



# Ambiguities between Islamic Charity and Financing ‘Terror’: The Dilemma of Muslim Civil Society in Kenya

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## ABSTRACT

*Awqaf*, guilds, madrasas, and Sufi orders were significant in the creation of civil societies in Islam since the first century A.H. *Awqaf* in particular, fostered bonds of social connection among members of different backgrounds giving rise to autonomous groups that political authorities always viewed with mistrust leading to protracted tussles between them. This paper contextualizes the ambiguities between the civil society and the political authorities through the prism of *awqaf* in Kenya. The change to other forms of charities illustrates the dynamics of endowments in Islam and the urge to guard the autonomy of civil groups in the public sphere.

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## Introduction

Establishing *waqf* (pl. *awqaf*, religious endowments) has always been an act of *ibada* (worship) and a form of *sadaqa* (charity) by an individual with a view to seeking *qurba* (closeness) and *sawab* (grace) from God. As a matter of fact, the term *sadaqa mawqufa* (immobilized alms) or more specifically, *sadaqa jariyya* (perpetual charity), has been used interchangeably with *waqf* to illustrate the close relationship between the two institutions in Islam.<sup>1</sup> The institution, initiated since the first century A.H. has been hailed as a means to wealth distribution in the society. Through *awqaf*, a *waqif* (endower) demonstrates his *taqwa* (piety) or *birr* (righteousness) by responding to the various divine calls in the Qur'an and *hadith* (pl. *ahadith*, Prophet's traditions) to give out some property in eternity, whether revenue generating or service rendering, to be held in trust by a *mutawalli* (also *nazir*, custodian) who directs its *manfa'a* (usufruct) to designated courses, mostly social welfare.

The law of *waqf* requires that the *asl al-mal* (initial corpus) be held in trust without being sold, inherited, or even given out as a gift so that its utility could benefit the intended courses as charity for a long time to come.<sup>2</sup> Accordingly, beneficiaries of *awqaf* broadly straddle between the endower's progeny (*waqf ahli/dhurri*), public courses including social welfare projects and institutions (*waqf fi sabil Allah*), or both simultaneously at predetermined ratios (*waqf khayri*).<sup>3</sup> The distinct law of *awqaf* and *shurut al-waqif* (conditions by the endower) implied that properties consecrated both by the laity as well as the political class and managed purely by the public and supervised by the Shari'a courts were meant for the welfare of the *umma* (community of believers) and not the state.<sup>4</sup> Consequently, the beneficiaries, both individuals and institutions, including the social-welfare services like religious institutions, education, health-care, water, poor kitchen, and coffee houses among others bonded in to "autonomous interest groups that, although they never acquired the status of legal entities, exercised much influence in the public sphere"<sup>5</sup> - the

"zone of autonomous social activity between the family and the ruling authorities" [that] appeals to the societal and cultural life outside formal institutions and relevant to the social and political order in general."<sup>6</sup>

It is this autonomy and economic security of the civil groups in the public sphere that generated mistrust with the political authorities in relation to political hegemony. More importantly, the state allegedly has no independent basis in Islam but entirely relies on the authority of the 'ulama (clerics) as interlocutors of Islamic knowledge and authority. Consequently, Muslims are collapsed into the *umma* as equal actors bound by the Shari'a not the political authority. In other words, the "*umma* and Shari'a were thus the center of gravity around which all activity in the public sphere revolved."<sup>7</sup>

This is not to deny that the political authorities influenced the affairs of the public sphere, and *awqaf* in particular. Evidence abounds where Muslim rulers in different communities especially controlled those *awqaf* with large beneficiaries' base ostensibly with a view to ensure fulfillment of the aspirations of the *waqif*. This occasionally involved disregarding *shurut al-waqif*; appointing collaborating *qadis* (Muslim judges) along theological inclinations to oversee the *awqaf*; and establishing special departments or ministries (*diwan al-awqaf*) that controlled the institution. In the majority of circumstances, these measures led to institutionalized corruption, dismemberment of *awqaf*, and collapse of the social welfare.<sup>8</sup>

The conflicts and struggles for control of the public sphere took a different dimension in many Muslim lands following the establishment of colonial imperialism in the last decades of the nineteenth century. Along the East African coast and Kenya in particular, control of resources and the general public sphere meant subordinating not only the various autonomous civil groups in the Muslim community secured by *awqaf* but also the institution as a whole. Like Muslim rulers, the British colonial government restricted the jurisdiction of the Shari'a courts to a narrowly defined

personal status law and established a state agency, the *Waqf* Commissioners of Kenya (WCK), and civil legislations that governed *awqaf*. These effectively placed the institution of *waqf* under imperial supervision unto this day. Muslim charities further faced rough terrain since the 1980s in the so called “war against terror” where they continue to be profiled as aiding radical militant groups.

These struggles between the state, both colonial and postcolonial, and the Muslim civil groups in the control of resources, particularly *awqaf*, and the public sphere in Kenya are thus the focus of this paper. The strategies employed by the colonial government and inherited by successive postcolonial regimes to control *awqaf* led to the social, economic, and political subordination of the Muslim community as resources failed to fulfill the aspirations of endowers. Faced by complete domination, the Muslim civil groups and beneficiaries in the community did not, however, wait to sink into oblivion. Rather, they responded, albeit in uncoordinated way, to reverse control of the institution and the public sphere without attracting the wrath of the political authorities. The colonial and postcolonial authorities were fixated on *awqaf* and the switch to alternative and uncontrolled charities like *zakat*, *sadaqa*, community based organizations, and private Muslim trusts, almost went unnoticed by the *awqaf* state agency. Although still under close scrutiny in the ongoing “war against terror,” these charities do not only illustrate the urge to regain control of resources and autonomy of the Muslim civil groups in the public sphere but also continued discharge of the religious requirement and demonstration of individual piety to God and responsibility to the *umma*.

#### *Judicial Space Control: Civil Legislations on Awqaf in Kenya since Colonial Times*

Mann and Roberts observed that “law formed an area in which Africans and Europeans engaged one another - a battleground as it were on which they contested access to resources and labor, relationship of power and authority, and interpretations of morality and culture.”<sup>9</sup> Control of the legal space, especially the legislature and the judiciary by the colonial government, therefore, radically changed the relationship between actors in the public sphere as the former took active role to impose its positions and ways of thought. Until the establishment of the British colonial Protectorate (Sw. *mwambao*) in the Kenya coast in 1897, for instance, there was no separate civil agency that controlled *awqaf*. Sayyid Said bin Sultan (1790-1856) whose rule also extended to the region treated *awqaf* as demanded by the Shari’a with *qadis* and *mutawallis* discharging their respective mandates.

To enable control of resources, the British colonial government established a number of legislations that weakened the authority of the Shari’a courts and the *‘ulama* in the community. First was the East African Order in Council (1897) where Shari’a courts were categorized as “customary courts” alongside courts of local chiefs (African local courts) and denied of Appellate powers.<sup>10</sup> This implied that they were subject to supervision by the High Court that was presided over by British judicial officers. Consequently, their decisions could be reviewed, and as a matter of fact, revoked by the High Court that was not bound by the spirit of the Shari’a.

The second statute that further weakened the authority of the *qadis* was the Mohammedan Marriage Divorce and Succession Ordinance (1897). From the wider understanding of Muslim personal status law, this Ordinance limited the

jurisdiction of the Shari’a courts to marriage, divorce, and inheritance between Muslim litigants in which the value of the subject-matter in dispute did not exceed one thousand Kenya shillings.<sup>11</sup> Accordingly, this took the control and supervision of *awqaf* out of the mandate of the *qadis* owing to the legal jurisdiction and ceiling on monetary value of litigations placed against them. Since then, *awqaf* were classified as dealings in real estate properties whose guidelines were mainly in English language and required expertise in Common law that the *qadis* were not adept to.

To fill the void occasioned by the legal limitation of the Shari’a courts, the British colonial government established the WCK in 1899. Ordinarily, establishment of the state agency could have herald a new development in the institution to streamline its operations by avoiding duplication of duties and amalgamating smaller charities to improve efficiency in service delivery. However, based on the political environment in which the agency was conceived and operated, it became a vehicle for the control of the economic mainstay of the *‘ulama* and various autonomous civil groups in the community that relied on *awqaf*.<sup>12</sup> Commissioners were appointed among Muslims deemed loyal and sympathetic to state policies and worked under strict guidelines in the supervision of British colonial officers incorporated in the state agency. Under the new laws imposed by the WCK statute, registration of *awqaf* also became compulsory. *Mutawallis* were required to register their *awqaf* at least two months upon establishment giving precise details including physical address of the *awqaf*, *waqif*, type of *waqf*, related properties, title of ownership (i.e. land title deed), and expected revenue. *Mutawallis* who faulted this rule faced up to six months imprisonment and two thousand shillings’ fine.<sup>13</sup> These developments herald an imperial control and supervision of *awqaf* hitherto unknown to the Muslim community in the region.

With this raft of measures, therefore, the autonomy of the *‘ulama* and various groups of beneficiaries of *awqaf* in the public sphere became increasingly constricted. Social welfare services that relied on *awqaf* were also dealt a blow as the colonial government interfered in the decision making process of the state agency to utilize revenues against designated courses.

#### *Economic Space Control: Civil Legislations and Awqaf Practices in Mwambao since the Colonial Times*

Since establishment of the British colonial government, capitalism became the official economic policy where house rents, land taxes, and paid labor, were favored over *awqaf* that came to be regarded as mere acts of generosity.<sup>14</sup> More precisely, the perception to land ownership and control in the socio-economy of the Protectorate became an area of contest between capitalism through Common law as advocated by the colonial government and Shari’a, particularly local *urf* (also *‘ada*, local customs). Capitalist economy understood land in terms of private ownership contrary to community ownership practiced by the local Muslim community. Accordingly, acquisition and ownership of land in the Protectorate was since then marked by possession of a land title deed upon survey and demarcation. Consequently, from 1908, through the Land Titles Ordinance, huge tracts of land changed ownership from community or native reserves to Crown Lands despite widespread protests and claims of historical tenure from the locals.<sup>15</sup>

This statute, backed by the 1894 Land Acquisition Act of India (later East African Land Regulations of 1897)

introduced in the Protectorate also empowered the Governor to alienate Crown lands supposedly for public courses or grant leases for purposes, terms, and conditions he deemed fit.<sup>16</sup> The net effect of these Ordinances was to abrogate the locals' ownership of some of their customary lands and reduce them to squatters, majority of who were incidentally Muslims, interfering with their socio-economic welfare. The government (both colonial and postcolonial) further acquired *awqaf* lands for the construction of public utilities including airports and rail way lines, particularly in Mombasa town.<sup>17</sup>

Some of the compulsory acquired *awqaf* were not, however, compensated as required under the Shari'a. Even those that were compensated were either undervalued in disregard to *ajar al-mithal* (prevailing market rates) or had their proceeds used against designated courses rather than establishing replacement *awqaf*.<sup>18</sup> To protect *mu'abbaad* (perpetuity) both of corpus and purpose of *awqaf*, the principle of *istibdal* (exchange) requires that proceeds from disposed corpuses be used to acquire new properties to carry on the initial wishes of the endower. The lack of compensation or where compensation was inadequate due to systemic devaluation of the property inhibited replacement of the dismembered *awqaf* widely affecting the beneficence targets in form of social welfare of the *umma* as well as spiritual aspirations of the endowers.

The titles of land ownership that became difficult to acquire by majority of the community also led to a significant decrease in the consecration of new land *awqaf*. On the other hand, those already established land *awqaf* could not be developed since *mutawallis* could not prove their legal ownership causing degeneration of the corpuses. Again, classification of *awqaf* as transactions in real estate properties meant that *waqfiyyat* (*waqf* charters) ceased to be recognized as legal documents in the transfer of properties from the individuals to divine ownership through the *mutawallis* for management. Unlike *waqfiyyat*, the African Property Preservation Ordinance (1916) prohibited any form of pledge on properties to non-Africans outside the region. It also demanded that documents purporting the transfer of such properties identify the legal entities and not the indeterminate poor and beggars to whom they were made.

This piece of legislation did not take cognizance of the fact that Islamic charity is not bound by race or geographical boundaries. Accordingly, it technically invalidated tens of *awqaf* consecrated by Asian Muslims in the region whose beneficiaries were non-African civil groups both inside and outside the country.<sup>19</sup> Besides, since the Shari'a places the ownership of *awqaf* to God (*milkiyat Allah*) who is in this case not a legal entity, this piece of statute effectively inhibited further consecrations since they stood to be declared as null and void.<sup>20</sup>

As the WCK Act basically remained unchanged even during the postcolonial period, imperial control, supervision, and interference with *awqaf* continued unabated. In 1989, the postcolonial parliament, for instance, enacted the Mazrui Land Trust (Repeal) that consequently invalidated *waqf dhurri* of the Mazrui.<sup>21</sup> This *waqf* was established in 1914 through the Mazrui Lands Trust Act following mutual working relations between the British colonial government and the Mazrui as former Bu Sai'di governors and leaders of the coastal communities.<sup>22</sup> It took almost two decades of protracted court battles with the government to have the *waqf* reinstated. Unto this day, beneficiaries of this *waqf* face the daunting task of evicting squatters that encroached on the *waqf* land during its

period of annulment and to catch up with the two decades of wasted development.<sup>23</sup>

Other *awqaf* that encountered state interference in the postcolonial period includes the *waqf* of Salim Mbaruk bin Dahman at Kanamai, Kilifi district.<sup>24</sup> In efforts to improve its output, the *waqf*, composed of 9.74 hectares of beach farm, was leased to the National Christian Council of Kenya (renamed National Council of Churches of Kenya, NCCCK) who turned round claiming to have acquired the property as freehold. NCCCK went further to involve the President to have the beneficiaries terminate their claim over the *waqf* in exchange of a three bed room Swahili house. Accordingly, the involvement of the executive in the *waqf* led to its dismemberment and its ineffectiveness in catering for the social welfare of the beneficiaries due to decreased revenues from the replacement corpus.

#### *Continued Challenges and Responses to State Control of Islamic Charity since Colonial Times*

As argued elsewhere in this paper, state involvement in *awqaf* is contrary to the spirit of autonomy of civil groups in the Muslim public sphere. Whereas Muslim rulers placed *awqaf* under imperial supervision claiming to help fulfill the aspirations of the *waqif*, their non-Muslim counterparts, and the invading colonial powers in particular, were basically out to reign on the 'ulama and civil groups for political hegemony. Imperial control of *awqaf* in the Muslim Protectorate in Kenya especially had serious ramifications on the social welfare of the *umma*. Most notable was the education sector as *madrasas*, orphanages, and *duksi* (elementary Qur'anic schools) crumbled owing to lack of funding because resources were diverted to non-designated courses. To worsen it, Christian missionaries introduced formal education with the help of the colonial government where admission to mission schools was contingent to baptism.<sup>25</sup> Consequently, most Muslims shunned mission schools missing out on formal education owing to the attached conditionality to admission. This resulted in their inability to compete favorably with their Christian counterparts in economic development, political negotiations, job placements, and civil service appointments for longer periods in the postcolonial times.

To reverse the trend of socio-economic subordination since the colonial period, a cross section of Muslims did not comply with the requirement for compulsory registration of *awqaf*. This was evident in the miserable figures captured in the central registry in the last decades of colonial rule (1950-1960) and three decades thereafter in the postcolonial period (1970-1990) where only 4.9 percent and 1.9 per cent of *awqaf* were registered respectively. Contrasted to these were 68.3 per cent registered in the first two decades upon establishment of the state agency (1920-1930).

Another means adopted by various Muslim groups to retain ownership and control of resources was to establish private trusts that were legally out of the jurisdiction of the state agency.<sup>26</sup> The Mazrui *waqf* discussed above comes in handy to corroborate this view. Upon reinstatement of the *waqf* in 2012, the beneficiaries established the Mazrui community trust effectively avoiding the grip of the state agency. From 1980s, there were also marked increases in community based organizations that were registered as Non-Governmental Organizations (NGOs). These include the Tawfiq hospital and the Muslim Education and Development Association of Malindi (MEDA); and the Mombasa Education and Welfare Association (MEWA) among others. These

associations used the goodwill of *waqf* to harness resources from local and transnational Muslims to offer a wide range of social welfare services including education, health-care, *da'wa* (proselytization), *iftar* portions during Ramadan, as well as caring for the widows and orphans.

There were also a number of transnational Muslim charities and private transnational foundations that collaborated with their local counterparts in providing social welfare in the community. These include the World Assembly of Muslim Youths (WAMY); the African Muslim Agency (AMA); the Al-Haramayn; al-Muntada al-Islamiya; the International Islamic Relief Organization (IIRO); the Islamic Relief Organization (IR, UK); and the Shaykh Zaid al-Nahyan foundation.

Like other Muslim charities the world over, however, Muslim charities in Kenya have not escaped the perception that they are basically aping Western charities and NGOs besides being accused of abetting Islamic fundamentalism and radicalism.<sup>27</sup> Accordingly, following the bombing of the U.S.A embassy in Nairobi in August 1998 and the 9/11 incident leading to an all-out “war against terror”, many of the transnational charities were banned on the pretext of national security. The local charities on their part have to contend with sporadic invasion by both national and international security forces including the FBI, The CIA, and Mossad who were allowed to set base in the country to help in the “anti-terrorism campaign.”<sup>28</sup> Various “Anti-Terrorism Laws” and “Anti-Money laundering Bills” were also enacted that ideally targeted Muslims and Muslim charities perceived as abetting “terror.” Accordingly, this caused financial constraints to Muslim charities as local and transnational donors and endowers were put under close scrutiny forcing them to scale down their operations or close shop altogether.

This unfriendly terrain put Muslim charities and the social welfare of individual Muslim groups in general into uncertainty. With Muslims making up about 11.2 per cent of the forty million total population and their predominant regions falling way below the national averages in socio-economic development, the profiling and subsequent banning of Muslim charities only served to cement the marginalization narrative of the largest minority religious community in the country.<sup>29</sup>

### Conclusion

The purpose of Islamic charity and *awqaf* in particular is twin fold: to illustrate individual piety and seek divine grace while at the same time catering for the social welfare of the community. Muslims perceive wealth as a trust accorded to them by God and have a religious responsibility to maintain the social fabric of the *umma* by providing for the wellbeing of the poor and beggars in the society. As provided by the Shari'a, endowers have the freedom to designate specific courses, ethnic, locale, jurisprudential, or family members as beneficiaries of their *awqaf* creating a bond of interdependence and patronage between them. This is a distinct sphere with specific rules of engagement overseen by the *'ulama* and *qadis* as interlocutors of Islamic knowledge and authority. Nevertheless, socio-economically secure and autonomous social groups and the *'ulama* in general have always been a cause of concern to the political authorities for their hegemony.

With conducive environment and mutual working relations, however, Muslim charities and *awqaf* in particular demonstrated the ability to supplement government efforts in

the provision of essential services including education, health-care, water, employment, road infrastructure, and even establishing income generating projects. These are significant contributions to the society that political authorities and policy makers could acknowledge and help the institution to flourish for the common good of the society. As discussed in this paper, nonetheless, imperial control and supervision of *awqaf* and Muslim charities in general only causes unnecessary antagonism between different actors in the society.

There is so far no indication that the various hiccups in place have effectively deterred Muslims from establishing charities since it is imbedded in the spiritual concern of their lives. As evident in the foregoing discussion, Islamic charity takes divergent forms and the curtailing of one type only accords an individual the opportunity to switch to another in the fulfillment of his responsibility to the *umma* and for his wellbeing in the afterlife. Imperial control and supervision, or even negative perception of one form of charity or section of beneficiaries, therefore, need not be associated with the rest of the institution and the *umma* in general.

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