

## Potential of *Waqf* in Contemporary World

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**Abstract.** Waqf resources which once used to finance the social welfare needs of the Muslim society, have now lost much of their vigor due to the economic ill-health of Muslims. Now, as new *awqāf* are not created often, a short-term measure to overcome the problem is to develop the existing *awqāf* and also to consider certain such measures which may enhance the income generation capability and administrative well-being of *awqāf*. With this in view, this brief write-up discusses in relative detail the issues inherent in the development of *awqāf*, better utilization of cash *waqf*, debate on perpetuity of *waqf*, state intervention and also whether origin of trust lies in *waqf* and a futuristic model of *waqf* management by separating religious *awqāf* (like mosques, graveyards, etc.) and secular *awqāf* so as to confine state intervention to secular *awqāf* alone.

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**KAUJIE Classification:** E22, E23

### 1. Introduction

There was a time in the past when Islamic States used to be poor, unable to afford costly social welfare schemes for the benefit of the society. Fortunately, millions of *awqāf* which were created and got scattered throughout the Islamic world filled this gap by providing and financing schemes for social welfare.

There were (and still are) several kinds of *waqf* to fulfill every need; *waqf 'amm* (public *waqf*), *waqf khāṣṣ* (private *waqf*) *waqf khayrī* (charitable *waqf*), *waqf dhurrī* (family *waqf*) and *waqf al-nuqūd* (cash *waqf*). In effect, over the centuries, *awqāf* became the Third Arm of the State. Nearly the whole of the

educational system in the Islamic world was funded by *awqāf*. Not only that, but also the health care, water supply, feeding of the poor, maintenance of mosques, pay-ment of salaries of the *imāms* and *mu'adhins*, main-tenance of orphanages and caravanserais, etc. were also funded through *awqāf* to name only a few.

Due to several reasons, *awqāf* have lost much of their dynamism. Their latent wealth, however, could still be salvaged through concerted efforts in *waqf* research and development.

There are many problems facing *awqāf* which have mainly caused their decline. Their latent wealth could still be salvaged through concerted efforts in *waqf* research and development.

There are many problems facing *awqāf* today. Issues inherent in the area of *waqf* laws and management techniques; better ways of taking up development of existing *awqāf* lying in a neglected state; are a few topics in this brief write-up that may provide opportunity to revisit these issues with the aim of suggesting improvement measures. *In shā' Allah* (Allah willing), we may succeed in infusing new life into *waqf*, which is ill, lying on a hospital bed, looking at us to do something to help it to regain health.

## 2. Role of *Waqf* in Social Welfare Sector

The establishment of a socio-economic welfare system in any society basically depends on the desire for the eradication of poverty and making the 'haves' to realize that a share in their wealth is for the 'have nots' also. Charity in its higher sense includes all help, not monetary alone, from those who are better endowed to those less endowed. The Qur'an makes this very clear in scores of chapters and verses like, 2:177, 2:195, 2:215, 2:219, 2:254, 2:261-276, 3:92, 3:134, 5:12; and so on. This makes it clear that notwithstanding the fact the '*waqf*' is not specifically mentioned in the Qur'an, yet the divine pleasure that charity attracts becomes very clear. In all probability, Allah reserved the honor of originating *waqf* to His Beloved Prophet (may the peace and blessings of Allah be upon him), as *waqf* is not simply a charity, like alms, *ṣadaqah* or *fiṭrānah* (*zakāt al-fiṭr*), but something which extends from generation to generation in perpetuity, making charity eternal, which otherwise it is not in its other forms.

With the passage of time, millions of *awqāf* came to be created in every nook and corner of the Islamic World that provided facilities in the field of education, social welfare, health and religion.

There is a need to widely advertise the good role played by *awqāf* as instruments of social welfare. It is a welcome alternative to the state providing social welfare schemes which have dwindled down to insignificance, particularly in the Third World countries where the majority of the Muslim population happens to be located now.

The affluent Muslims in these countries and even elsewhere, including advanced nations of the West, may be reminded of their ethical duty to help the poor. However, the problem is that not many among Muslims are rich. This is why we hardly hear about the creation of any new *waqf*. A serious effort we undertake today to rekindle the urge to create *waqf* may take many years to produce any positive result. So, the question would be: what should be done to fulfill the philanthropic needs of the *ummah*? The obvious answer is: let us develop the *awqāf* already in existence, but lying in dilapidated condition, to generate income for social welfare.

## 3. Issues Inherent in Developing Dilapidated *Waqf* Properties

No one knows the real worth of *waqf* properties in the world. As many are historical: mosques like the Blue mosque of Istanbul, Jamia Masjid of Delhi and Lahore, Masjid Nabvi (the Prophet's mosque) in Madinah, Shia Imambaras (mosques of the Shī'ah sect) of Lucknow, etc. Their worth alone would be billions of dollars. Similarly, it would only be foolhardy to talk about the valuation of graveyards *dargāhs* (shrines), *takias* (hospices), universities and hospitals (like Hamdard *Waqf* in Delhi and Karachi). Surprisingly, there are many *awqāf* in other parts of the world whose existence is not known as no survey has ever been conducted in a methodical manner anywhere except in India, where in the 1960s it was officially believed that there were 100,000 *awqāf* in the country (Rashid, 1978, Preface), but the survey revealed that their number is 490,000 (Government of India, Sachar Committee's Report, 2006, p. 220)<sup>(1)</sup>.

From the above, two inferences may be drawn. First, development of *waqf* properties may provide to the *ummah* the key to that treasure trove which our ancestors have left behind in the form of *awqāf* located sometimes in far off places, whose economic growth through development may go beyond our wildest imagination; thanks to fast and vast urbanization and a consequential phenomenal jump in property valuation and rentals in recent times. Today, the average rate of annual return of developed *waqf* properties, as shown in studies conducted by the Islamic Development Bank (IDB) and others in the Middle

(1) The survey of *awqāf* in India is still in progress and the number of *awqāf* has already crossed the 500,000 mark.

East, India, Sudan, Malaysia, Singapore, etc. comes to around 34%; averaging between 22% and 48%. Even though the total number of *awqāf* in existence globally is yet not known, however, it may be presumed to be not less than 1.5 million, discounting mosques, graveyards, etc. Presumably not less than 25-30 thousand may be worth developing. These may produce hundreds of millions every year for welfare schemes. What hurdles come in our way will be discussed in the coming pages.

Secondly, a comprehensive survey is a prerequisite for a worthwhile *waqf* development scheme. Because, how could a *waqf* administrator or a person interested in financing *waqf* development could make up his mind without knowing their number, objects, valuation, income, governing structure and existing financial burden, if any, on a *waqf* property. It is only on the basis of such detailed information that any developmental scheme may be framed.

### 3.1 What Development May Achieve?

In centuries past, no emphasis is found to be placed on 'development' as an important component of a *mutawallī's* duties. Probably, it was found to be unnecessary as enough of affluent Muslims were around to provide emergency help. Then there was the efficient system of *zakāh* and *bayt al-māl*. Unfortunately, all of these have lost much of their efficiency. Leaving aside *zakāh* and *bayt al-māl* to be discussed elsewhere (see, for example, Ahmad, 2016), let us focus on *waqf* alone. As mentioned earlier, development of *waqf* properties is a sure means to raise funds for social welfare.

What development may achieve is astonishing. To give only one example, let us look at phenomenal jump in annual income which is on record based on 100 *waqf* properties in India of small to medium-size in value.

**Table (1) Return to Investment on Waqf Development in ten States of India**

State	Loan given (Rs. in Lakhs) (Rs. in '00,000)	Annual Return before Development (Rs. in '000)	Annual Return after Development (Rs. in '000)	Increase in Return after Development (%)
Kerala	49.8	96	877.7	814
Bihar	23.8	5.8	459	7814
Karnataka	633.7	1087.8	12001	1003
Maharashtra	41	9.7	590	5988
Andhra Pradesh	58.7	30.7	1160	3681
Rajasthan	3.2	-	106	-
Madhya Pradesh	75.4	85	2512	2855
Tamil Nadu	191.4	720.3	3747	420
Orissa	188.1	60.4	4232	6907
Punjab	17.6	-	666	-
<b>INDIA</b>	<b>1241.6</b>	<b>2086</b>	<b>25760.7</b>	<b>1135</b>

Source: Government of India, Sachar Committee Report (2006, p. 220)

### 3.2 Who should formulate a New Waqf Development Strategy? And what should it be?

As an eminent international organization founded by OIC and respected everywhere, IDB (and its department, IRTI) would have been the obvious choice to chart out the new development strategy. However, there is something which comes in the way. It is the track record of the *Awqāf* Properties Investment Fund (APIF), which is supposed to spearhead, on behalf of the IDB, the *waqf* development initiative. Unfortunately, its performance graph is steadily going down for no apparent reason. It completed the deve-

lopment of 8 *waqf* properties during 2002-03, 7 during 2007 and 5 during 2010. I do not have the figures for later years. My personal enquiry with the director disclosed two things: that the fund is not receiving financially sound and viable projects and the increasing size of properties' development cost consume nearly the whole of funding given annually to APIF. On developing only a few, IDB could have taken up the matter with OIC and also could have tried to convince other Islamic Banks and Islamic Banking windows in conventional banks to overcome the problem of scarcity of funds.

It means some new entity may be conceived and established for this purpose. For instance: World *Waqf* Development Corporation (WWDC) with different wings dealing with (i) Research & Feasibility wing; (ii) Construction Supervision & Execution wing; (iii) Quality Control wing; (iv) Audit of Accounts wing, etc. A research team may study the major construction projects now in progress focusing on economics of construction planning, feasibility studies, selection of suitable construction companies in the Islamic and Western World, effective modes of quality control, etc. A steady source of financing would be a must for the success of the major scheme which might need nearly 500 million dollars per year or even more.

The corporation should not be a government established entity to avoid the proverbial bureaucratic stagnation, political wire-pulling, and non-professional working ethics. Very careful thinking should go in the formulation of its Articles of Association and Memorandum of Association. The Board of Directors must be highly qualified persons in Islamic finance and law, construction and quantity survey, quality control and audit. Under no circumstances a political camp follower, corrupt, and a person of non-Islamic behavior may become a director.

### 3.3 Most appropriate Islamic Financial Instruments to finance *Waqf* Development Projects

Loan raised on the basis of *ribā* (interest) are totally unfit for *waqf* development financing. Hence, only funds raised in Islamic manner should be used. That is, it must fulfill the requirements of being *māl mutaḥawwam*. Money or property acquired through bribe, theft, fraud, coercion, threat, gambling, un-Islamic equity trading, political kick-backs, etc., is unfit for financing development of *waqf* properties.

It is difficult to prepare a list of Islamic financial instruments for our purpose strictly in order of merit. Because merit alone is not the criterion of selection. The one which fulfills our needs in a given situation is the best instrument. For example, if among two persons, one of whom is *mutawallī* of a *waqf* property to be developed and the other who has the money and know-how that is required in their project, then *mudārabah* is the best instrument for their project, no matter how much they like another one, unless they are ready to take risk of loss.

In the list of “good, better and best” the following instruments may come: (not in any order of merit).

- i) *Mudārabah* (profit and loss sharing)
- ii) *Mushārahah* (partnership)
- iii) *Mushārahah mutanāqīshah* (diminishing partnership)
- iv) *Istiṣnāʿ* (commissioned manufacturing)
- v) *Ṣukūk* (certificates or bonds), especially *ṣukūk al-intifāʿ* (time sharing certificate) used in Zam Zam tower in Makkah.
- vi) Blockchain means of *waqf* development

### 3.4 Alternative funding for *waqf* development via the use of blockchain technology<sup>(2)</sup>

The recent phenomenon of blockchain technology has unlocked new avenues in raising capital through a process called “Initial Coin Offering” (ICO). This process uses the concept of crowd funding, which is the practice of funding a project or venture by raising many small amounts of money from a large number of people, typically via the Internet. An ICO is therefore a form of crowdfunding that can serve as an alternative method of financing.

In 2017 alone, it was estimated that over US\$6 billion was raised through ICOs<sup>(3)</sup>, and has now surpassed other financing methods by over five times, and has grown in popularity by over hundred times<sup>(4)</sup>. Although similar concepts of crowdfunding exist, such as mail-order subscriptions, benefit events, and many more, the term “ICO” refers to Internet-mediated registries.

This modern crowdfunding model is generally based on three types of actors: the project initiator who proposes the development idea and/or project to be funded, individuals or groups who support the idea, and a moderating organization (the “platform”) that brings the parties together to launch the idea. The key component to this crowdfunding model is the ‘blockchain platform’, which has contributed to a scenario where blockchain technology has proven to be a serious disrupter in the banking and financial

(2) As this is a technical subject, I have discussed it with Mr. Syed Hamid K. Rashid, founding CEO of Finterra Technologies Company, Kuala Lumpur which is specializing in this type of financing for the development of *waqf* properties.

(3) <https://news.crunchbase.com/news/2017s-ico-market-grew-nearly-100x-q1-q4>

(4) <https://www.icodata.io/stats/2017>

sector. There are four unique attributes of blockchain technology that has made this possible: unparalleled transaction processing speed, decentralized global distributed network nodes, proven data security and integrity, and transparency of transactions.

The far-reaching potential of a blockchain platform of this nature, was recently showcased at the

‘International *Waqf* and Blockchain Forum 2018’, held on the 1<sup>st</sup> of March 2018, in Kuala Lumpur, Malaysia. The Finterra *Waqf* Chain Use Case is part of the overall scope of the ‘Finterra Project’, which emphasizes research and development that will translate into a ground-breaking approach to crowd funding, while accommodating regulatory compliances such as AML/KYC.

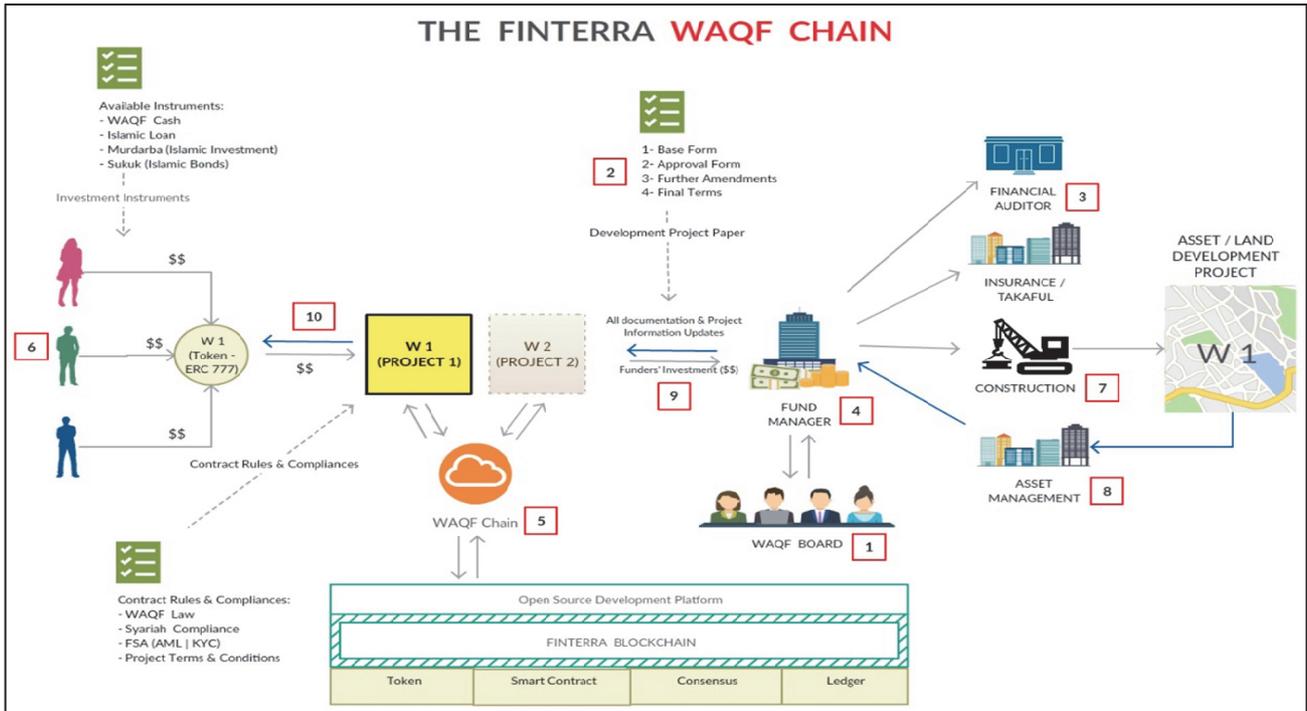


Fig. (1) The Finterra *Waqf* Chain

How the blockchain could support raising of capital for *waqf* development using The Finterra *Waqf* Chain (Figure 1) is explained below:

1. The *waqf* board identifies and makes available a land asset for development.
2. A development project paper is written that covers land title, feasibility study, building architecture, building project plan, project costing, project profit and loss, and recommended instruments of financing.
3. An independent auditor reviews and endorses the development project paper.
4. A licensed fund manager is then engaged to launch an ICO for the development of the specific

*waqf* development project, via the sale of crypto tokens to pre-qualified investors globally.

5. The “*waqf* chain”, built on-top of the Finterra blockchain, launches the tokens against the required capital which needs to be raised.

Pre-qualified investors globally purchase the token, while the funds collected are in escrow by the appointed fund manager. At the point when investors purchase the token, they are given an option on which financing instrument they are allowed to use. The *waqf* chain will have the following four instruments built-in:

- a. Cash *waqf*
- b. Islamic loan
- c. *Muḍārabah*
- d. *Šukūk*

6. Once the capital raise hard-cap is reached, the fund manager appoints a construction company to start constructing and developing a structure.
7. Upon completion of construction, the fund manager appoints an asset manager to operate and maintain the asset.
8. The fund manager collects any revenues or income generated by the asset.
9. Collected revenues or income earned is then shared with the investors based on the investment instrument used and the underlying terms and conditions.

Blockchain technology is destined to complement the potential impact of pervasive adoption as a technology designed to sustain *waqf*-related projects on a global scale. Like any new technology, the blockchain is an idea that initially disrupts, and over time it could promote the development of larger ecosystems that includes both the old way and the new innovation. It offers a huge potential due to its cost-effectiveness, emphasis on quality assurance, is highly traceable, allows for peer to peer transactions while protecting data from any possible tampering, and virtually eliminates all human error.

There is a pressing need for the global community to recognize the huge impact of blockchain technology that inevitably will address the whole value chain in *waqf*-related projects. For academics, developers and practitioners, the burden is on us to continue to educate the public, including business leaders, on the promise of blockchain technology. This requires an honest assessment of those things that blockchain technology does well and candid disclosure when existing conventional solutions are more appropriate. Evidently, it points towards the fact that blockchain technology could be the answer to being future-proof and enhance the existing scenario of *waqf* initiatives worldwide.

### 3.5 Colossal Funding Requirements for global *waqf* development needs government help. Need of *Irşād* (State Sponsored *Waqf*)

This sharing of burden does not mean providing funds for sharing the financing of *waqf* development. What in fact it means is requesting the state to establish *awqāf*, thus revising a historical tradition whereby Muslim kings established state *awqāf* for the benefit of public called *irşād*. A technical legal objection may be raised that since ownership of the

thing being made *waqf* should be in the possession of the *wāqif* and since the king is not technically the owner of state property, he cannot create a valid *waqf*. However, in accordance with the Holy Qur'ān, (57:7), Allah is the real and absolute owner of everything in this world and universe and He bestows the trusteeship of worldly things on man to look after and enjoy them. The expression "*mustakhlaḥfīn*" used in this *āyah* negates the assumption of absolute ownership in the whole of Islamic law of property, which prohibits destruction of property, calling it *fasād* because how can someone who is not the owner of a property, be allowed to destroy it.

I am of the view that a *waqf* created by the head of state (*irşād*) is a *waqf* in every sense of the word. Even though the ownership of the land made *waqf* does not belong to the King, if he is a Muslim. But if he is non-Muslim, like an Indian Raja, he may validly create a *waqf*, as he is not governed by the Islamic law of property and the principles of *irşād*. There are many *awqāf* in India created by Hindu Rajas that won judicial recognition. It is a well settled law that a non-Muslim, either an ordinary common person or Raja or Rani, may create a *waqf* if the object of dedication is lawful according to the creed of dedicator as well as the Islamic law. *Irşād* in principle is based on juridical derivation, whose validity is still debated, particularly on the point whether it constitutes such an intimate part of Islamic law of property that its non-observance makes *waqf* void. The only restriction placed on a non-Muslim is that he cannot create a *waqf* of a mosque or in favor of a mosque<sup>(5)</sup>.

As stated earlier, the Holy Qur'ān confers only trusteeship (not absolute ownership which belongs only to Allah) which in practical parlance is treated as ownership to facilitate property transactions. Thus, when a person or a King holds some properties, he becomes the 'owner' of the thing (*māl*) he holds as a trustee. Hence, like a common man, when a king makes a *waqf* of something he holds (or owns), a valid *waqf* is created. Therefore, an *irşād* (also known as *al-rizq al iḥbāsīyah*) is as valid a *waqf* as any other (Muhammad Afifi, 1991, as cited in Islahi, 2008, p. 58)<sup>(6)</sup>.

(5) Delroos Banoo Begum v. Nawab Syud Ashgur Ally Khan (1875) 15 Beng L.R. 167.

(6) Many Hindu Rajas created *awqāf* for graveyards, *dargāhs*, etc. Section 3(r) of the Waqf Act, 1995 as amended in 2013 indirectly supports *irşād*.

### 3.5 Lack of Development Planning

In any long term planning we have to identify and prioritize *awqāf* in accordance with their income generation capability. This requires knowledge of every detail of all the *awqāf* which only a survey could provide. Moreover, thousands of *waqf* properties are held illegally as private properties of the encroachers. Once the judicial enquiry regarding the title of these persons is made by the *waqf* survey commissioners having judicial powers of a civil court (like in India – in *Waqf Act, 1995*), there may come to light very large number of *waqfs* held as private properties. As could be logically inferred, nobody would take the risk of illegally holding some properties unless they are very valuable or have great economic potential. Survey has revealed in India that there are about 390,000 illegally held *waqf* properties (Haq, 2002, pp. 133-134).

It is important that top priority should be given to develop such *awqāf* which have general charitable objects, so as to avoid legal complications. A *waqf* created for a specific object cannot be diverted for general charitable use after development. To do so would be illegal under Islamic Law.

Feasibility study is very important for the success of any development project. However, as a feasibility study estimates the amount to be invested, the operational cost and expected income, all of which are based on future happenings, it is always safe to proceed very cautiously. Sometimes, it is more prudent to start with ‘pre-feasibility’ studies. Also, to be beware of “time gap” is also necessary, that is, the time the study was made and the time the project actually starts. It may affect budgeting and economic viability (Zarqa, 1994, pp. 56-57).

## 4. Cash Waqf: It's Emergence Out of a Long Hibernation

### 4.1 The Indian Dilemma Affecting 160 Million Muslims

Nearly two decades ago I had occasions to discuss personally with Murat Cizakca, cash *waqf* when he was spending a major part of his sabbatical leave in Kuala Lumpur while writing his book: *A History of Philanthropic Foundations: The Islamic World from the Seventh Century to the Present* (2000). Once he

wanted to know what problems ‘cash *waqf*’ were (are) facing in India, I told him these *awqāf* received indirect recognition, without mentioning their name, when the *Mussalman Waqf Validating Act, IV of 1913*, in its definition of ‘*waqf*’ said that *waqf* means dedication of “any property”. This opened the flood-gates for cash *waqf*, equity shares, bonds, and debentures, etc. to be fit subject matters of *waqf*, notwithstanding the contrary view taken by the *Hanafi Law*. But due to two reasons, nearly 160 million Muslims in India could not get any benefit out of cash *waqf* even though they now accept it unconditionally. Reasons are its past controversial status in the *Hanafi* jurisprudence, which is predominant in India. Secondly, and more importantly, the absence of Islamic banking and finance in India makes it impossible for getting any banking facility to invest cash *waqf*. All Indian banks operate on interest basis. A very small sized Islamic cooperative banking now available in Kerala is not capable to provide any Islamic banking facility worth mentioning. The *mudārabah* mode of utilizing cash *waqf* resources is too technical and business-oriented model that does not suit to a common man’s needs. So, right now, even on a conservative estimate, a billion-dollar worth of cash *waqf* could not be dedicated. The Muslim countries, including OIC, should impress upon the Government of India to allow Islamic banking and finance, as many non-Islamic countries have since long allowed it. A few years ago, when Raghunath Rajan was the Governor of the Reserve Bank of India, his discussion on allowing Islamic banking and finance in India was in an advanced stage. However, his contract was not renewed and this matter has gone into cold stage since then. So, right now, cash *waqf* is in cold storage in India due to lack of investment avenues.

### 4.2 Re-designing Cash Waqf

The credit for popularizing cash *waqf* is rightly claimed by Turks. But a Turk himself asks a pertinent question: Why did the Ottoman cash *waqf* not function like the Western banks and contribute to the process of capital accumulation in the economy rather than limiting themselves to the redistribution of capital? Why, in other words, did they finance merely consumption rather than entrepreneurial investment? (Çizakça, 2011, pp. 26-27, 36).

The answer lies in Imam Zufar's suggested *muḍārabah* model of cash *waqf* utilization scheme. Naturally, it did not have any immediate and guaranteed profit margin and possibility. So the Turks diluted the 'bitter' *muḍārabah* with a sweeter concoction called "*istighlāl*" to make things pleasant. *Istighlāl* was a legal device (or *hīlah*?) concealing a *muḍārabah* transaction, "dangerously approaching *ribā*". The borrower was asked to provide collateral in the form of a house. Each borrowing, one house rule made the borrowing very difficult. Pooling of resources of many cash *waqf* institutions to formulate a bank was never taken seriously. However, in case it is interest-free banking that we are talking about, there is no problem, as we are back to Imam Zufar's mode of investment model, or dividend earning fixed deposit format, business, rejecting the interest contaminated *istighlāl* model. It is worth adopting or adapting by those interested in re-designing cash *waqf* (Çizakça, 2011, p. 36).

### 4.3 Perpetuity Element in Cash *Waqf*

Cash *waqf* is given approval in the OIC Fiqh Academy meeting held in Oman in 2004. Any investment done with cash *waqf* retains its *waqf* character, notwithstanding the change in the form of asset per se. This *fatwā* helps to retain the perpetuity of cash *waqf*.

To conclude the discussion on cash *waqf*, let us clearly state that in countries where Islamic banking and finance facilities are available, providing ample avenues for the profitable investment of cash *waqf* resources, the nearly eternal requirement of Imam Zufar's rule could be given a holiday. What needs to be done elsewhere where such facilities are yet not available needs some food for thought. Would investment in Blockchain be possible? Or investment in Shari'ah compliant equity shares? Or investment in education sector, building engineering and medical colleges to be run on commercial lines, or investing into development of *waqf* lands on commercial basis serving the dual objective of earning profit for cash *waqf* investors and converting dilapidated *waqfs* into income generating institutions. The possibilities are endless, depending upon the degree of commitment and imagination.

## 5. Trust Me! Trust

Leading English legal scholars Maitland and Holmes, during the past 100 years, floated several theories about the origin of Trust, but failed to propound anything definitive on this issue.

Maitland initially thought that trust emerged from Roman law institution of *Fideicommissum*. But he himself soon after dismissed it because this Roman device was based on a concept that was essentially a testamentary disposition. But trust is not essentially based on testamentary disposition. Maitland himself admitted that "every attempt to discover the genesis of our 'use' in Roman law breaks down, and I have been led to look for it in another direction" (Maitland, 1894, p. 127; see also, Pollock & Maitland, 1968, p. 226).

Thus, the earlier view that favored the Roman origin of 'uses' (from which trust emerged) was found to be ill-founded.

The Privy Council in one of its judgment delivered in 1946 rejected the theory of origin of trust based on *Fideicommissum*<sup>(7)</sup>.

After the demolition of Roman theory, Holmes in 1885 drew the attention to *German Salmannus* theory (Holmes, 1899, pp. 445-446). But unlike the law of uses and trust, *Salmannus* theory never perceived either the separation of usufruct from ownership or the creation of life interest or the system whereby usufruct passed from one generation to the next (Cattan, 1955, p. 216).

After the rejection of the above mentioned two theories, there arose a third – the Franciscan Friars theory (Pollock & Maitland, 1968, p. 226). Franciscans were religious men leading a life of nomads, who were not entitled to hold property of any kind, but who were nevertheless entitled to enjoy the usufruct of properties given to them. These Friars roamed around propagating Christianity and lived by asking other people for food and other things. It is widely believed that they may be credited for bringing the idea of 'uses' into England, which ultimately developed into trust. But the question is: From where they got the idea of 'uses'?

(7) Abdul Hameed Siti Khadija v De Saram, (1946) AC 217. See two other cases: (1957) 2 W.L.R. 281, and (1928) AC 746 (P.C.).

St. Francis, the head of Friars, went to Egypt in 1219, where at that time thousands of *awqāf* were in existence. It is only natural to presume that he must have noticed the way *awqāf* worked and their basic concept. Popes sent letters to the Muslim Kings to solicit permission for the friars to stay in Palestine. "In the 14<sup>th</sup> century the Franciscans were finally permitted to reside in Palestine as caretakers for the holy places, but not as missionaries" (Crusade, The Encyclopædia Britannica, vol. 16, p. 839).

During the 13<sup>th</sup> century, a very large number of persons from Europe went to the Holy Land for crusades. It is well recorded that

between 1095 when the first crusade was launched and 1291, when the Latin Christians were finally expelled from their bases in Syria, historians have formally enumerated eight (8) major expeditions.... The establishment of the Franciscan and Dominican Friars in the East during the 13<sup>th</sup> century made possible the promotion of missions within the Crusade area and beyond. (Crusade, The Encyclopedia Britannica, vol. 16, p. 827)

Since Franciscan Friars are generally believed to be the originators of the ideas of uses in England, it is naturally logical to suggest that they brought back the idea from Palestine and Egypt where they were based. It was a mirror image of *waqf*. An English scholar frankly admits:

It would be rash to deny any share in the outburst of intellectual energy which marks the thirteenth century to the new ideas and broadened outlook of those who, having gone on crusade, have seen the world of men and things in a way to which the society of the tenth and eleventh centuries was unaccustomed. (Passant, 1926, p. 331)

It thus appears plausible "that the English 'uses' have been derived from the Islamic system of *awqāf*", as contended by Henry Cattan (1955, p. 205).

Avisheh Avini of Tulane Law School, admits, that

if an outside paradigm for the English use is to be located, the Islamic *waqf*'s parallel structures and historical proximity indicate that it was the *waqf* which most prominently influenced the development of use... Islamic contribution to... "European Awakening" is widely accepted... Evidence of this Eastern influence can be found not only in a range of disciplines such as medicine, philosophy and mathematics, but also in the structure of learning

institutions such as English Inns of court or... (Avini, 1996, p. 1163)

#### 4.1 Uncanny Resemblance between Trust and *Waqf*

It is well settled that *waqf* is at least five hundred years older than trust. So, there is no possibility that trust influenced the evolution of *waqf*. The contrary is clearly a possibility, particularly when the origin of uses and trust could never be explained by the English jurists.

The uncanny resemblance between *waqf* and trust is surprising. For instance, the ownership of *waqf* vests in Allah and in its original form, the ownership of trust vested in Christ. *Waqf* is perpetual so also trust in its original form. The well-known three certainties and perpetuity are common among the two. These similarities are so numerous that it may take a long exposition to narrate these. So, let us contend ourselves to a mention of these common points. This is not an exhaustive list.

*A possible list of Topics having close Resemblances*

- 1) Lawful objects of trust & *waqf*;
- 2) Creation of trust and *waqf*;
- 3) Settlor/*waqif* appointing himself as trustee *mutawallī*;
- 4) No trust or *waqf* could be created by an insolvent person;
- 5) No Trust or *waqf* can be created to defraud creditors;
- 6) Objects of dedication (originally, trust for family members could be created in the same way as family *waqf*);
- 7) Public benefit;
- 8) Dedication for the salvation of soul (originally a trust for this was allowed, then disallowed, and now once again is allowed since 1990 by the House of Lords);
- 9) When the object of a trust and *waqf* fails;
- 10) Appointment of trustee and *mutawallī*;
- 11) Remuneration of trustee and *mutawallī*;
- 12) Removal of trustee and *mutawallī*;
- 13) A trust or *waqf* does not fail for want of a trustee or *mutawallī*;
- 14) Termination of trusteeship and *mutawallīship*;
- 15) Duty not to deviate from the object of a trust or *waqf*;
- 16) Court's power to regulate actions of trustee and *mutawallī*;
- 17) Beneficiaries' rights.

These similarities cannot be termed accidental. There is a need of frank admission of the fact that there is a clear possibility of Trust originating from *waqf*. In law, when direct evidence is missing, circumstantial evidence is given the status of things proved. This is how the situation stands here.

### 6. Whether Law of Trust Might Benefit Law of Waqf?

The law of trust which was behind that of *waqf* 1000 years ago, kept on being improved by the jurists, whereas in case of *waqf*, the position remained static. The areas in which major or minor improvements were brought in the law of trust may be briefly mentioned as follows:

- 1) Rule against perpetuity (still allowing it in case of charitable trusts).
- 2) Invention of 'resulting' and 'constructive' trusts.
- 3) Equitable remedy of 'tracing'; used to 'trace' trust properly from one encroacher to other except a bona fide purchaser for value and without notice.
- 4) 'Knowing assistance' and 'knowing receipt' on the basis of which even strangers may be held liable for breach of trust just like a trustee if these strangers intermeddle with the trust fund or property or in its management.
- 5) Duty of the trustee to maintain equality among the beneficiaries who are 'life interest holders' and 'remainder man' by converting (selling) all such trust assets which are of wasting, or of future or reversionary nature and happen to be in the form of royalties, risky investments, etc., and invest the sale proceeds into secure investments.
- 6) The *chillingworth* rule (derived from the judgment in *chillingworth v. chamber*, 1896, 1 C. 685) which imposes an enhanced liability upon a trustee, who is also a beneficiary at the same time. If he commits a breach of trust along with his co-trustee who is not a beneficiary, to indemnify his co-trustee first to the extent of his beneficial interest, and thereafter to share equally the remaining liability, if any, with the co-trustee.
- 7) A trustee cannot 'set off' loss in one transaction against the gain earned in another, unless all the transactions are in furtherance of a common

investment strategy (*Bartlett v. Barclays Bank Trust Co. Ltd.*, 1980, Ch. 515).

There are no equivalent provisions in the law of *waqf*, and a careful study may show how much of these rules may be useful for *waqf* laws and management. But the basic problems affecting *awqāf* are corruption and mal-administration that owe their reasoning to lack of morality and un-Islamic life behavior and pattern whose solution lies within Islamic Law (Sharī'ah) itself.

### 7. Perpetuity v. Temporality of Waqf

Temporality versus perpetuity is a debate which affects the future of *waqf*, as questions are often raised about the practicality and viability of perpetual *waqf* as an economic institution. Mosques, graveyards, etc., are not covered by this debate as these are religious and not economic institutions. Modern world looks at perpetuity with suspicion, unmindful of the fact that the law of *waqf* treats it as one of its cardinal principles. It is generally believed by economists in today's world that non-perpetual *waqf* deserves equal respect and attention as the perpetual ones. A glance over the jurists of the past shows that they allowed *waqf* of movables on the grounds that it is for the lifetime of the asset. The Mālikīs extended this to the discretion of the *wāqif* who might create a temporary or perpetual *waqf*. The Ḥanafīs and the Shafī'īs insist on perpetuity. Could we mix the two viewpoints? Let us see whether it is possible under Sharī'ah (Cajee, 2011, pp. 336-337).

According to Abu Hanifah, *waqf* was similar to *'ariyah* or a usufructuary bequest, and being a voluntary contract was revocable in the same way as all the other voluntary contracts in the Ḥanafī law. However, the Ḥanafī law came to be based on the views of Abu Yusuf and Imam Muhammad bin Hasan, for whom *waqf* is irrevocable. But two problems arise here due to two exceptions that the Ḥanafīs allow (Tyabji, 1949, pp. 139-142).

#### *First Exception:*

A custom that was recognized since the earliest times, allowed *waqf* of things which were not capable of perpetual use on the grounds that all subject matters of *waqf* which were customarily recognized as such were valid. But this exception was confined to beasts of burden and weapons of war, and also

such other things which could be used for a limited period only (Tyabji, 1949, p. 114 & 139).

The effect of this on the idea that the corpus is vested in God is obvious – and though it seems nowhere to have been directly admitted in Ḥanafī law, it is implicit in the fact that an authority like *Radd ul Mukhtar* [*al-Muhtar*] says that a *waqf* can even validly be made of a purely usufructuary interest in perpetuity, provided the interest is a *permanent* one. (Tyabji, 1949, pp. 139-140)

#### *Second Exception:*

Abu Yusuf held that once a *waqf* comes into being, it vests in Allah, and never reverts back either to the *wāqif* or his heirs. Imam Muhammad maintained otherwise, that *waqf* property never vests in Allah. Even though his view was initially ignored but we find its acceptance in later times. For instances according to Kamila Tyabji's finding, now a custom prevails in North Africa which permits a Ḥanafī *wāqif* to alter, amend, or even annul a *waqf*. It clearly shows a return to the idea that ownership of *waqf* continues to vest in the *wāqif* as held by Abu Hanifah, and acceptance of the theory of revocability of *waqf*. In Algeria, the Ḥanafī *qāḍīs* (judges) extend it further and allow the amendment of a *waqf* if the beneficiaries so desire (Tyabji, 1949, p. 140). In Egypt, a statutory acceptance of Abu Hanifah's view is found in Section 40 of the Waqf Act, 1946. It brought a sea of change in the Ḥanafī law of *waqf* bringing it in conformity with Abu Hanifah's views. According to this law, in Egypt (Securities Commission Malaysia, 2014):

- i) A family *waqf* may not last for more than two generations or 60 years from the time of the death of the *wāqif*, after which it will become the absolute property of the *wāqif's* heirs;
- ii) Creation of *waqf* for a limited duration is possible.
- iii) A *wāqif* may revoke his *waqf* whether or not he reserved this right at the time of creating the *waqf*; and
- iv) A *waqf* may be divided if the beneficiaries so request unanimously.

The Mālikīs allow a *waqf* for a limited period, just in line with Abu Hanifah's view.

We may easily draw certain conclusions from the above difference of opinion among the jurists. For Imam Abu Hanifah, *waqf* was revocable and amenable, but his two disciples, Abu Yusuf and Imam Muhammad, disagreed and insisted on perpetuity. However, both have showed a tendency to amend their views when it appeared necessary in order to accommodate certain customs and societal needs. The modern Islamic States have adopted certain views of these jurists in order to amend certain anomalies. Thus, perpetuity of *waqf* which started as being nearly mandatory became, during the course of history, voluntary. So now, it seems perfectly possible to make a *waqf* either perpetual or revocable according to the societal needs. As the law of *waqf* is nearly totally jurist made, it is logically open to amendments. To be safe, Muslim public opinion may be gathered to settle the issues whether *waqf* needs to be perpetual or temporary. Presently, it seems, many Muslims like to have a non-perpetual *waqf* along with the perpetual one. The fast spreading popularity of cash *waqf* is a pointer towards the acceptance of non-perpetual ones.

In the absence of a temporary or revocable *waqf* in Malaysia, a trust named *Hiba Harta*, which is temporary and revocable, marketed by Bank Bumiputra (now CIMB) became very popular among Malaysian Muslims mainly because in its marketing publicity, the Bank claimed it to be Shari'ah compliant. In my own personal observation, I found considerable support for temporary *awqāf*. Probably this has something to do with the psychological effect of the rule against perpetuity of the English Law of trust imposed in all the colonized nations and, something which relates to the modern notions of property ownership.

#### **8. State Intervention in Waqf Administration**

*Waqf* belongs to the private sector, where a private citizen (*wāqif*) dedicates his privately-owned property as *waqf* and hands over its management to a person (*mutawallī*) nominated by him privately and determines its object(s). Thus, logically, the State which belongs to the public sector has nothing to do with it except general supervision for the purpose of good governance. This is how *waqf* administration was designed during the times of the Prophet (may the peace and blessings of Allah be upon him) and it continued like this for centuries.

The first attempt by the State to control *awqāf* took place in Egypt during the Mamluk Dynasty (1250-1517 CE). But due to very strong opposition of the 'ulamā', it was quickly withdrawn. However, this change was slowly brought about by the Ottomans (1281-1918 CE) in their vast kingdom that extended from Turkey to the Arabian Peninsula and Eastern Europe (Dafterdar, 2009, p. 3).

In later years, the Ottoman's example was used as an excuse by the British, French, Dutch, Italian and Portuguese colonizers of Muslim lands for their own take-overs of *waqf* properties, thus establishing a pattern of governmental control which is still continuing even after the abolition of colonialism. The post-colonial governments found it too alluring to give it up (Rashid, 2003, p. 13).

Muslim population generally, and some of the Muslim States, are now getting convinced that State intervention in *waqf* management is unhealthy, unwise and counterproductive. In India, for example the Joint Parliamentary Committee in its report observed that in matters of *waqf* the government for the purpose to achieve 'political mileage through patronage' blindly appoints as members and Chairman of *waqf* boards "persons with no knowledge of *waqf* matters, integrity or management capability", knowing fully well that these persons would be dealing with "the religious and charitable institutions, and discharge a very sacred duty . . . (Such) unscrupulous persons should not be put in-charge of the *waqf* Boards and damage the cause of the *waqf*" (Parliament of India, Joint Parliamentary Committee on Wakf, 2008, p. 207).

Some of the Muslim countries accepted that *awqāf* are a separate entity and that *waqf* fund should not be mixed with public funds. Thus, Egypt in 1971 established "Egyptian *Awqaf* Authority" that assumed management of *awqāf* from the Ministry of *Awqaf*. Sudan followed suit by establishing in 1987 the "Federal Corporation of *Awqaf*", Kuwait did likewise by establishing "*Awqaf* Public Foundation" in 1993. Jordan also did the same by establishing "*Awqaf* Properties Development Corporation", and Qatar founded in 2007 "Qatar *Awqaf* Authority" and took over the charge of *awqāf* from the Ministry of *Awqaf* (Dafterdar, 2009, p. 4).

The above reformatory measures are laudable which other countries may hopefully follow, particularly those which do not favor total control of *awqāf* by the State. But State control of *waqf* is so alluring and power addicting that it is indeed very difficult to give it up. However, the States should realize that power-sharing instead of power grabbing is in its own interest. It may save the States from accusations of unwelcome interference in the management of *awqāf* and misappropriation of *waqf* funds. Once the State exhibits even a little accommodating gesture, it may bring a sea change in public attitude.

A good lesson may be learnt from the pioneering strategy of MUIS (Majlis Ugama Islam Singapore) through the corporatization of its property development department into hundred percent wholly owned subsidiary called WAREES Investment Pte. Ltd.

Through an imaginative use of the concept of *istibdāl* (asset migration), employing real estate investment initiatives and innovative Shari'ah compliant financing instruments, WAREES successfully raised funds for financing the development of *waqf* properties in Singapore. This innovative measure amounts to a liberalization step towards freeing *awqāf* from State control (Nagaoka, 2015, p. 18; Shamsiah, 2010).

## 8.1. Possible Way Out

### 8.1.1 Separating Religious from non-Religious *Awqāf* for Purposes of Management

In order to minimize State's involvement in *waqf* management, the first thing which appears necessary is separation of purely religious *awqāf* like mosques, graveyards from non-religious *awqāf* like schools, clinics, orphanages, etc., and entrusting the management of these to two separate specialist bodies called "Council of Religious *Awqāf*" and "Directorate of Secular *Awqāf*".

### 8.1.2 Council of Religious *Awqāf* (like Mosques, Graveyards, *Imāmbārgāhs*, etc.)

In countries where the government is unwilling to finance such Councils, reliance may need to be placed on public donations and contributions. In India, Muslims rejected the government offer to pay the salaries of *imāms* of the thousands of mosques in the country mainly on religious grounds. Muslims

argued, how could they offer *ṣalāh* behind a government paid *imām*, particularly when the government is non-Muslim.

The Council should be established under a separate law, which also should provide provisions for non-religious *awqāf* management. Details of the membership of the council, the terms of office of its members, their duties, etc., are to be specified in this law, formulated with the help of Muslim jurists.

### 8.1.3 Directorate of Secular *Awqāf*

The law stated above must specify the mode of establishing the Directorate of Secular *Awqāf* its rights, duties, staffing, financing, auditing, and its relationship with the government.

Reasonable involvement of the State would be profitable to provide administrative support, exemption from taxes, legislative support and financial backing.

Ideally, the expenses of running the *Waqf* Directorate should be borne by the State as part of its social welfare responsibility. Where the State is unable to do so, an annual levy of 7% may be levied on the annual income of every *waqf*. Such levy would be in conformity with the *Sharī'ah*.

Staff of the Directorate shall be qualified in *waqf* laws. The Directorate should be run on corporate governance principles of accountability and transparency; shall use Islamic capital market products for raising funds, for instance, *ṣukūk*, *Sharī'ah* compliant shares, Islamic Unit Trust, REITS (Real Estate Investment Trusts), and *mushārahah*, *muḍārahah*, etc. However, no amount of theoretical good governance can make up for lousy management. Moreover, good corporate governance like cooking or knitting more closely resembles art than science (Securities Commission, Malaysia, 2014).

The level of State involvement in *waqf* management has to be kept at a minimum level to avoid community's resentment. For example, the offending provisions in the *Waqf* (Amendment) Act 49 of 1984 in India could never be enforced as it tried to legalize greater amount of state involvement in *awqāf* which the community never accepted. This paved the way for the 2013 amendment which reduced the state intervention (see, section 14 of the *Waqf* Act, 1995).

The public participation in *waqf* management could very well be termed as mobilization, participation and involvement of stakeholders. The Muslim community as a whole becomes stakeholder, so also the beneficiaries and the *mutawallīs*. Muslim business and professional community, so also the Islamic banks, *takāful* groups, mutual fund management companies, all become part of "stakeholders". The support of this vast fraternity constitutes a very strong NGO. The State should enact supportive legislation, whose provisions are to be drafted in the light of local realities, which differ from country to country.

The above Directorate may be a better substitute for effective management compared with individual *mutawallīs*. However, where the Directorate so desires, it may also delegate its authority to an individual *mutawallī* if he is found to be professionally qualified, honest and a person of virtuous behavior.

## 9. Government's Regulation of Secular Activities of *Waqf* in India

In India, the Central Government learnt a lesson in *waqf* management after the provisions conferring on it sweeping powers in matters of *waqf* management angered the Indian Muslims so much that *Waqf* (Amendment) Act, 1984, which contained the offending provisions could never be enforced. Now, the Government of India is playing safe by confining its regulatory powers to "secular activities" of *awqāf*. Section 96 of the Act was in-seated into the *Waqf* Act, 1995, through the *waqf* (Amendment) Act 2013. It is interesting to see the way the secular activities are explained in sub-section (1) of section 96.

1. For the purpose of regulating the secular activities of *awqāf*, the Central Government shall have the following powers and functions namely:-
  - a. to lay down general principles, and policies of *waqf* administration in so far as they relate to the secular activities of the *awqāf*;
  - b. to co-ordinate the functions of the Central *Waqf* Council and the (*Waqf*) Board, in so far as they relate to their secular functions;
  - c. to review administration of the secular activities of *awqāf* generally and to suggest improvements if any.

2. In exercising its powers and functions under sub-section (1), the Central Government may call for any periodic or other reports from any Board and may issue to the Board such directions as it may think fit and the Board shall comply with such directions.

Explanation – For the purposes of this section “secular activities” shall include social, economic, educational and other welfare activities.

This statutory provision may serve as a useful guideline for the governments of other countries as a safe boundary within which any Government may deal with *waqf* matters. However, in view of the sensitivity of this matter, the extent and scope of governmental regulatory powers may differ from country to country.

In my opinion, it is very difficult to conceptualize and propose a new model of state intervention for *waqf* management which might suit all the countries. No guideline is available in the Islamic legal literature. On the one hand, if excessive governmental control of *awqāf* is self-defeating, total exclusion of the State would be even more harmful. What appears as the solution is some sort of administrative power-

sharing between the government and Muslims at the grass root level that may create a volunteer force to act as ‘vigilantes’, since it is financially impossible to raise a field-staff big enough to keep an eye over thousands of *awqāf* scattered all over the country.

Government’s involvement would be useful for the need of having laws and regulations legislated; establishing statutory tribunals for *waqf* disputes adjudication in place of costly, cumbersome and delay-prone civil litigation which involves wastage of valuable *waqf* resources; empowering government officers to conduct survey of *waqf* properties; providing judicial powers to *Waqf* Commissioners to conduct survey of *awqāf* and giving them judicial powers to eject encroachers from *waqf* properties, and placing on District Commissioners to eject the encroaches on *waqf* properties.

It may be argued that good governance may also be achieved if, government could be replaced by a commercial bank to administer *awqāf* on the model of English trusts. Banks indeed possess specialist knowledge to manage trust properties, investment skills and profit-making know-how. However, they lack the powers of a government and are good only in management and investment of *waqf* funds.

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## إمكانيات الوقف في العالم المعاصر

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المدير المؤسس ، المركز الدولي لأبحاث الوقف، الجامعة الإسلامية العالمية، ماليزيا

المستخلص. فقدت موارد الأوقاف التي كانت تستخدم في السابق لتمويل الاحتياجات الاجتماعية للمجتمع الإسلامي الكثير من حيويتها بسبب تدهور الحالة الاقتصادية للمسلمين. وفي الوقت الراهن بالنظر إلى قلة إنشاء أوقاف جديدة، فإن الحل لهذه المشكلة على المدى القصير هو تطوير الأوقاف القائمة مع النظر في بعض التدابير التي قد تعزز قدرة توليد الدخل وتحسن الوضع الإداري للأوقاف. ومن هذا المنطلق، تتناول هذه المقالة بشيء من التفصيل الجوانب التالية: القضايا المتأصلة في تطوير الأوقاف؛ كيفية استفادة أكبر من الوقف النقدي؛ النقاش حول ديمومة الوقف؛ تدخل الدولة في إدارة الأوقاف؛ هل فكرة الترس (Trust) الغربية ترجع أصولها إلى الوقف الإسلامي؟؛ ونموذج مستقبلي لإدارة الوقف من خلال الفصل بين الأوقاف التي تخصص للمصالح الدينية (كالمساجد والمقابر ونحوها) وتلك التي تخصص للمصالح الدنيوية، بحيث ينحصر تدخل الدولة في الأوقاف الدنيوية.

الكلمات الدالة: الوقف، وقف النقود، تطوير الأوقاف، تقنية "بلوكشين" لتمويل الأوقاف، ديمومة الأوقاف.

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