

DEVELOPMENT OF DORMANT WAQF PROPERTIES: APPLICATION OF TRADITIONAL AND CONTEMPORARY MODES OF FINANCING*

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ABSTRACT

Maintenance of waqf assets and keeping them in a productive state is emphasized in Islamic legal literature. In addition to traditional avenues, jurists have sanctioned certain special modes for sustaining awqâf, in order to ensure their continuance. Due to the specific legal nature of waqf assets in shari‘ah, some contemporary modes of financing are not readily practicable in the context of waqf. Equity-based financing modes where a joint venture is initiated with the waqf assets forming part of the joint capital are not acceptable, as such modes involve partial transfer of waqf-ownership. Decreasing partnership and other formats proposed

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may be used for financing some waqf projects, with due observance of shari‘ah guidelines. Due to concerns that arise in certain modes principally relating to the issue of ownership, formats based on ijârah and istisnâ‘ appear best suited for financing awqâf.

Keywords: Waqf Property, Ownership, Financing, *Mushârakah*, *Ijârah*, *Istisnâ‘*, Development, Investment.

INTRODUCTION

The institution of *waqf* supported and sustained the social organizations in fulfilling their functions, thus playing an important role in social and economic development. Endowment funds acted as the foundation of welfare institutions that were in operation in the Islamic state. Fields such as education that are administered by government ministries today were operated mostly by *awqâf* established for the purpose.¹ Whenever a social institution was founded a *waqf* was created simultaneously for supporting it, which effectively led to the perpetuation of social welfare institutions functioning independently, unaffected in many cases by changes and political upheavals that took place in the period. Islamic history is replete with such exemplary welfare establishments that successfully withstood the vicissitudes of long centuries. Worthy of special mention is the fact that the institution of *waqf* facilitated the independent operation of the education system and the judiciary. Endowment funds greatly reduced the financial burden of the state, while sustaining social and public institutions in a more efficient manner than could have been possible under state administration. As *waqf* functioned as a permanent factor in funding important segments of the society and providing for their needs, it performed the vital economic function of creating demand, thereby boosting production and economic activity.²

¹ Anas al-Zarqâ, “al-wasâ‘il al-hadîthah li al-tamwîl wa al-istithmâr,” in *Idârah wa tathmîr mumtalakât al-awqâf*, Jeddah, Islamic Research and Training Institute, 1989, p. 186.

² Sâlih ‘Abdullah Kâmil, “Dawr al-waqf fi al-numûw al-iqtisâdi,” in *Nahw dawr tanmawî li al-waqf*, Kuwait, Ministry of Awqâf and Islamic Affairs, 1993, p. 42.

However, with state intervention in the function of *awqâf* under colonial occupation leading to their merger with government property and the degeneration that followed in its wake, this vital social and economic institution became dysfunctional to a great extent, and the developmental role of the *waqf* institution came to be neglected. In rejuvenating this institution as a vital factor in the advancement of the *ummah*, inactive and unproductive *waqf* assets are in need of being turned into income generating and self-sustaining entities that could effectively support their respective objectives while providing for their own preservation and continuation. Means of investing and utilising *waqf* properties have to be developed and diversified, within the broad context of the Islamic transactional modes. With a *waqf* sector functioning robustly and effectively, social activities that had taken to reliance on other means in the recent past could be expected to return to a *waqf*-based footing, which would signify an important advancement.

This paper examines the structures that have been employed in the past for revitalising unproductive *waqf* assets and making use of them, along with recent modes of financing and investment that have been proposed and are currently in vogue. It discusses factors peculiar to *waqf* assets that demand consideration when employing different financing structures, and attempts to highlight important aspects and possible *Shari‘ah* concerns, together with possible alternatives.

EMPHASIS ON FINANCING AND MAINTENANCE OF THE WAQF

The institution of *waqf*, by nature, is founded with a view to its perpetuation. This could be regarded as the fundamental purpose in the donor / philanthropist opting for a *waqf*-based structure instead of adopting a means such as donation (*sadaqah*) or gift (*hibah*). While the latter modes are successful in achieving the basic aim, i.e. benefiting the party whose welfare is intended, such assistance is generally of use only in the short term. *Waqf*, on the other hand, purports to serve the intended beneficiary on a long-term basis. Therefore, regeneration, maintenance, and possible improvement could be regarded as part of the overall scheme of *waqf*, that ensure its perpetuation.

It is evident that for realising continued functioning of the *waqf* so that its objectives could be fulfilled and the specified beneficiaries

supported on a steady basis, maintenance of the *waqf* is emphasized by Muslim jurists.³ While non-productive *awqâf* may require financing from external sources thus calling for the adoption of various financing techniques discussed below, those that give rise to some form of income could be supported through their own earnings. The *nazir* of the *waqf*, i.e. the caretaker or trustee, has been required to pay attention to maintaining the *waqf* assets in proper order. A part of the income would be allocated for maintenance and upkeep of the *waqf* asset so that it remains in its original condition. Thus, if the *waqf* consisted of trees that were in danger of annihilation, saplings were to be purchased through *waqf* income for plantation.⁴ Expenses of the *waqf* are to be provided from the property of the donor where this has been stipulated; otherwise, such expenses are to be carried out from any income generated through the *waqf* property.⁵

Where the *waqf* is not in possession of sufficient funds for its upkeep and maintenance as well as for renovation and refurbishment, obtaining funds needed for the purpose from external sources has been achieved through various means. A perusal of the juristic literature on *waqf* and the history of Islamic *awqâf* highlights certain processes adopted for financing *awqâf* in various instances. A brief study of some of these techniques is undertaken in what follows.

TRADITIONAL MODES FOR WAQF FINANCING

Investment of *waqf* properties is fundamentally aimed at creating a relatively superior means of income that could facilitate the *waqf* in providing improved services to its beneficiaries. In examining the state of *awqâf* that have been in existence for long periods, it is evident that a substantial number of them comprise real estate and agricultural lands, which in most instances have been neglected or not received the care

³ Wahbah al-Zuhaylî, *al-Wasâyâ wa al-Waqf fî al-Fiqh al-Islâmî*, Dimashq, Dâr al-Fikr, 1996, p. 188.

⁴ Muhammad Amîn Ibn ‘Âbidîn, *Radd al-Muhtâr*, vol. 4, p. 366.

⁵ Ibn Qudâmah al-Maqdisî, *al-Mughni*, Beirut, Dâr al-Fikr, 1405H, vol. 5, p. 590; Muhammad al-Khatîb al-Sharibînî, *Mughni al-Muhtâj*, Beirut, Dâr al-Fikr, n.d., vol. 2, p. 395.

and attention necessary to make them flourish. As a result, these are observed to be unproductive in general, or generating only a minimum income that is hardly adequate to fulfil the objectives for which they were created by the endowers. This has made it necessary to study the possible means and avenues through which such *waqf* assets could be developed, in order to make them generate sufficient revenue for their upkeep and maintenance, and to contribute towards their respective beneficiaries.

During the early periods, the trustees of *waqf* assets adopted various traditional avenues for maintaining and investing the properties in their care. These included means such as lease of buildings, commercial properties and land for earning rental income, farming of agricultural lands and sale of their produce, as well as replacement of *waqf* assets where this was justifiable. Muslim jurists have described the accepted methods for carrying out these in a manner that does not involve violation of the particular restrictions applicable to *waqf* properties. In leasing of *waqf* assets, the caretaker was allowed to contract a lease on a rental not falling below the prevalent rate of rental for similar assets.⁶ The asset could be leased to a beneficiary if needed, as the latter, although having claim to the income of *waqf*, had no claim to the ownership of the asset and was thus an external party in this regard. The period of the lease was limited to a maximum of three years, exceeding which was only possible with the sanction of the court.⁷

In the latter centuries, especially during the Ottoman period, the scholars and those in charge of trust properties came to realise that the traditional means were insufficient for optimum management and investment of *awqâf* funds, and that the traditional methods had to be upgraded and new modes developed. The need for developing alternative or more sophisticated methods was felt for ensuring the productiveness of *waqf* properties and to prevent them from becoming unbeneficial. This resulted in the adoption of certain formats that were hitherto unknown or unutilised.

⁶ *Ibid*, vol. 4, p. 402.

⁷ *Ibid*, vol. 4, p. 401.

IHTIKĀR

Such a new method adopted was the long term lease contract that came to be known as *ihtikâr* or *istihkâr*.⁸ An amount that was close to the value of the *waqf* property—empty land in most instances—was paid by the acquirer of land as a down payment of rental, against his right to utilise the land on a long term basis. The so-called lessee was free to build on the land, use it for agricultural purposes etc. similar to the usage of a proprietor. Any structure thus put up by the lessee with the permission of the trustee of the *waqf* belonged to the lessee, which could be sold by him to a third party and was inheritable. A relatively small sum was paid annually by way of rental, at which the contract of lease was renewed. The right of utilising the land acquired thus could be sold to another, and was inherited. The contract was categorised as a long term lease that became effective with a court order, which facilitated making use of *waqf* properties that were otherwise in danger of being left barren and unutilised. By means of this contract, the *waqf* could obtain a large sum of money that came close to the value of the property by transferring the right of exploiting such land on a long term basis, in addition to a smaller amount annually by way of rental. The liquidity gained thus could be invested in other more profitable avenues, or in maintaining and developing other *waqf* properties. The right gained by the lessee to the usufruct of the land, however, was contingent on his paying the rental duly.

Hanafi texts suggest that the preferred arrangement dictated that the periodic rental in this case does not fall below the market rate. The Hanafi jurist Ibn ‘Âbidîn has recorded the ruling that if the lessee in *ihtikâr* refused to pay a rental that was in keeping with the normal rental for such as land, i.e. *ujrah al-mithl*, he was required to remove his structure, and the land was leased to another.⁹ Thus, it appears that the rental was adjustable to reflect the changing market value of the land. It

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See Muhammād Amîn Ibn ‘Âbidîn, *Radd al-Muhtâr*, Beirut, Dâr al-Fikr, 1979, vol. 4, p. 523; Hasan ‘Abdullah al-Amîn, “al-Waqf fî al-fiqh al-Islâmî,” in *Idârah wa tathmîr mumtalakât al-awqâf*, Jiddah, IRTI, 1989, p. 134; Nazîh Hammâd, “Asâlf b al-istîthmâr al-awqâf wa usus idâratihâ,” in *Nahw dawr tanmawî li al-waqf*, Kuwait, Ministry of Awqâf and Islamic Affairs, 1993, p. 174.

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Muhammād Amîn Ibn ‘Âbidîn, *Radd al-Muhtâr*, vol. 6, p. 218.

is important to note, however, that the land devoid of the structure was taken into consideration for ascertaining the rental, as the structure put up at the expense of the lessee may not be considered for this purpose. Also important is the fact that the rental was raised only if the prevailing market rental rose substantially.¹⁰ This implies that increase of rental was not common. Indeed, in the practical scenario, rentals appear to have remained unchanged for long periods. However, when finding a lessee willing to pay market rental under this arrangement was impossible, Hanafi jurists seem to have condoned that a lesser sum may be fixed as the rental, provided the sum initially paid was spent on the *waqf*.¹¹ It is clear that this method was adopted in exceptional circumstances when no other avenue was feasible for obtaining the liquidity needed by the *waqf*, as the rights pertaining to the asset passed on the lessee in a near permanent manner, the *waqf* having little control over the property thereafter. In a variation of this arrangement, no sum appears to have been paid upfront, the only benefit to the *waqf* being an insignificant amount paid as annual rental.¹² Evidently, this could only have been resorted to as an alternative to total abandonment of the *waqf* property.

IJĀRATAYN

A device that was more or less similar came to be adopted for facilitating reconstruction of *waqf* buildings that the *waqf* management was unable to finance due to lack of funds. This mode that was referred to as *ijāratayn* became popular during the latter centuries of the Ottoman Empire when large scale fires ravaged Istanbul resulting in the destruction of a large number of the numerous *waqf* structures, thus disfiguring the landscape.¹³ The revenue from *waqf* properties suffered as a result, leading to abandonment of their reconstruction. The arrangement involved a prospective lessee paying an amount of money that was sufficient for the reconstruction of the damaged buildings by way of advance rental, against his securing the right to occupy the structure on

¹⁰ *Ibid*, vol. 4, p. 392.

¹¹ *Ibid*, vol. 4, p. 593.

¹² Ahmad ‘Abd al-Ḥalīm ibn Taymiyyah, *Kutub wa Rasā’il wa Fatāwā ibn Taymiyyah*, al-Riyād, Maktabah Ibn Taymiyyah, vol. 31, p. 17.

¹³ Anas al-Zarqā, “al-wasā’il ...,” p. 194.

a permanent basis, and paying a periodic rental that was relatively small.¹⁴ This right could be transferred to another and was inheritable. The contract of lease was renewed annually. The arrangement provided an alternative means to finance reconstruction, while avoiding violation of the prohibition on the sale of *waqf* properties and their long term lease.

The difference between the current method and the *ihtikâr* format aforementioned is that in the case of the former, any structure put up on the land as well as the trees planted belonged to the lessee, as they were introduced by the lessee after payment of the value of the land by way of an immediate gross rental. In the latter mode, both the structures as well as the land belonged to the *waqf*, as the construction was undertaken by the *waqf* itself, through the advance rental paid by the lessee. In both, the lessee achieved the right of long term occupation that could be transferred and bequeathed, which deprived the *waqf* of exploiting the land through any better means that became available afterwards.

MURSAD

A variation of the same format that was known as *mursad* referred to the lessee being allowed to construct in the *waqf* property, so that the amount spent by the lessee remained a debt on the *waqf* that was set off against the periodic rentals. The construction remained in the ownership of the *waqf*, and the lessee was allowed the right to occupy it permanently and to relinquish his entitlement to the debt in favour of another, who succeeded him in the lease arrangement with the authorisation of the court. Ensuring settlement of the *mursad* dues has been considered to be of more importance than supporting the beneficiaries

¹⁴ The title given to this specific mode seems to be based on the two components comprising the rental arrangement; there is no indication in any source that two individual rental agreements were brought together in this mode, which had inspired the title. See Muḥammad ‘Abdah ‘Umar, “*Tabbîq nizâm al-binâ wa al-tamlîk fi ta‘mîr al-awqâf wa al-marâfiq al-‘âmmah*,” paper presented at the 19th session of the Islamic Fiqh Academy Conference, held in Sharjah, United Arab Emirates, 26-30 April 2009.

of the *waqf*.¹⁵ Thus, Ḥanafī scholars have ruled that if the *waqf* possessed any funds or means of income, it would be diverted first towards meeting the *mursad* dues, so that the rental income at prevalent market rates could accrue to the *waqf*. However, when the rental applicable had risen as a result of the development of the property through the *mursad* arrangement, the lessee was not required to pay the excess rental.¹⁶

Long term lease that was not approved in the case of *waqf* properties in many schools of Islamic law was achieved in certain instances by modifying the contract of lease. This involved breaking the duration of the contract into smaller units, fixing a separate rental for each periodic unit that was specified individually. Thus, each contract usually involved the lease of the property for one year, the rental for which was specified. In the case of buildings as well as agricultural land, Ḥanafī jurists had disallowed long term lease, as this could lead to abolishment of the *waqf*.¹⁷ However, later Ḥanafī jurists permitted adoption of consecutive lease contracts that facilitated long term lease, when the construction and repair of *waqf* assets thereby ensuring their perpetuation could be achieved only through this means.¹⁸

SHARĪ‘AH ISSUES THAT ARE IMPORTANT IN DEVISING FINANCING AND INVESTMENT STRUCTURES FOR AWQĀF

Due to the developments that have taken place in the sphere of Islamic banking and finance in the last few decades, diverse structures have been evolved by contemporary Islamic scholars for facilitating financing and investment in projects and ventures of various nature. These include various formats based on *mushârakah*, *mudârabah*, *ijârah*, *istisnâ‘*, *murâbahah*, different combinations of these modes, as well as securitization of assets based on some of them. These have been popularly used for financing trade, agriculture, import and export, housing,

¹⁵ Muhammad Amîn Ibn ‘Âbidîn, *Radd al-Muhtâr*, vol. 4, p. 367.

¹⁶ *Ibid*, vol. 4, p. 403.

¹⁷ *Ibid*, vol. 4, p. 402.

¹⁸ *Ibid*, vol. 4, p. 401.

manufacturing, husbandry etc by modern Islamic financial institutions. Although most *waqf* institutions fall under these categories, the above methods could not be applied in financing *waqf* projects in a straight forward manner in some instances. This is because of the specific nature of the institution of *waqf* which embodies certain distinct features that set them apart from other entities belonging to the same category. These distinct features dictate that some important adjustments are made to some financing structures so that these could be adopted in financing *waqf* projects without an objection. Some other structures that are applied to ordinary projects may not suit *waqf* financing at all, as these go against the very nature of *waqf* as upheld in Islamic law. The distinct features of *waqf* that demand special consideration with regard to financing include the particular nature of the ownership of *waqf* and the resultant restrictions on co-ownership of *waqf* assets and transfer of their ownership, directives regarding the period they could be leased and the nature of the rental, permanency of *waqf*, responsibilities of the caretaker or trustee that involve his management of the *waqf* only in a manner conducive to its best interest etc. Of these aspects, the issue of ownership of *waqf* assets is explored hereunder due to its special relevance, with attention to its effect on the possibility and nature of adopting various methods of financing.

OWNERSHIP OF THE WAQF PROPERTY

According to the majority of the schools of Islamic law, with the conversion of an asset into a *waqf*, it ceases to belong to the previous owner, as the asset leaves his ownership. It is referred to as an asset retained in the ownership of Allah ta’ala, which means that the previous owner no longer enjoys its ownership. However, the ownership of the asset does not pass on to another, and the asset remains in an ownerless state.¹⁹ Thus, with the creation of the *waqf*, the donor, i.e. the previous owner loses the power to transact on the property, and is required to devote its utility or income towards the specified cause. Based on this,

¹⁹ This is what is meant by the asset passing on to the ownership of Allah in *waqf*, there being no other mortal owner in this instance. See Wahbah al-Zuhaylî, *al-Wasâyâ wa al-Waqff fi al-Fiqh al-Islâmî*, p. 188.

waqf is defined by the majority of scholars as “retaining a property that could be utilised while its corpus remains intact, by barring the possibility of the donor or any other person transacting on its corpus, towards an existent and permissible (charitable) avenue, for gaining proximity to Allah ta’ala.” This highlights that the asset leaves the ownership of its donor in a final manner, he being no longer permitted to transact using it, through selling, gifting or bequeathing it. Retention means that it is prevented from being owned by any party and becoming the subject matter of a transaction affecting its ownership. This meaning is upheld by the majority of the Ḥanafī jurists, and the Shāfi‘ī and the Ḥanbalī schools.²⁰

Imām Abū Ḥanīfah has upheld the position that *waqf* entails directing the usufruct (i.e. utility or benefit) of the property in a charitable avenue while the owner retains its ownership.²¹ Thus, it remains in the ownership of the donor, who is free to reclaim it. The *waqf* becomes irrevocable only in certain specific instances such as through a court order, or in the case of a mosque, when people start offering prayers in it. However, many scholars of the Ḥanafī schools have given preference to the majority position aforementioned. It is reported from Imām Mālik that according to him the ownership of the usufruct of the property alone is transferred to the specified beneficiary, up to a defined period.²² This indicates that the owner directs the income or usufruct of the asset in a charitable avenue, while retaining the ownership and disallowing any transaction taking place on it. According to this position, permanency and everlastingness of the *waqf* is not required, as it could be for a specified duration. It also dictates that one who owns only the right to the usufruct, such as a lessee, may create a *waqf* based solely on the usufruct.

Different conceptions of jurists with regard to the essence of *waqf* in the above manner, based necessarily on their interpretation of various prophetic traditions and narrations from prophetic companions, has given rise to divergence in the approaches adopted by them in deriving

²⁰ Ibn Qudāmah al-Maqdisi, *al-Mughnî*, vol. 5, p. 349; ‘Alī ibn Abī Bakr al-Marghīnāni, *al-Hidāyah*, Bayrût, al-Maktabah al-Islamiyyah, n.d., vol. 3, p. 13; Muḥammad al-Khatib al-Sharibīni, *Mughnî al-Muhtâj*, vol. 2, p. 376.

²¹ Al-Marghīnāni, *al-Hidāyah*, vol. 3, p. 13.

²² Sîdi Aḥmad al-Dardîr, *al-Shârh al-Kabîr*, Beirut, Dâr al-Fikr, n.d., vol. 4, p. 76.

rulings pertaining to various aspects of *waqf*. However, the majority of scholars, represented in this case by the Shâfi‘î, Hanbali and some Hanafî jurists, consider *waqf* similar in some respects to gift and charity, in that its ownership is severed from the donor in a final and irrevocable manner. The *waqf* transaction is binding, and the donor does not have the right to annul it or reclaim the asset. The position of the Mâlikî jurists is close to this in that the *waqf* may not be annulled by the donor, despite of their validation of *waqf* for a limited duration.²³

THE EFFECT OF OWNERSHIP OF WAQF ON FINANCING AND INVESTMENT

The fact that the *waqf* is not in the ownership of anyone and that no party can gain its ownership through any contract is of profound importance in devising structures for financing and investment of *awqâf*. It is essentially impossible to transfer the ownership of a *waqf* asset to another by any means in normal circumstances. This fundamental position dictates that any financing mode that involves the sale or transfer of the *waqf* asset to any party is not admissible. Thus, modes such as sale on instalment through instruments such as *murâbahah* and lease ending in transfer of ownership, i.e. *ijârah muntahiyah bi al-tamlîk* as upheld by contemporary *Shari‘ah* scholars, cannot be employed for investment of *awqâf*, as both of these formats require the transfer of ownership of the leased or sold asset, which is not feasible in the case of *waqf*. Due to the above reason, such formats could be applicable only in certain areas of *waqf* financing where the *waqf* seeks to acquire assets, or when normal properties owned by the *waqf* are to be disposed of through these modes.

It should be noted that apart from the property that has been converted into a *waqf* by the donors, there could be other assets owned by the *waqf*, which themselves are not *waqf*. This is possible through the *waqf* acquiring assets needed for various purposes through the income accruing to it. For instance, a *masjid* and its land which may constitute a *waqf* due to their having been converted into *waqf* entities by the donors, may own various items needed for maintenance and upkeep of

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See references above.

the *waqf* and for other purposes, that had been purchased possibly through the income received from other *waqf* properties assigned to the *masjid*. Alternatively, cash donated to the *masjid* may have been used for purchasing such items, or they may have been received as donations from the public, not necessarily stipulating that these be made *waqf*. These items that are themselves not *waqf* assets may be sold or disposed of in any suitable manner. This makes it clear that although financing modes that require acquiring or transfer of ownership of *waqf* properties themselves may be inadmissible, such methods could be validly employed for financing and investment using other assets owned by the *waqf*.

MUSHĀRAKAH AND OWNERSHIP OF WAQF ASSETS

The unfeasibility of gaining ownership of *waqf* assets also dictates that joint ventures where a part of the *waqf* property may become jointly owned may not be created based on such property. Therefore, financing modes based on *mushârakah* where the procedure involves the *waqf* property, e.g. land, being contributed as the capital of the venture while the monetary capital necessary is invested by the financial institution, are not practicable in the case of *awqâf*. This is because, even according to the Mâlikî position that recognises the validity of contributing illiquid capital, i.e. capital in kind, in forming joint ventures, a sale is held to take place concurrent to the contract of *shirkah*. Mâlikî theory holds that with the finalisation of the contract, an undivided share of the capital input of each partner is sold to the other against a similar share in the latter's capital.²⁴ This is based on the fact that the Mâlikî school perceives *shirkah* in essence to consist of agency and sale.²⁵ The second position adopted by the Hanbali school that holds contribution of capital in kind admissible, too, regards that with the finalisation of the contract of

²⁴ Abû 'Abdillah al-'Abdari, *al-Tâj wa al-Iklîl*, Beirut, Dâr al-Fikr, 1398H, vol. 5, p. 123. See for details Muhammed Abdurrahman Sadique, "A study of equity financing modes for Islamic financial institutions in a Shari'ah perspective," unpublished doctoral thesis, International Islamic University Malaysia, 2006, p. 163.

²⁵ Muhammed ibn 'Abdillah al-Khurashi, *Hâshiyah al-Khurashi*, Beirut, Dâr al-Kutub al-'Ilmiyyah, 1997, vol. 6, p. 338.

partnership, the capitals contributed by each partner become mutually owned. Thus, in the context of partnerships involving capital, Hanbalī theory maintains that the contract of *shirkah* results in each partner becoming the owner of half the capital input of the other.²⁶ Therefore, entering into modes based on *mushârakah* always involve the establishment of joint ownership on the capitals contributed by the partners, where each partner becomes the owner in part of the other's capital. In the case of the Ḥanafī school, although such common ownership over capital is not created in *mushârakah*, where the capital of one partner comprises illiquid assets, a mutual sale involving the exchange of parts of the capitals is necessary in order to create the joint capital base.²⁷ *Mushârakah* is otherwise unfeasible in this instance. The position of the Shāfi‘ī school too envisages such a sale.²⁸ Since transactions involving the ownership of capitals are thus a necessary part of creating *mushârakah* ventures, the latter cannot be done in a valid manner as far as *waqf* assets are concerned.

This fact demands that when *mushârakah* based formats are to be adopted for financing and investment of *waqf* assets, the contribution of the *waqf* towards the venture be made through the income derived from the *waqf*, or through other liquid funds that have been contributed to the *waqf*, however, not by way of turning them into *waqf* endowments. Alternatively, where illiquid capital is to be contributed towards the *mushârakah*, they should be such assets that are owned by the *waqf* which are not *waqf* entities themselves.

MUSHĀRAKAH MUTANĀQISAH AND WAQF OWNERSHIP

The above is also true of *mushârakah mutanâqisah* or decreasing partnership, which has been upheld by various bodies of

²⁶ Ibn Qudâmah, *al-Mughnî*, vol. 5, 128.

²⁷ Kamâl al-Dîn ibn al-Ḥumâm, *Fath al-Qadîr*, Beirut, Dâr al-Fikr, n.d., vol. 6, 174, al-Ḥaskafi, *al-Durr al-Mukhtâr* and Ibn ‘Âbidîn, *Radd al-Muhtâr*, vol. 4, 310.

²⁸ Abû Zakariyyâ al-Nawawi, *Rawdah al-Tâlibîn*, Beirut, Dâr al-Kutub al-‘Ilmiyyah, vol. 3, 509.

contemporary scholars as a suitable structure for financing *awqâf*.²⁹ To illustrate the use of this mode in the context of *waqf*, let us suppose that some commercial properties comprising shop lots form a *waqf*. The management of the *waqf* is interested in utilising these for initiating a business venture run by the *waqf* itself, instead of leasing the shops to other businesses. A *mushârakah mutanâqisah* could be proposed for establishing the business in joint partnership with a financial institution for sharing the revenue earned, where after the business starts functioning in a regular manner, the *waqf* could resort to purchasing the share of the financial institution gradually, until the whole venture is owned by the *waqf* solely. Here, in contributing capital towards the formation of the joint venture, the *waqf* may not count the shop lots as its share of the joint capital due to the above objection, viz. the *mushârakah* format entailing the partners acquiring ownership of a portion of each other's capital.³⁰ Adopting *mushârakah mutanâqisah* would automatically give rise to the financial institution gaining the ownership of a part of the shop lots proportionate to the value of the capitals invested. This being impossible in the case of *waqf* property, this structure may not be adopted in this manner in the current instance. Therefore, the contribution of the *waqf* towards the venture should be sourced from liquid funds that belong to the *waqf*.

²⁹ See section below on decreasing partnership.

³⁰ It should be noted that converting buildings and infrastructure into capital contribution in *mushârakah*-based joint ventures carries some fundamental weaknesses from a Shari'ah perspective, even when *waqf* property is not involved. The partners become joint owners of the capitals of each other, which leads to the buildings becoming partly owned by the other partner, often a financial institution. However, since this phase of the transaction is not documented, it remains a hidden aspect that is usually ignored in *mushârakah* ventures financed by Islamic banks. As a result, repurchase of the bank's share that becomes necessary at the winding up of the venture does not take place. This could result in the *mushârakah* taking the form of a mere financing arrangement, where the reality of the joint participation platform is abandoned to a large extent.

SECURITIZATION AND WAQF OWNERSHIP

The issue of ownership arising in *awqâf* also places financing through securitization strictly outside the ambit of possible means of financing and investment. Securitization as is currently adopted by Islamic financial institutions for financing large scale business ventures usually takes the form of securitization of *ijârah* assets or other income generating property. When the underlying pool of assets consists of properties that have been leased out, the process involves the ownership of the pool of assets being divided into equal units, that are sold to potential investors at a fixed sum. The investors who purchase these units are issued a bond or certificate usually referred to as *sukûk*, indicating their investment in the project and evidencing the extent of their ownership in the pool of assets. The rental income from the leased assets is forwarded to the owners of *sukûk*, proportionate to their ownership. By this means, the cost of establishing a large scale *ijârah* venture are collected upfront with a profit. Regardless of the diverse issues of *Shari‘ah* importance raised in this procedure both on the theoretical basis as well as the process of its practical implementation, its application in the case of *waqf* properties is not possible due to the question of transfer of ownership. Where the underlying *ijârah* assets comprise *waqf* property such as apartments, commercial buildings or land, these may not be securitized, as the transfer of their ownership is unfeasible.

MODERN MEANS OF FINANCING WAQF PROJECTS

With neglect in the maintenance and development of *awqâf* leading to the near-abandonment of this important avenue in supporting various fields of religious, social and economic importance over the latter centuries, the need was felt to explore and devise additional means for exploiting *awqâf* and making better use of them. This has led contemporary scholars to considering certain additional formats that could effectively finance the development of *awqâf*, so that they could contribute successfully in raising the socioeconomic level of Muslim communities. Salient features of some prominent modes that have been suggested for this purpose and are currently in practice in various parts of the world are discussed below.

DECREASING PARTNERSHIP

Several studies undertaken by the Islamic Development Bank as well as other scholarly bodies had recommended the decreasing partnership structure as a platform especially suitable for financing different *waqf* projects. Two conferences organised by the Islamic Research and Training Institute (IRTI) on managing and investing *waqf* assets that were held in 1984 in Jeddah upheld the application of two modes, viz. *istisnâ'* and decreasing partnership for financing *awqâf*. Briefly stated, this structure involves the bank initiating a partnership with the *waqf* to undertake a profit making venture with an agreement to divide the return on the basis of the proportion of participation. The *waqf* purchases the bank's share in the joint venture on a staggered basis, until the total ownership is gained by the *waqf*.

The primary concept of decreasing partnership involves the joint purchase of an asset or a venture by two parties, on the assurance given by one of them that the share of the other in the asset or the venture would be purchased by the former in stages. Due to the fact that the share of one party, usually that of the financial institution, decreases gradually as a result of the consecutive purchases by the other, this structure has been referred to as *mushârakah mutanâqisah* or decreasing partnership. Based on the common ownership of the parties, any revenue through the asset or the venture would be shared between them. When this structure is adopted for procurement and development of assets and real estate, the additional feature of *ijârah* is usually seen to be incorporated, however, as an independent contract. The share of one partner, i.e. usually that of the Islamic bank, is leased to the other at a fixed rental. With the progressive purchases of the client that result in the reduction of the bank's share, the rental too is reduced. This is achieved through the bank providing an undertaking at the outset that if the client purchases the bank's share in portions, the rental would be reduced accordingly. With the client's purchase of the bank's share completely, the *ijârah* terminates and the relationship comes to an end.³¹

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For details on decreasing partnership and its practical application by Islamic banks, see Muhammad Abdurrahman Sadique, 'Financing micro and medium sized enterprises through decreasing partnership (*mushârakah mutanâqisah*): refining Shari'ah and banking aspects

The forms advocated by contemporary scholars for decreasing partnership are various, all of which share in the formation of an equity relationship at the outset, over tangible assets or in a joint venture. The structure for facilitating acquisition of assets usually functions in the manner given above, i.e. through an initial joint purchase of an asset, where the undivided share of the bank is leased on *ijârah* to the client, while the client continues to purchase the share of the financier in equal units, which also results in the rental decreasing accordingly, until the whole asset is owned by the client. In a variation of decreasing partnership advocated for joint ventures, the purchase of the share of the financier, i.e. the bank, is prescribed to commence after the venture had started to function in a steady manner and the objective of the venture had been achieved, e.g. the establishment of a functioning supermarket. Each partner is given total freedom to sell his share in portions to the other, or to a third party. In another variation recommended for joint ventures, a portion of the profit or net return through the project remaining after the client and the bank had claimed a part of the profits at each profit loss calculation is set aside for the purchase of the share of the bank. Thus, the net return is divided into three portions in this model, where a portion is allocated for the ultimate secession of the bank from the venture.³² A variation of the same structure suggests that after the bank had secured its share of profit at each profit distribution, the remaining portion be retained for the purchase of the bank's share within a stipulated duration.³³ A third structure for joint ventures proposes that the total value of the project be split into equal units, which are acquired by the bank and the client partner proportionate to their investments. The profit of the venture would be divided as agreed between them. The client is allowed to purchase any number of units from the bank's share whenever he could

for enhanced applicability,” in the proceedings of the First International Islamic Conference on inclusive financial sector development organized by University Brunei Darussalam and Islamic Research and Training Institute, Brunei, 17-19 April, 2007.

³² Muhsin Ahmад al-Khudayri, *al-Bunâk al-Islâmiyyah*, al-Qâhirah, Iytrak li al-Nashr, 1995, 133.

³³ ‘Abd al-Sattâr Abû Ghuddah, “al-Mushârakât al-Mutanâqisah wa Dawâbituhâ al-Shar‘iyyah,” in *al-Iqtisâd al-Islâmi*, No. 277, Rabî‘ al-Akhir 1425H, vol. 24, 217.

afford the liquidity to do so without adhering to a fixed schedule, until he becomes the sole proprietor of the venture.³⁴

When the decreasing partnership mode is employed for the purpose of financing *waqf* projects for initiating profit generating ventures, many of the above forms could be applicable, provided the special nature of *waqf* and the relevant restrictions on ownership etc are carefully observed. In one format, the *waqf* contributes its share in the form of the value of the land provided for the project, while the bank's share constitutes the required monetary capital. The income through the project is divided initially in two parts, one of which is reserved for the purchase of the share of the bank. The remaining part is divided between the bank and the *waqf* proportionate to capital participation. However, this arrangement raises the question of *waqf* property entering the ownership of the bank, even though temporarily. This being unfeasible, in an alternative format adopted, the *waqf* undertakes provision of a part of the monetary capital required, in addition to the land or premises. Here, the land is considered to have been leased to the project by the *waqf*, in return of which a part of the income is claimed by the *waqf* as rental. The remainder of the income is divided based on the capital ratio. The purpose served in this format is that the bank is prevented from becoming a partial owner of the *waqf* land, which could result through creating the partnership on its basis.³⁵

However, these modes may involve some concerns from a *Shari'ah* perspective, which remain relevant even when they are applied for financing *waqf* properties.³⁶ In addition, in joint ventures involving

³⁴ First Islamic Banking Conference Dubai, 22-24 May 1979, held at Dubai Islamic Bank, *Fatâwâ Shar'iyyah fî al-A'mâl al-Masrafiyyah*, 22.

³⁵ Mahmûd Aḥmad Mahdi, “Tajribah al-bank al-Islâmî li al-tanmiyah fî tathmîr al-awqâf al-Islâmiyyah,” in *Nahw dawr tanmawî li al-waqf*, Kuwait, Ministry of Awqâf and Islamic Affairs, 1993, p. 72. According to the author, this format has been proposed by Prof. al-Siddîq al-Darîr in an unpublished paper of his on utilising decreasing partnership for financing awqâf. Potential violation of the directives pertaining to the ownership of *waqf* here was discussed in the section on the effect of ownership of *waqf* on financing and investment above.

³⁶ For a detailed analysis of these issues, see Muḥammad Abdurrahman Sadique, “A study of equity financing modes for Islamic financial institutions in a *Shari'ah* perspective,” unpublished doctoral thesis, International Islamic University Malaysia, 2006, p. 163.

waqf projects where the *waqf* is expected to participate in the venture through contributing a part of the investment, the share of the *waqf* in such projects could be minimal, in view of the low levels of liquidity available to the *waqf*. Due to the share of the *waqf* being insignificant, the part of the returns accruing to it too would not be substantial, leading to the purchase of the bank's share taking a long duration. The latter aspect could be a potential deterrent that could discourage financial institutions from taking part in such projects.³⁷

ISTISNĀ'

Istisnā' is essentially a mode of sale upheld by the Hanafī school, that facilitates manufacture and construction against a fixed sum payable to the manufacturer.³⁸ An order is placed with a manufacturer for manufacturing and supplying a defined item the specifications of which are fully described, using the manufacturer's material, against a fixed price mutually agreed. *Istisnā'* mode could be employed effectively by *awqâf* for the construction of housing units, business structures, factories, work shops etc on *waqf* properties, that could be leased to potential businessmen or operated by the *waqf* itself. The main difference between this mode and the mode of *salam* that enjoys wider acceptability among jurists is that in *istisnā'*, payment of the complete price at the outset itself is not necessary, as is required for the validity of *salam*.³⁹ This facility makes this mode especially suitable for financing large scale ventures such as construction of housing projects, as the payment may take place on a staggered basis. Build, operate, transfer (BOT) mode, recently upheld as a valid format for financing *waqf* by the Islamic Fiqh Academy, too, is similar to a large extent, with the difference that the constructor recovers his cost and the projected revenue through operating

³⁷ For a possible solution to this, see section on shared ownership under modern means of financing *waqf* projects below.

³⁸ Jam'iyyah al-Majallah, *Majallah al-Ahkâm al-'Adliyyah*, n.p., Kârkhânah Tijârat Kutub, n.d., vol. 1, p. 75.

³⁹ Muhammâd ibn 'Abd al-Wâhid al-Sîwâsi Ibn al-Humâm, *Sharh Fath al-Qadîr*, Beirut, Dâr al-Fikr, n. d., vol. 7, p. 114.

the project himself for a limited period, before handing over the whole to the *waqf*.⁴⁰

In adopting *istisnâ'c* mode for financing *waqf* projects, the *waqf* management engages a financial institution to construct a structure on the *waqf* property according to specifications provided by the *waqf*, on the agreement that the completed structure would be transferred to the *waqf* against a fixed sum to be paid by the latter. The *istisnâ'c* contract as recognised by the Hanafi school allows that the payment in this case could take place as agreed between the parties, without any restriction as to the time or method of payment. Thus, it could be paid as a lump sum on an agreed date, or over a period as arranged between the parties in instalments. The *waqf* could undertake to pay throughout the duration of construction and beyond, until the agreed amount is fully settled. The method in practical usage is that a larger part of the agreed price is paid in instalments, through income received by the *waqf* by way of leasing the property to prospective lessees, that takes place after completion of the construction process.

In this arrangement, the *istisnâ'c* contract is primarily effected between the *waqf* and the financial institution. Although the financial institution adopts the role of the constructor here, it may not undertake the construction process itself. A firm involved in construction and manufacture is engaged for the purpose, possibly through another contract of *istisnâ'c* entered into between the financial institution and a constructing firm.⁴¹ This contract is based on similar terms, with the price to be paid to the constructor being lower than that in the first contract, the payment taking place as arranged between the constructor and the financial institution. The difference between the two prices forms the profit of the financial institution. In the practical scenario, selection of the constructor and all negotiations pertaining to price, specifications etc are finalised between the constructor and the final client, i.e. the *waqf*. The bank is brought into the process at a later stage, before any contact is concluded between the *waqf* and the constructor and the latter

⁴⁰ See resolutions of the 19th Session of the OIC Islamic Fiqh Academy, held in Sharjah, United Arab Emirates, 26-30 April 2009. It should be noted that there are areas relevant to practical application of these modes, that require further academic elaboration.

⁴¹ Muhammed Taqi Usmani, *An Introduction to Islamic Finance*, Karachi, Idaratul Ma'arif, 2000, p. 199.

commences the project. The bank assumes the primary role by entering into an *istisnâ'* agreement with the *waqf* for constructing the required buildings etc, and finalises another *istisnâ'* agreement with the constructor. It is necessary that the two contracts remain independent of each other.

The Islamic Fiqh Academy Jeddah, in its resolution on investment certificates, has upheld that in the case of *istisnâ'* involving *waqf* projects, the government may provide an undertaking to settle the dues of the constructor, which shall take the form of a gift, or an interest-free loan, i.e. to the *waqf*.⁴²

An important advantage in employing this mode for financing *waqf* projects is that the concerns regarding possible violation of the restrictions on *waqf* ownership etc that could arise in decreasing partnership being irrelevant here. This is because the financial institution does not enter into a partnership with the *waqf* on the basis of joint capital. The financier is engaged only in the capacity of a service provider who also supplies the material necessary for construction himself, and sells the manufactured item to the client. Regarded from this perspective, this method as upheld by contemporary scholars could be more appropriate for financing *awqâf*. Another significant advantage is that the total amount payable to the financial institution being fixed upfront, there remaining no possibility of ambiguity on the issue. Conversely, in the case of decreasing partnership that necessitates sharing of profits, the total amount payable to the financial institution would depend on the profitability of the venture. However, it should be noted that in *istisnâ'*, the *waqf* is responsible for the payment of the instalments duly, and in the event of the project not performing up to expectations, seeking external funding for meeting instalments may become necessary, this being an aspect that could not arise in decreasing partnership. Therefore, it is evident that *istisnâ'* demands a vigorous and precise feasibility analysis, more so than is required in decreasing partnership, so that the duration required for complete settlement and the nature of instalments may be properly decided.

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Resolution No. 30 (5/4) concerning *muqâradah* bonds and investment certificates, issued by the Council of the Islamic Fiqh Academy in its Fourth Session held in Jeddah, 18-23 Jumada Thani 1408H (6-11 February, 1988).

MUDĀRABAH CERTIFICATES

Mudârabah certificates or bonds known also as *sukûk* that are structured on the basis of *mudârabah* either partially or completely have been adopted for financing *waqf* projects. The structure here is based on restricted *mudârabah*, where an investor extends funds towards a specific project in the form of *mudârabah* capital. The funds may be invested totally by a financial institution, or through allowing public subscription by means of *mudârabah* certificates, a structure based on which was initially practised for financing *awqâf* in Jordan.⁴³ The net returns after the capital of the financier is restored are divided between the *waqf* and the investors.

In practical application, this involves the *waqf* management assessing the total cost of the planned venture and the projected income, and issuing certificates to the public with the mediation of a financial service provider, where the total bond value is equal to the projected cost of the venture. The *waqf* management or a party representative of it acts as the *mudârib*, responsible for providing the labour and expertise necessary, while the subscribers to the bonds become financiers (*rabb al-mâl*) of the venture. Each bond holder is a joint investor in the project to the extent of his investment, represented by the number of bonds purchased by him. The holders of the certificates may exchange them in the open market at a mutually agreed price, subject to certain conditions. The certificate does not carry a fixed dividend. Profits to be divided are calculated based on constructive liquidation, i.e. evaluation of the assets of the venture and identifying the excess over capital. Profits paid before liquidation are considered provisional disbursements paid on account. The *waqf* itself may invest towards the project, possibly through subscribing to a proportion of the capital. The income through the venture is primarily divided between the *waqf* and the investing public on the basis of their shares in the capital, the *waqf* gaining an additional share for its role as *mudârib*. The income realised by the *waqf* is used for the purpose of redeeming the shares of the investors, through which process the project becomes solely owned by the *waqf* itself. The scholars who uphold this structure consider the process of redeeming as an instance where the *waqf* purchases the shares of the *mudârabah* investors. This

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As sanctioned by the *Muqâradah Bond Act No. 10* of year 1981.

takes place on the basis of a price periodically announced by the issuer, i.e. the *waqf*, preferably based on expert valuation of the project.

In practice, there has been an unrelated promise provided by the government as in the case of *muqâradah* certificates issued by the Ministry of *Awqâf* in Jordan, to donate a sum, which is understood to provide some assurance to the investors. The promise here is totally unrelated to the *mudârabah*, in the sense that the promise does not form a condition for the *mudârabah*, and the parties to the latter may not invoke this promise under any circumstance. This has been considered acceptable due to the promise in this case being given by a third party other than the investors and the fund manager, while not being linked to possible losses encountered in the project. The salient features of this procedure were explained and upheld in the Islamic Fiqh Academy resolutions of 1987 and 1988.⁴⁴ Although the *muqâradah* bonds issued for the *awqâf* project in Jordan envisaged that in the event of the *waqf* failing to purchase the share of the investors within the specified period, the government would provide the funds necessary for the purpose as an interest free loan to the *waqf*, this format has not been approved by scholars.

SHARED OWNERSHIP

Another method proposed for financing land development is the basis of shared ownership of the completed project, allowing the financier to construct on the property and to retain the ownership of the structure. In adopting the shared ownership basis for developing *waqf* assets, the *waqf* management could enter into an arrangement with potential developers for constructing on the *waqf* property, where the land would remain in the ownership of the *waqf*, while the buildings would be owned by the developer. This involves an agreement whereby the income to be derived through leasing the developed asset is divided between the *waqf* and the financier proportionately, based on the value of the land and the

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Resolution No. 30 (5/4) concerning *muqâradah* bonds and investment certificates, issued by the Council of the Islamic Fiqh Academy in its Fourth Session held in Jeddah, 18-23 Jumada Thani 1408H (6-11 February, 1988).

constructed building. In this arrangement, the *waqf* retains the ownership of the land, while the structure is owned by the financier who spent on its construction. After completion of the project, the total asset is leased out as a jointly owned property, the income being claimed by the financier and the *waqf* proportionate to the value of their respective portions. Where the structure is constructed by a financier who wishes to withdraw from the project after the phase of construction is complete, this is achieved through the *waqf* devoting a part of its share of the income towards purchasing the construction in instalments.

This procedure has been recommended in the resolution of the Islamic Fiqh Academy Jeddah on the issue of *muqâradah* certificates.⁴⁵ According to this, the value of the *waqf* assets, i.e. land, forms the contribution of the *waqf*, while the financier contributes the funds needed for the project, which constitute his share of the capital. The contract of partnership here incorporates a binding promise extended by the second party, i.e. the financier or the financial institution, that it undertakes to sell its share to the *waqf*. This has been stipulated to ensure permanency of the *waqf*, and that the income through *waqf* properties accrue to its beneficiaries. The resolution considers this format to be based along the lines of *mushârakah mutanâqisah*.

An aspect of concern here is that considering the *waqf* land as the capital contribution of the *waqf* results in the land becoming commonly owned by the partners subsequent to the finalisation of the contract, as described earlier.⁴⁶ As contribution of illiquid assets as partnership capital is upheld based on the Mâlikî position on the issue and a secondary position of the Ḥanbalî school, it should be noted that the capitals become jointly owned through the contract of partnership. It is questionable whether the stipulation ensuring that the shares of the remaining investors shall be sold to the *waqf* is sufficient to mitigate this possibility, as such a sale could take place only after the partners gain partial ownership of the *waqf* property through the partnership contract. Therefore, the more acceptable format would be to make the capital contribution of the *waqf* in the form of liquid funds it possesses through *waqf* income etc, or to contribute non-*waqf* assets towards the joint venture.

⁴⁵*Ibid.*⁴⁶See sections under Shari'ah issues that are important in devising financing and investment structures for *awqâf* above.

A possible difficulty here could be that liquid funds available to *awqâf* being meagre, the share of the *waqf* in the venture could become relatively insignificant. Thus, if the profits were to be distributed based on the capital ratio, the *waqf* may claim only a small share of the profit, leading to the purchase of the other partner's share using such income taking an unduly long duration. This problem may be addressed through agreeing on a higher ratio of profit to the *waqf* than is proportionate to its capital, as sanctioned by the Ḥanafî and Ḥanbalî schools of law.⁴⁷ This is justifiable in view of the fact that the *waqf* provides the land that is essential for the venture. The *waqf* may also lease the land to the venture, against which it may charge a rental.

The above arrangement resembles to some extent a procedure known as *kadak* and *kardâr* that was sanctioned by the later Ḥanafî jurists, where the lessee of a *waqf* land was allowed to construct on it with the permission of the trustees.⁴⁸ The lessee of the land was allowed to retain ownership of the structure by paying the market rental for the land devoid of the structure. The lessee gained the right to transfer his ownership of the structure to others by way of sale, gift etc, which formed part of the lessee's estate upon his death. The trustees of the *waqf* were not allowed to demand removal of the structure, as this could result in harm to the interests of the lessee. The *waqf*'s interests were safeguarded by the periodic rental that was claimed on the land. If the lessee of the land who owned the structure had leased it to a third party, the rental income was to be divided between the owner of the structure and the *waqf* according to the ratio of the rental due on the structure and that for the land.⁴⁹

⁴⁷ Ibn Qudâmah, *al-Mughnî*, vol. 5, p. 147, 'Alâ al-Dîn al-Kâsânî, *Badâ'i' al-Sanâ'i', Beirut, Dâr El-Mârifah, 2000, vol. 6, p. 100.*

⁴⁸ Ibn 'Âbidîn, *Radd al-Muhtâr*, vol. 4, 392, 404.

⁴⁹ See Nazîh Hammâd, "Asâlib al-istithmâr al-awqâf wa usus idâratihâ," in *Nahw dawr tanmawi li al-waqf*, Kuwait, Ministry of Awqâf and Islamic Affairs, 1993, p. 174, quoting from Qadri Bâshâ, *Qânnûn al-'adl wa al-insâf li al-qadâ 'alâ mushkilât al-awqâf*, pp. 347, 348.

LONG TERM LEASE

In this format proposed for financing *waqf* projects, the *waqf* leases its land to an entrepreneur who is allowed to build on the land and use it in profitable avenues. The rental on the land due to the *waqf*, either completely or partially, is condoned by way of payment of the price of the buildings to the entrepreneur. This means that the construction or its value is considered as an upfront payment of the rental due on the land, a nominal sum being claimed thereafter throughout the duration of the lease as periodic rental, for maintaining the position of the *waqf* as lessor intact.⁵⁰ This method appears close to the *mursad* arrangement that was in vogue during earlier centuries.⁵¹

CONCLUSIONS

Islamic legal sources indicate the stress placed in *shari'ah* on maintenance of the *waqf* and keeping it in a productive state. Various traditional avenues were adopted for drawing benefit from *awqâf* in the early period. During the later centuries, certain formats that were hitherto unutilised were sanctioned by jurists to ensure continuance of *waqf* properties, some of these being long term lease of *waqf* land where the lessee was allowed to build known as *ihtikâr*, the *waqf* undertaking construction on the land through an advance payment by the lessee (*ijâratayn*), and construction by the lessee being counted as an advance rental (*mursad*). Certain devices were adopted for facilitating long-term lease of *waqf* land. Due to the specific nature of *waqf* assets in *shari'ah*, some modern modes of financing are found to be unsuitable for financing *awqâf*. An important issue is the specific position of *waqf* with regard to ownership. According to the majority of schools of Islamic law, with the creation of the *waqf*, it leaves the ownership of the donor irrevocably, and may not be subjected to transfer of ownership thereafter. Thus, financing modes that involve the sale or transfer of the *waqf* asset are

⁵⁰ This method has been proposed by the Islamic Fiqh Academy Jeddah in its resolution No. 30 (5/4).

⁵¹ See section on *mursad* under traditional modes for *waqf* financing above.

not approved. Mâlikî and Hanbalî jurists who uphold the eligibility of illiquid assets for partnership capital advocate the establishment of the partners' joint ownership in capital. Consequently, joint ventures where the ownership of *waqf* property is partly transferred to the other partner may not be acceptable. Contribution of the *waqf* towards joint ventures based on decreasing partnership etc. should be sourced from liquid funds that belong to the *waqf*. Due to the same reason, *waqf* assets may not be securitized. In employing the various formats proposed on the basis of decreasing partnership for financing *waqf* projects, Shari'ah guidelines on ownership etc should be observed. In comparison, *istisnâ'* could be employed effectively, as concerns regarding violation of ownership do not arise here. The financial institution may resort to a parallel *istisnâ'* to facilitate construction. Allowing public investment in *waqf* projects through issuing *mudârabah* certificates is upheld by some contemporary scholarly bodies. The mode of shared ownership may be adopted when the capital share of the *waqf* is contributed through liquid funds or non-*waqf* assets that are owned by the *waqf*. Allowing a lessee to construct on *waqf* land by considering the value of the building as an advance is another option proposed. Due to the concerns that arise in some of these modes principally relating to the issue of ownership, formats based on *ijârah* and *istisnâ'* appear best suited for financing *awqâf*.

