim communities throughout the different generations and in different centuries. Its significance remains until today.

Islam advocates and encourages humanitarian social services. This social obligation towards charitable projects is part of Islamic belief and a relief to the less fortunate in societies. This great contribution to the development of humankind is rewarded by Allah (s.w.t) in this world and also in the hereafter.

The life pattern of Islam stimulates and develops an attitude of care for all and creates in Muslims an urge to contribute generously towards good deeds in general. *Waqf* plays a prominent and critical role through its contributions in social-economic, educational and cultural fields. The past and present role of *waqf* is note worthy and its role needs to be extended to cover wider areas of life in Muslim societies

¹ *Waqf* in Arabic language means to hold, confine or prohibit. Technically it is an act of holding certain property and preserving it for the confined benefit of certain philanthropy and prohibiting any use or disposition outside those specific objectives. See Wahbah al-Zuhayli, *Precepts and Consecration in Islamic Jurisprudence*, n.p., 1998, at 134-135.

² *Waqf* is a legacy from the traditions of Prophet Muḥammad (s.a.w) when he said: "When the son of Adam dies, all his good deeds come to an end except three: on-going charity, knowledge from which others benefit after he is dead, and a righteous son who will pray for him". The on going charity in this *Ḥadīth* is the basis of *waqf*. Muslim bin al Ḥajjāj al-Qushayrī, *Saḥīḥ Muslim*, Beirut, Dār Iḥyā' al-Turāth al-'Arabī, vol. 11 at 85; see Abū Bakr Ibn 'Amr al-Khassāf, *Kitāb Aḥkām al-Awqāf*, Cairo: Diwan 'Umum *al-Awqāf* al-Miṣriyyah at 1904, also see: Tauqir Muḥammad Khan & M.H. Syed, *Law of Waqf in Islam*, New Delhi: Pentagon Press, 2007, at 169.

throughout the world. Contribution of *waqf* to the development of Muslim societies is clearly reflected in the educational facilities put up in their countries.

In the Islamic world, we see the poor being helped, school and mosques being put up, the young being educated and these are products and outcomes of this unique institution of Islam. A practical example of the above could be found in Egypt, Turkey and Saudi Arabia. Even in Muslim minority countries like Kenya and India, *awqāf* has been established. However, there are obstacles and short comings in *waqf* management developed over a period of time.

Muslims need to strengthen the *waqf* institutions for the well being of the *ummah*. The problem of mismanagement of *waqf* property needs to be addressed urgently so that this institution could play its beneficial developmental role. The abuse of *waqf* is a problem in almost all Muslim societies today and Kenya is not an exception.³

1.2 SUMMARY OF THE PROPOSED DISSERTATION

The thesis is divided into six chapters. Chapter I looks at the background of *waqf* from the historical point of view, statement of the problem and the objective of the project, research questions, the literature review and the research methodology. Chapter II gives the primary purpose of the research. It discusses the institution of *waqf* in Islam, management of the *waqf* property and the challenges faced. It further highlights who has the mandate to manage *waqf* property, the conditions which should be met by the custodian of *waqf*, the powers and the limits, and possible obstacles towards his service delivery. It will also elaborate the legal conditions of *waqf* property itself and

³ Ibrahim Ghānim, "Feature of the Historical Formation of the *Waqf* Management," *Awqāf Journal, Experimental Issue*, November 2008, 66.

what should be regarded as *waqf* from the juristic point of view. A practical approach on the management of *waqf* properties is highlighted as well, and how far the experiences of other countries could usefully be adopted for the benefit of *waqf* management and development in Kenya.

Chapter III will focus on the critical examination of the provisions of the *Waqf* Act in Kenya. All the rules of the Act will be explored and selected ones analyzed. Chapter IV covers the issues and challenges faced by *waqf* from the Kenyan context.⁴ Chapter V will give the summary, the role of *waqf* institutions in achieving the Ummatic goals, conclusion and also some recommendations regarding policies that may be used for managing their effectiveness.

1.3 STATEMENT OF THE PROBLEM

How are *waqf* properties neglected in Kenya and in many cases allowed to become family or private properties? What remedial measures may be necessary to rectify this situation? Secondly, mismanagement of *waqf* property has become a common phenomenon in Kenya. What measures are required to address the situation?

1.4 THE OBJECTIVES OF THE STUDY

The institution of *waqf* in Kenya and elsewhere suffers from a lot of problems due to poor management. There is a need to bring about decentralization and democratization of *waqf* administration in Kenya to revive this noble institution. Measures have to be identified to make *waqf* institutions productive and useful again.

⁴ It covers some issues and challenges regarding *waqf* property as well as the practical implications on the gradual growth of these institutions.

1.5 RESEARCH QUESTIONS

1. How effective is the present *waqf* management infra-structure in Kenya?
2. Are the legal provisions adequate?
3. What measures are necessary for the revival of *waqf* institutions in Kenya?

1.6 LITERATURE REVIEW

This literature review examines previous and current literatures on *waqf* relevant to the present study.

In Muḥammad Muṣṭafā's *Aḥkām al-Waṣāyā wa al-awqāf* (1982), modes of the establishment of *waqf*, its conditions, its legal aspects and finishing of *waqf* are discussed. He examines *waqf* management with reference to those who have the right to manage.

Aḥmad Farrāj Ḥussein, the author of *Aḥkām al-Waṣāyā wa al-Awqāf fī al-Sharī'ah al-Islāmiyyah* (1986), contributes to the literature by covering management of *waqf*, legal aspect of *waqf*, conditions of *waqf* and the type of property that could be used for *waqf*.⁵ It is clear that the work of the *waqf* manager is not only to have access to *waqf* property but also to look for modalities to be used to generate a reliable income for the *waqf*. This is one of the issues this research will look into.

In Hasmet Basar's *Management and Development of Awqāf Properties* (1987), the following items are discussed: definition of *waqf*, legitimacy of *waqf*, *waqf* objectives in Islam, its historical role in the service of Islam, types of *waqf*, the canons

⁵ Aḥmad Farrāj Ḥussein, *Aḥkām al-Waṣāyā wa al-Awqāf fī al-Sharī'ah al-Islāmiyyah*, Egypt: Dār al-Jāmi'ah, 1986, at 352.

and conditions of *waqf*, exchange of *waqf* assets by other assets, their management and finally *waqf* rental and its regulations. All these however, do not contribute much to our discussion on *waqf* in Kenya.

‘Abd al-Qahār Dāwūd Al-‘Aynī, the editor of *Aḥkām al-Waṣāyā wa al-Awqāf fī al-Sharī‘ah al-Islāmiyyah wa al-Qānūn* (1994) addresses the validity of *waqf*, types of *waqf*, the conditions of the property to be established as *waqf*, *waqf* in legal perspective and the views of Muslim scholars concerning *waqf*.

Kubaysī Muḥammad ‘Ubayd, the author of *Aḥkām al-Waqf fī al-Sharī‘ah al-Islāmiyyah* (1997) examines the expenditure of *waqf*, renting of *waqf* property, *waqf* management, types of management and its conditions, conditions of the manager and what he is allowed to do and what he is not allowed to do. In accounting for untrustworthy custodian, the *Hanafī* scholars see that the judge has the right to compel an untrustworthy custodian to bring forward the separate account of the profit of *waqf* and its expenditure in different course.⁶ However, other scholars have different opinions on the topic which we will explore in the course of our research.

‘Abd al-Wadūd Moḥammad in his book, *al-Waṣāyā wa al-Awqāf wa al-Mawārith fī al-Sharī‘ah al-Islāmiyyah* (1997) identifies legal aspects of *waqf*, types of *waqf*, conditions of *waqf*, conditions of custodian and management of *waqf*. Issues on effective policies to govern *waqf* properties have not been addressed in his work. This is what the research intends to address in the context of Kenya.

Muḥammad Kamāl al-Dīn Imām, the author of *al-Waṣāyā wa al-Awqāf fī al-Fiqh al-Islāmī* (1998), examines the establishment of *waqf*, its importance, its

⁶ Al-Kubaysī, Muḥammad ‘Ubayd, *Aḥkām al-Waqf fī al-Sharī‘ah al-Islāmiyyah*, Baghdad: al-Maktabah al-Waṭaniyyah, 1977, at 259.

regulations, its legal aspects, its types, its conditions and its management.⁷ In this work, the author confines the importance of *waqf* to educational role even though the *waqf* institution has a broad contribution to the development of the *ummah* from the social, economical and cultural perspectives.

Wahbah Al-Zuhaylī in his book *al-Waṣāyā wa al-Awqāf fī al-Fiqh al-Islāmī* (1998) discusses the pillars of *waqf*, types of *waqf* and their places, its condition and its expenditure. In all, he highlights the opinions of the different scholars of Islam. Aḥmad Amīn Ḥassan and Faṭḥi ‘Abd al-Hādī, the authors of *Mawsū‘ah al-Awqāf* (2003) have gathered *fatwā* concerning *awqāf* since 1890 to 1997. Some of the existing problems have been solved through the *fatwā*. However, they have not specified any strategies to manage the *waqf* property.

Tauqir Mohammad Khan and M.H.Syed in the book they edited namely, *Law of Waqf in Islam* (2007), outline the basic principles of *waqf*, *waqf* in effect, aims of *waqf*, management of *waqf*, and gifts. In the management of *waqf* they discuss *mutawallī* in detail.⁸ A booklet with the title *Lamaḥāt ‘an al-Awqāf fī al-Kuwayt* also discusses the management of *waqf* from the family stage perspective to the management of *waqf* by higher authorities like the Ministry of *Awqāf* and Islamic Affairs of Kuwait.

For the purpose of this research, all the above materials and others not mentioned will be covered, which is *waqf* in general, but nothing has been done specifically to formulate effective strategies and policies to govern the *waqf* properties in the Kenyan context. It is also worth to note that to date there is no single scholarly

⁷ Muḥammad Kamāl al-Dīn Imām, *al-Waṣāyā wa al-Awqāf fī al-Fiqh al-Islāmī*, Beirut: *al-Mu‘assasah al-Jami‘ah Lī al-Dirāsāt*, 1998, at 146.

⁸ Tauqir et al, n. 2, at 169.

work that addresses this problem in Kenya and this is where this research comes in to fill this gap.

1.7 RESEARCH METHODOLOGY

The study will employ different methodologies in the course of the research. A major part of the dissertation is library based. The *waqf* phenomenon will be examined from historical perspective and with new ideologies brought in to add relevance to present needs. References will be taken from books, published papers as well as previous parallel studies, papers presented at international conferences intended to cure the problem, articles in academic journals, daily newspapers, and reported cases (if any), articles in magazines, online databases as well as reliable sources on the Internet. Effort will be made to conduct field work, to make the study more empirical and practical. To sum up, the researcher will carry out field work and meet the stakeholders and those who are connected with the administration of *waqf* in Kenya.

1.8 THE SCOPE AND LIMITATIONS OF THE STUDY

The study will be confined to *waqf* institutions generally and to the Kenyan situation in particular in the areas of legal provision and management. There are constitutional provisions on *waqf* institutions from its administration and management, indicating its utilization in Kenya directly from the state law office.⁹ Similarly, an examination of the provisions of the *Waqf* Act will show the areas which need improvements and statutory changes. The study will be limited to the Kenyan *waqf* system and its operations and policies governing it, not forgetting the differences in the terms of management and administration in different Kenyan provinces.

⁹ The *Waqf* Commissioners Act Cap 109, 1951, Revised 1981(1962).

CHAPTER TWO

WAQF IN ISLAM

2.1 INTRODUCTION

Islam strongly supports the idea of mutual help, coordinated and collective efforts with efficient management of resources for the common good of humanity. The institution of *waqf* began to develop in the first century, after Hijrah¹ and was legally established in the second century A.H. The origin and importance of *waqf* was discussed by various scholars in their work found in different books of Islamic jurisprudence and traditions of the Prophet (s.a.w). For many decades, *waqf* boosted the social-economic status of the *ummah*.² Some scholars regard *waqf* as old as Islam stating that the first *waqf* was the Masjid *Ḥarām* in Makkah.³

All successive generations gave *waqf* in perpetuity for an immediate or ultimate charitable purpose, and the jurists are in agreement that *waqf* were well developed as an institution during the earlier centuries of Islam⁴ after the *hijrah* of Prophet (s.a.w) to Madinah.⁵ The *waqf* which exists in the present form was established and developed in the eighth and ninth centuries with the companions of the Prophet (s.a.w) being major contributors to its success.

The institution of *waqf* made a significant role in social, cultural, and economical development of the *ummah* throughout the Islamic history. The main

¹ The journey of the Prophet (s.a.w) from Makkah to Madinah which was a turning point for the beginning of the Islamic calendar.

² Magda Ismail Abdel Mohsin, "Intergration of *Waqfs* in the Process of Socio-Economic Development (Case Study: Sudan)," (Unpublished Ph.D. thesis, International Islamic University Malaysia, 2003), 164.

³ Abrār Aḥmad, "*Awqāf* in Makkah Mukarramah: Problems and Prospects" Paper presented at International *Waqf* Conference, Capetown Southern Africa, 2007, 1; Kubaysī, at 22.

⁴ Imām, at 158-159.

⁵ It is the famous town which the Prophet (s.a.w) migrated to after Hijrah.

ideology behind *waqf* is to promote Islamic values, dignity and identity. This was and is still done through establishing social institutions like schools, *madrasahs*, mosques, hospitals, and building cities and bridges as well as to boost the well-fare of scholars and their students in different generations. The poor and the needy also receive relieve through the effort of this unique institution of Islam.

Examples of the contribution of *waqf* to the social-economical welfare of the Muslim societies can be found in many parts of the world. In Egypt, the whole economic basis of the country is derived from the income of these endowments which were and still are being created by wealthy benefactors through bequests or donations of some part of their estates⁶. In Central Asia, a large number of endowments were created during the 15th century in which lands and other types of holdings were transferred to this pious institution⁷ for example, the *waqf of Ahrar and Ulugh Beg*.⁸ Hospitals have been developed and their maintenance catered for by these institutions throughout the Islamic history.⁹ Examples of these hospitals are Ibn Tulun Hospital in Egypt and ‘Aududi Hospital in Baghdad. The outcomes of the *waqf* were used to pay salaries to the physicians, for the school of medicine and pharmacy.¹ This chapter will also discuss the *waqf* management practices in Malaysia and Kuwait. Kenya can learn from the best practices in *waqf* management of both the countries.

⁶ Siti Mashitoh Mahamood, *Waqf in Malaysia Legal and Administrative Perspectives*, Kuala Lumpur: University of Malaya Press, 2006, at 2.

⁷ McChesney, R.D., *Waqf in Central Asia: Four Hundred Years in the History of a Muslim Shrine, 1480-1889*, Princeton, New Jersey: Princeton University Press, 1991, at 33-38.

⁸ Siti, n.6 at 2.

⁹ Ibid.

¹ Kahf Monzer, “Financing Development of *Awqāf* Property” vol. 16 No.4 (1999), *The American Journal of Islamic Social Sciences*, 45.

2.2 WAQF IN ISLAMIC LAW

From the historical perspective, *waqf* has played a significant role as a non-profit institution which catered for social, economic, ethical and spiritual values of the *ummah*. In the past, educational institutions were sustained by these endowments. The purpose of *waqf* was to educate the area of society whom the founders chose. Major Islamic cities had up to or even above 100 high schools and universities.¹ The University of Al-Qurawiyin in Fez, al-Azhar in Cairo and Nizamiya *Madrasah*, as well as Shrine College of Abū Ḥanīfah in Baghdad are some of the examples.¹ A large number of *waqf* have also been dedicated for public purposes in Malaysia, for examples *suraus*¹, mosques and also some³ commercial buildings and premises.¹

However, there is no explicit injunction in the Qur'an regarding the institution of *waqf*. There are a number of implicit injunctions on charity which has a wide scope in Islam as a general principle.¹ The traditions of the Prophet (s.a.w) provided many *aḥādīth* on *waqf* with clear cut guidance. The legitimacy of *waqf* can be deduced from several Quranic verses which call upon Muslims to give charity that carry the essence of *waqf*. All the scholars are in agreement that the legal status of *waqf* property is recommendable charity given voluntarily out of one's asset and it is not a compulsory

¹ Siti, n. 6 at 3.

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¹ Makdisi George, *The Rise² of Humanism in Classical Islam and the Christian West*, Edinburg: Edinburg University Press, 1990, at 48; Kahf, n. 10 at 44.

¹ A place of worship for Muslims³ in Malaysia, which functions like a mosque but the latter, is usually a big building where the *juma'ah* prayer is held, Siti, n.6 at 165.

¹ Siti, n. 6 at 3.

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¹ Qur'an, Sūrah al-Baqarah (2): 177, 195, 215, 219, 254, 261-76; Sūrah Al-Imrān (3): 86, 92 and 134; Sūrah al-Mā'idah (5) 12; Sūrah al-Anfāl (8): 3-4, and 60; Sūrah al-Tawbah (9): 79 and 99; Sūrah al-Ra'd (13): 22; Sūrah Ibrāhīm (14): 31; Sūrah al-Naḥl (16): 90; Sūrah Banī Isrā'īl (17): 26; Sūrah al-Ḥajj (22): 34-35; Sūrah al-Furqān (25): 67; Sūrah al-Qasas (28): 54; Sūrah al-Sajdah (32): 16; Sūrah al-Fāṭir (35): 29; Sūrah Yāsin (36): 47; Sūrah al-Shūrā(42): 38; Sūrah al-Dhāriyyāt (51):19; Sūrah al-Ḥadīd (57):7 and 10; Sūrah al-Mujādalah (58):12; Sūrah aṣ-Ṣaff (61):10-11; Sūrah al-Munāfiqun (63): 9-10; Sūrah al-Taghābun (64):15-16; Sūrah aṭ-Ṭalāq (65): 6-7; Sūrah ad-Duḥā (93): 10; Sūrah al-Mā'un (107):3 and 7.