

Competing and Conflicting Power Dynamics in *Waqfs* in Kenya, 1900-2010

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Dedication

To my wife, friend, and the mother of my children,

Nuria

For your love and support

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Summary

Waqfs (religious endowments) are a socio-cultural heritage established in the seventh century to provide means to express *taqwa* (piety) for the purpose of *qurba* (divine closeness) and for the safeguarding of socio-economic security of the progeny and the community. As an Islamic charitable endeavor, it was expected that *waqfs* would be administered according to the Shari^ca by Muslim institutions of the *mutawalli* (custodian) with the *kadhis* (Muslim judges) and *‘ulama* (clerics) not only interpreting the requisite normative precepts under which it subsists, but also settling matters arising there from. This not being the absolute case, the scenario puts the institution of *waqf* in Kenya under constant negotiations between the Muslims and the secular state on the one side, and among diverse socio-ethnic groups of Muslims on the other.

This study was, therefore, undertaken to achieve four significant objectives: To explore the historical development of the institution of *waqf* from the British colonial period (1900) to independent times (2010); examine secular state policies and civil courts’ rulings that influenced *waqfs*; interrogate Muslims’ response vis-à-vis the secular state and civil courts’ constructs in the practices of *waqfs*; and establish how Muslims use *waqfs* in their contribution to socio-cultural development of the society. To realize the set objectives, this study adopted a multi-disciplinary approach. Bourdieu’s theory of practice (1977), particularly the concepts of field, capital (symbolic, cultural, social, and political), and symbolic violence, aptly explained the negotiations among various state and non-state actors and agents in the control of resources including *waqfs* in the community.

While James C. Scott’s (1976) concept of symbolic (ideological) resistance was useful in understanding Muslims’ response to state control of *waqfs*, together with Bourdieu’s theory of practice, they could not adequately explain the internal socio-ethnic and cultural dynamics that informed the behaviors to consecrate, control, manage, and uses of *waqfs* by Muslims themselves during and after colonization and outside the purview of the secular state. This accounts for the development and adoption of the concept of *umiji-wamiji* (locale identity and belonging) based on the historical fluid spatial relations between Muslim groups and regions in the country. Whereas primary data was collected in over ten months of extensive fieldwork along the predominant Muslim regions of Mombasa, Malindi/Kilifi, Lamu, and Kwale through informal talks with different *waqf* actors, analysis of requisite *waqf* records, and visits to *waqf* sites;

secondary data was obtained through review of cutting edge investigations on *waqfs* across Muslim societies.

Normative precepts as well as qualitative and quantitative methods were used as the bases for analysis of the data, findings of which were presented using a fusion of historical, anthropological, and descriptive approaches. The study established that secular state legislations and civil judicial rulings ushered in control of *waqfs* subjecting Muslims into socio-economic and cultural subordination since the British colonial times. Consequently, cowed by the loss of the socio-cultural heritage and its privileges, Muslims unwittingly ‘exited’ from state controlled *waqfs* to uncontrolled charitable institutions including *sadaqa* (alms giving), community based organizations, and other *non-labeled waqfs* as provided by the Shari‘a as part of Islamic charity.

This exit did not only change the relations’ matrix between the ruler and the ruled into retaining ownership and control of resources for socio-cultural and economic power, but also helped Muslims to fulfill the spiritual obligation of giving back to the community through a wider concept of charity. This seemingly united response against state control of *waqfs* is, nonetheless, not to deny the prevalent internal dynamics in the Muslim community manifested in the use of *waqfs* to safeguard and promote temporal group and locale interests.

Zusammenfassung Dissertation

Die Institution des islamisches Stiftungswesens (*waqf*) reicht bis ins 7. Jahrhundert zurück und steht für ein reiches sozio-kulturelles Erbe. Die vornehmlichen Aufgaben des islamischen Stiftungswesens waren finanzielle Mittel zu generieren, die als Ausdruck von Frömmigkeit (*taqwa*) Nähe zu Gott (*qurba*) bezwecken sollten. Zudem diente es dazu sowohl die Nachkommenschaft als auch die Gemeinschaft gesellschaftlich und wirtschaftlich abzusichern. Als ein islamisch-wohlütiges Unternehmen unterliegt das islamische Stiftungswesen einer durch das islamische Recht (Scharia) legitimierten Verwaltung, die dem Verwalter (*mutawalli*), der durch Kadis und islamische Gelehrte (*‘ulama*) angeleitet wird, unterstellt ist. Seine Aufgabe ist nicht nur auf die Interpretation normativer Vorschriften, durch die die Existenz der Stiftung sichergestellt werden, beschränkt, sondern auch auf potentielle Konflikte, die daraus entstehen können, zu regeln.

Ferner bedingt diese islamische Institution im Kontext von Kenia auch einen ständigen Aushandlungsprozess gegenüber dem säkularen Staat einerseits und gegenüber den unterschiedlichen sozialen und ethnischen Gruppen der Muslime Kenias andererseits. Diese Studie hat folgende Hauptforschungsziele: Die Darstellung der historischen Entwicklung der Institution des *waqf* vom britischen Kolonialismus (1900) bis in die Gegenwart (2010). Die Analyse der Einflüsse eines säkularen Staatswesens und zivilrechtlicher Regularien auf das islamische Stiftungswesen sowie die muslimischen Reaktionen auf diese Rahmenbedingungen. Schließlich untersucht die Studie die Nutzbarmachung islamischer Stiftungen für die gesellschaftliche und kulturelle Entwicklung der Gemeinschaft durch die Muslime.

Zur Umsetzung dieser Forschungsziele, bedient sich diese Studie eines multidisziplinären Ansatzes. Bourdieus Theorie der Praxis (1977) erhellt die Aushandlungsprozesse zwischen den unterschiedlichen staatlichen und nicht-staatlichen Vertretern und Akteuren in Bezug auf die Kontrolle über die Ressourcen – einschließlich des islamischen Stiftungswesens – der muslimischen Gemeinschaft. Insbesondere Bourdieus Konzepte zum sozialen Feld, Kapital (symbolisch, kulturell, sozial und politisch) und symbolischer Gewalt bieten vielversprechende Erklärungsansätze. James C. Scotts (1976) Konzept des symbolischen (ideologischen) Widerstands war nützlich, die Reaktionen der Muslime auf die staatliche Kontrolle des islamischen Stiftungswesens zu verstehen. Allerdings konnten weder Scotts Ansatz noch Bourdieus Theorie der Praxis die internen sozio-ethnischen und kulturellen Dynamiken vollumfänglich erklären.

Diese Dynamiken umfassten Verhaltensweisen in Bezug auf die Schaffung, die Kontrolle, das Management und den Gebrauch von islamischen Stiftungen während und nach der Ära des Kolonialismus sowie außerhalb der Einflussphäre des Staates. Auf Basis dieser Beobachtung und auf Grundlage der historisch bedingten Fluidität räumlicher Beziehungen zwischen muslimischen Gruppen und Regionen im Lande erfolgte die Entwicklung des Konzepts von *umiji-wamiji* (lokale Identität und Zugehörigkeit). Die primären Forschungsdaten sind das Ergebnis von über zehn Monaten Feldforschung in den überwiegend von Muslimen bewohnten Gebieten von Mombasa, Malindi/Kilifi, Lamu und Kwale. Es wurden informelle Gespräche mit unterschiedlichen Akteuren des islamischen Stiftungswesens geführt, entsprechende *waqf* Unterlagen analysiert sowie islamische Stiftungen vor Ort besucht. Als sekundäre Daten diente

die aktuellste wissenschaftliche Literatur zum islamischen Stiftungswesen in muslimischen Gesellschaften. Normative Konzepte als auch qualitative und quantitative Methoden waren die Grundlage für die Datenanalyse, deren Ergebnisse mit einer Verschmelzung historischer, anthropologischer und deskriptiver Ansätze präsentiert werden. Die Studie kommt zu dem Ergebnis, dass die Gesetzgebung des säkularen Staates sowie die daraus resultierenden zivilrechtlichen Regularien in eine Kontrolle über das islamische Stiftungswesen mündeten. Infolgedessen fanden sich die Muslime seit der britischen Kolonialherrschaft in einer untergeordneten sozioökonomischen und kulturellen Stellung wieder.

Als Ergebnis des Kontrollverlustes über dieses soziokulturellen Erbes und dessen Privilegien, haben sich die Muslime von dem staatlich kontrollierten islamischen Stiftungswesen abgewandt und anderer nicht unter staatlicher Kontrolle stehender islamischer Wohltätigkeit bedient. Auf der Grundlage scharia-rechtlicher Möglichkeiten handelte es sich um freiwillige Gaben (*sadaqa*), wohltätige Organisationen unter der Kontrolle der Gemeinschaft sowie alternativer Formen islamischer Stiftungen. Somit haben sich die Muslime der staatlichen Kontrolle entzogen. Dadurch änderte sich nicht nur das Beziehungsgeflecht zwischen Herrschern und Beherrschten sondern hatte auch den Effekt, dass die Muslime weiterhin die Eigentumsrechte und die Kontrolle über sozio-kulturelles und wirtschaftliches Vermögen innehatten. Durch ein breiter angelegtes Konzept islamischer Wohltätigkeit waren die Muslime somit weiterhin in der Lage ihrer spirituellen Verpflichtung – die Sorge für die Gemeinschaft – nachzukommen. Diese offenbar konzertierte Antwort auf die staatliche Kontrolle über das islamische Stiftungswesen hat jedoch nicht dazu geführt, dass die innerhalb der muslimischen Gemeinschaft vorhandenen Dynamiken – das islamische Stiftungswesen für zeitlich und lokal begrenzte Gruppeninteressen zu benutzen – abhandengekommen sind.

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Abbreviations and Acronyms

| | |
|---------|--|
| AG | Attorney General |
| AFRICOG | Africa Center for Open Governance |
| AH | After <i>Hijra</i> |
| AHIF | <i>Al-Haramayn</i> Islamic Foundation |
| AMA | Africa Muslim Agency |
| APIF | <i>Awqaf</i> Properties Investment Fund |
| BH | Before <i>Hijra</i> |
| CIPK | Council of <i>Imams</i> and Preachers of Kenya |
| CKRC | Constitution of Kenya Review Commission |
| CPC | Civil Procedure Code |
| CPP | Coast Peoples' Party |
| DC | District Commissioner |
| DO | District Officer |
| IBEAC | Imperial British East African Company |
| IDB | Islamic Development Bank |
| IIRO | International Islamic Relief Organization (Saudi Arabia) |
| IR (UK) | Islamic Relief (United Kingdom) |
| JTQ | <i>Jama'at Ta'lam al-Quran</i> |
| KFF | King Feisal Foundation |
| KMA | Kisumu Muslim Association |
| KNBS | Kenya National Bureau of Statistics |
| KNCHR | Kenya National Commission on Human Rights |
| MEDA | Muslim Education and Development Association (Malindi) |

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| MEWA | Mombasa Education Welfare Association |
| MP | Member of Parliament |
| MRC | Mombasa Republican Council |
| MUHURI | Muslims for Human Rights |
| NACOSTI | National Commission for Science, Technology, and Innovation (Kenya) |
| NAMLEF | National Muslim Leaders Forum |
| NCCK | National Council of Churches of Kenya |
| NFD | North Eastern Frontier District |
| NGO | Non-Governmental Organization |
| NMK | National Museums of Kenya |
| NSIS | National Security Intelligence Services |
| NUKEM | National Union of Kenya Muslims |
| PC | Provincial Commissioner |
| PCPC | Penal and Criminal Procedure Codes |
| RRT | Rent Restriction Tribunal |
| SUPKEM | Supreme Council of Kenya Muslims |
| UNESCO | United Nations Education, Scientific, and Cultural Organization |
| WAMY | World Assembly of Muslim Youths |
| WCK | <i>Waqf</i> Commissioners of Kenya |
| WWF | World <i>Waqf</i> Fund |

Glossary of Terms

While transliteration of Arabic words and terminologies followed the Encyclopedia of Islam and Muslim World (2004), translation of Qur’anic verses followed the *Sahih* International. Plurals of Arabic nouns are in the Anglicized form. Abbreviation of languages: Ar. is Arabic; Per. is Persian; Lat. is Latin; Heb. is Hebrew; Swa. is Swahili.

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| [‘] <i>ada</i> (Ar.) | local customs, recurring habits and social morals of the people. |
| <i>adhan</i> (Ar.) | the call for prayer. |
| [‘] <i>adl</i> (Ar.) | being just. |
| <i>ahbas</i> (Ar.) | consecrated properties or charitable trust in Islam, also <i>habus</i> . |
| <i>ahbas mu[‘]ayyana</i> (Ar.) | purpose specific <i>waqf</i> . |
| <i>ahl al-bayt</i> (Ar.) | people of the house i.e. family members of Prophet Muhammad. |
| <i>ahl al-sunna wa[‘]l-jam[‘]a</i> (Ar.) | people of the <i>sunna</i> and community, or followers of strict and puritan traditions of Islam who seek to emulate practices of pious predecessors, a return to pristine Islam, <i>Salafi</i> . |
| <i>ahl al-tariqa</i> (Ar.) | the term used in describing an ideological disposition of Muslims perceived to rely on medieval authority (<i>taqlid</i>) different from those advocating for return to pristine Islam (<i>salafiyya</i>); also conservative, or literally, people of the way, Sufis. |
| <i>ahmadiyya</i> (Ar.) | a messianic reform movement in Sunni Islam that believes in the teachings of Mirza Ghulam Ahmad (d. 1908). |
| <i>al-asaba</i> (Ar.) | an agnate heir. |
| <i>al-awqaf al-hukmiyya</i> (Ar.) | revenue generating <i>waqfs</i> in form of estates in the towns of Fustat and Cairo during the reign of the Mamluk. |
| <i>al-rizaq al-ahbasiyya</i> (Ar.) | endowed agricultural lands. |
| <i>al-Shabab</i> (Ar.) | the youngsters, literally, a jihadist terrorist group based in East Africa. |
| [‘] <i>ana</i> (Ar.) | long term lease of a revenue-generating <i>waqf</i> . |
| <i>al-nazir al-mashrut</i> (Ar.) | <i>waqf</i> custodian (<i>nazir</i>) appointed by stipulation and not related to the endower. |

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| <i>al-nazir bi'l asala</i> (Ar.) | <i>waqf</i> custodian (<i>nazir</i>) appointed by right of birth, i.e. blood relative of the endower. |
| <i>ansar</i> (Ar.) | helpers, the Muslim community in Medina who welcomed the migrants from Mecca. |
| <i>anwatan</i> (Ar.) | arms struggle, or invasion and combat. |
| <i>apotropos</i> (Heb.) | trustee or guardian. |
| <i>asl al-mal</i> (Ar.) | subject matter of <i>waqf</i> . Also corpus. |
| <i>awa'il</i> (Ar.) | the first (in relation to the earliest <i>waqf</i> in Islam). |
| <i>awl</i> (Ar.) | increase (principle used in the distribution of inheritance). |
| <i>awwalan fa-awwalan</i> (Ar.) | one generation after the other. |
| <i>baraka</i> (Ar.) | blessings, ordinarily from God, but believed to be held and wielded by members of the Prophet's family, <i>sharifs</i> . |
| <i>batala</i> (Ar.) | null and void, also invalid. |
| <i>bay'</i> (Ar.) | sale. |
| <i>bayt al-mal</i> (Ar.) | public treasury. |
| <i>bid'a</i> (Ar.) | un-Islamic religious innovation in theology, ritual or customs that did not exist in early Islam but came into existence in the course of history. |
| <i>birr</i> (Ar.) | righteousness or piety in the context of Allah's grace or paradise. |
| <i>cy press</i> (Lat.) | as near as possible. |
| <i>darura</i> (Ar.) | prevailing public concern or need, (also <i>haja</i>). |
| <i>da'wa</i> (Ar.) | Islamic discourse of mobilization or missionary aspect in Islam calling people to the religion and reminding believers to remain steadfast in the faith, summons. |
| <i>dawla</i> (Ar.) | dynastic succession, particularly in the period after the rise of Abbasid power implying empire or nation-state. |
| <i>din</i> (Ar.) | religion. |
| <i>divini juris</i> (Lat.) | heavenly jurisdiction, concerned with gods and religious symbols. |
| <i>diwan al-awqaf</i> (Ar.) | state department or ministry in-charge of <i>waqfs</i> . |

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| <i>du^ca</i> (Ar.) | spontaneous, unstructured conversation with God, supplication. |
| <i>duksi</i> (Sw.) | elementary Qur’anic school. |
| <i>faddan</i> (Ar.) | acres (of agricultural land). |
| <i>fatwa</i> (Ar.) | legal or advisory opinion issued by a recognized authority on law and tradition in answer to a specific question or broader issue facing the community. |
| <i>faqih</i> (Ar.) | Muslim jurist practicing <i>fiqh</i> . |
| <i>fay’</i> (Ar.) | immovable property, lands conquered by Muslims, subject to tribute (also <i>fai</i>). |
| <i>fidei commissum</i> (Lat.) | practice where foreigners and exiled persons unable to establish <i>res sacrae</i> entrusted their properties to a trustee for the benefit of the progeny. |
| <i>fiqh</i> (Ar.) | Islamic jurisprudence or science of law. |
| <i>fi sabil Allah</i> (Ar.) | in the course of God. |
| <i>fuqara</i> (Ar.) | needy persons in the society. |
| <i>ghanima</i> (Ar.) | booty in form of moveable properties. |
| <i>hadith</i> (Ar.) | a genre of Muslim literature or individual text of this genre from early period of Islamic history conveying Prophet’s accounts, traditions, or teachings on religion and morality. |
| <i>haja</i> (Ar.) | See <i>darura</i> . |
| <i>hajj</i> (Ar.) | Muslim pilgrimage. |
| <i>halal</i> (Ar.) | permitted or lawful. |
| <i>hawa^cit</i> (Ar.) | walled gardens in Medina believed to have been among the first <i>waqfs</i> . |
| <i>hekdes</i> (Heb.) | consecrated property. |
| <i>hiba</i> (Ar.) | gifts. |
| <i>hikr</i> (Ar.) | renting out a revenue-generating <i>waqf</i> property to improve output. |
| <i>hujaj al awqaf</i> (Ar.) | see <i>waqfiyya</i> . |
| <i>hunafa’</i> (Ar.) | monotheistic ascetics in Arabia during the times of prophet Abraham. |

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| <i>‘ibadi</i> (Ar.) | also called ‘ <i>ahl al-istiqama</i> ’ or <i>‘ibadiyya</i> - the people of straightness. <i>‘Ibadis</i> are also part of the <i>Khawarij</i> (Kharijites, or ‘Exiters’). |
| <i>‘id</i> (Ar.) | Muslim holidays including the end of Ramadan (<i>‘id al-fitr</i>) and <i>‘id al-adha</i> . |
| <i>iftar</i> (Ar.) | meal at the end of the fasting day. |
| <i>ilm al-faraid</i> (Ar.) | Qur’anic regulations governing inheritance, the ‘science of shares’. |
| <i>ijab</i> (Ar.) | offer of beneficiary of <i>waqf</i> given to a legal heir as a requirement of a valid <i>waqf</i> in Shi‘a Islam. |
| <i>ijar al-mithal</i> (Ar.) | the prevailing market rate or value of a given property. |
| <i>imam</i> (Ar.) | a leader, a model, an authority, or an exemplar; also a leader of the congregational prayer, leading Sunni theological scholars, or the infallible guide of the community in Shi‘a Islam. |
| <i>istibdal</i> (Ar.) | sale or exchange of worn out or unproductive <i>waqf</i> . |
| <i>istihsan</i> (Ar.) | the common social good or welfare. |
| <i>ithna’ ‘ashari</i> (Ar.) | branch of Shi‘a Islam that believes in twelve <i>imams</i> , also Twelver Shi‘a. |
| <i>jihad</i> (Ar.) | Striving or exerting oneself towards some goal, or (in the Islamic context) to attain and maintain the Islamic faith, or a virtuous struggle toward some praiseworthy end as defined by religion. |
| <i>ka‘ba</i> (Ar.) | sacred cube-shaped house or holy mosque built and consecrated by Abraham in Mecca. |
| <i>kadhi</i> (Sw.) | See <i>qadi</i> . |
| <i>khalifa</i> (Ar.) | political leader of the Muslim community or successor of the Prophet (Eng. caliph). |
| <i>kharaj</i> (Ar.) | land tax levied on lands owned by non-Muslims in a Muslim state. |
| <i>khitma</i> (Ar.) | recitation of the Quran by proxy seeking the grace of God with a view to benefiting the deceased. |
| <i>khums</i> (Ar.) | one fifth. |
| <i>khutba</i> (Ar.) | sermon. |

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| <i>kiamu</i> (Sw.) | one of the Swahili language dialects spoken around Lamu region in Kenya. |
| <i>kufr</i> (Ar.) | disbelief or infidelity. |
| <i>legatum sub modo</i> (Lat.) | indirect legacy. |
| <i>liwali</i> (Sw.) | Muslim administrative officer (district governor) during the East African Bu Sa'idi Sultanate before the coming of the British. |
| <i>madhhab</i> (Ar.) | manner followed, ideology, or institutionalized school of law espousing distinct jurisprudential disposition. |
| <i>madrassa</i> (Ar.) | Qur'anic school, Islamic college, or place of instruction in religious law in Islam. |
| <i>mahbusa muharrama</i> (Ar.) | consecrated properties, synonym for <i>waqf</i> . |
| <i>mahram</i> (Ar.) | close (blood) relative with whom marriage is disallowed. |
| <i>ma'lim</i> (Ar.) | teacher. |
| <i>manfa'a</i> (Ar.) | usufruct or benefits derived from <i>waqf</i> . |
| <i>masjid</i> (Ar.) | customary place for performing the obligatory ritual prayer in the Muslim tradition, a mosque. |
| <i>masakin</i> (Ar.) | the poor. |
| <i>maslaha</i> (Ar.) | see <i>istihsan</i> . |
| <i>mawlid al-nabi</i> (Ar.) | celebration of the birth day of Prophet Muhammad. |
| <i>mikoko</i> (Sw.) | mangrove poles (sing. <i>mkoko</i>). |
| <i>milk</i> (Ar.) | ownership. |
| <i>milkiyat Allah</i> (Ar.) | divinely owned by God or property of God. |
| <i>mirath</i> (Ar.) | total estate of a bereaved person to be shared among heirs as inheritance in Islam. |
| <i>mitzvah</i> (Heb.) | religious duty. |
| <i>mji</i> (Swa.) | town or locale (pl. <i>miji</i>). |
| <i>mu'abbad</i> (Ar.) | principle of perpetuity in <i>waqf</i> , (also <i>ta'abbid</i>). |

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| <i>mu^ʿadhdhin</i> (Ar.) | person performing the call to prayers, <i>adhan</i> . |
| <i>mudaraba</i> (Ar.) | contractual business relationship or partnership between two parties one offering capital and the other contributing labor and expertise with a view to sharing profits according to predetermined ratios. |
| <i>mudir</i> (Ar.) | third-class magistrate (or director) during the East African Bu Sa ^ʿ idi Sultanate of Zanzibar before the coming of the British. |
| <i>muhajirun</i> (Ar.) | Muslim migrants to Medina from Mecca. |
| <i>mukhabara</i> (Ar.) | sharecropping. |
| <i>musala</i> (Ar.) | informal place of prayer usually in places or buildings other than mosques. |
| <i>mushaf</i> (Ar.) | hard copy or written text of the Qur'an. |
| <i>mutawalli</i> (Ar.) | a male manager or administrator of <i>waqf</i> (also <i>wali</i> or <i>nazir-a</i>). A female administrator is <i>mutawaliyya</i> . |
| <i>mwalimu</i> (Sw.) | see <i>ma^ʿlim</i> , also name of a person. |
| <i>mwambao</i> (Sw.) | the coastal Kenya Protectorate during British colonial period. |
| <i>mzee</i> (Sw.) | old person, title of respect or address. |
| <i>nadhir</i> (Ar.) | pledge, consecration, or vow. |
| <i>nazir</i> (Ar.) | see <i>mutawalli</i> . |
| <i>nizara</i> (Ar.) | trusteeship. |
| <i>pat ruvan</i> (Per.) | practice where properties were consecrated and thought to be a possible origin of <i>waqfs</i> in Islam. |
| <i>piae causea</i> (Lat.) | practices of charity among Byzantines touted as a possible origin of <i>waqf</i> in Islam. |
| <i>qabala</i> (Ar.) | see <i>mukhabara</i> . |
| <i>qabul</i> (Ar.) | acceptance, especially of an offer (Ar. <i>ijab</i>) of beneficence as a requirement of <i>waqf ahli</i> in Shi ^ʿ a Islam. |
| <i>qadi</i> (Ar.) | Muslim judge, (also <i>kadi</i>). |
| <i>qital</i> (Ar.) | physical force or fighting, also part of <i>jihad</i> . |
| <i>qiyas</i> (Ar.) | analogy. |

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| <i>qur'an</i> (Ar.) | Muslims' holy Book. |
| <i>qurba</i> (Ar.) | divine closeness. |
| <i>rabbi</i> (Heb.) | a Jewish religious leader with mastery knowledge of the scriptures, oral traditions, and competence in interpreting the law. |
| <i>radd</i> (Ar.) | return (principle used in the distribution of inheritance). |
| <i>ratib</i> (Ar.) | people frequenting a specific mosque for prayers. |
| <i>res nullius</i> (Lat.) | owned by 'no one but God'. |
| <i>res sacrae</i> (Lat.) | sacred objects or consecrating objects in Roman tradition thought as possible origin of <i>waqfs</i> . |
| <i>riba</i> (Ar.) | interest. |
| <i>ruvanagan</i> (Per.) | see <i>pat ruvan</i> . |
| <i>sadaqa</i> (Ar.) | charity, alms giving. |
| <i>sadaqa jariyya</i> (Ar.) | charity whose benefits are believed to be perpetual. |
| <i>sadaqa mawqufa</i> (Ar.) | immobilized alms. |
| <i>sahih al-Bukhari</i> (Ar.) | authoritative <i>hadiths</i> collection in Sunni Islam by <i>imam</i> Bukhari (d. 870). |
| <i>sahih Muslim</i> (Ar.) | authoritative <i>hadiths</i> collection in Sunni Islam by <i>imam</i> Muslim (d. 874). |
| <i>salafi</i> (Ar.) | see <i>ahl al-sunna wa'l-jam'a</i> . |
| <i>salf</i> (Ar.) | advance payment for the lease of <i>waqf</i> , also premium. |
| <i>sarf</i> (Ar.) | transfer of surplus benefits from one <i>waqf</i> to another. |
| <i>sawab</i> (Ar.) | divine grace (merit) attained after doing good deeds. |
| <i>senatus consultum</i> (Lat.) | statutes necessary for the consecrating of property. |
| <i>shari'a</i> (Ar.) | Islamic law derived from the Quran, Prophet's traditions (<i>hadiths</i>), consensus by Muslim juri-consultants (<i>ijma'</i>) and analogy (<i>qiyas</i>). |
| <i>sharif</i> (Ar.) | honorific title of nobility whose holders are allegedly traceable to the genealogy of the Prophet Muhammad. |
| <i>shurut al-waqif</i> (Ar.) | specific conditions imposed by the endower on a particular <i>waqf</i> . |

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| <i>shaykh</i> (Ar.) | honorific title for a religious leader, head of a tribe or village, Sufi order, or generally an old man. |
| <i>shaykh al-Islam</i> (Ar.) | honorific title given to the leading Muslim scholar in a particular locality, here in <i>Chief Kadhi</i> . |
| <i>shiʿa</i> (Ar.) | theological groups in Islam united by a belief in the imamate of ʿAli bin Abi Talib as the first authentic caliph. They include the Twelvers, Zaydis, Khoja Ismaʿilis, and Bohra Ismaʿilis. |
| <i>sunna</i> (Ar.) | normative examples of Prophet Muhammad as recorded in traditions about his speech, his actions, his acquiescence to the words and actions of others, and his personal characteristics. |
| <i>taʿabbid</i> (Ar.) | see <i>muʿabbad</i> . |
| <i>taʿamul</i> (Ar.) | principle where customs and traditions of an Islamized group not antithetical to Shariʿa are accepted to the legal body polity as a source of law or legal reference (also <i>taʿaruf</i>). |
| <i>tabdil</i> (Ar.) | see <i>istibdal</i> . |
| <i>taʿbid</i> (Ar.) | changing the specific conditions imposed by an endower on a given <i>waqf</i> . |
| <i>taʿqib</i> (Ar.) | the descent strategy establishing right of beneficence among progeny of an endower. |
| <i>taqwa</i> (Ar.) | piety, righteousness. |
| <i>tariqa</i> (Ar.) | the way (to follow) or ethical acts linked to spiritual development in form of manuals, guides, and literary works. |
| <i>tasrif</i> (Ar.) | see <i>sarf</i> . |
| <i>tawhid</i> (Ar.) | Unity of God. |
| <i>thalatha taifa</i> (Sw.) | three ethnicities – part of the Swahili Muslim confederation of Mombasa. |
| <i>thenashara taifa</i> (Sw.) | twelve ethnicities – Swahili Muslim confederation of Mombasa composed of the <i>thalatha taifa</i> and <i>tisa taifa</i> . |
| <i>thulth</i> (Ar.) | one third. |
| <i>tisa taifa</i> (Sw.) | nine ethnicities – part of the Swahili Muslim confederation of Mombasa. |
| <i>ʿulama</i> (Ar.) | the scholarly class in the Muslim society, i.e. those who know or have knowledge, clerics. |

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| <i>umma</i> (Ar.) | community of believers in Islam. |
| <i>umuji</i> (Swa.) | belonging to a specific town's locale. (pl. <i>umiji</i>). |
| <i>urf</i> (Ar.) | see <i>ada</i> . |
| <i>ushenzi</i> (Sw.) | social perception associated with being uncivilized among the Swahili people. |
| <i>ustadh</i> (Ar.) | see <i>ma^clim</i> . |
| <i>uungwana</i> (Sw.) | social perception associated with civilization among the Swahili people. |
| <i>vakif</i> (Per.) | see <i>ahbas</i> (pl. <i>evkaf</i>). |
| <i>wabara</i> (Sw.) | upcountry folk. Used as an essentialist noun by the coastal communities in reference to the non-coastal immigrants in the region. |
| <i>wakil</i> (Ar.) | agent or representative. |
| <i>walad</i> (Ar.) | biological child. |
| <i>wamiji</i> (Sw.) | dwellers of a specific town's locale. |
| <i>wapwani</i> (Sw.) | coastal folk. Used as an essentialist noun in contrast to <i>wabara</i> . |
| <i>waqf</i> (Ar.) | see <i>ahbas</i> . |
| <i>waqf ahli</i> (Ar.) | family or private (also posterity) <i>waqf</i> . |
| <i>waqf al-awlad</i> (Ar.) | see <i>waqf ahli</i> . |
| <i>waqf al-haramayn</i> (Ar.) | consecrations for the benefit of the two holy sites in Islam, Mecca and Medina. |
| <i>waqf al-khassa</i> (Ar.) | see <i>waqf ahli</i> . |
| <i>waqf^camm</i> (Ar.) | public <i>waqf</i> . |
| <i>waqf al-turaha'</i> (Ar.) | <i>waqfs</i> for the burial expenses for the indigents in the Egyptian society during the reign of the Mamluk. |
| <i>waqf dhurri</i> (Ar.) | see <i>waqf ahli</i> . |
| <i>waqfiyya</i> (Ar.) | <i>waqf</i> deed or charter. |
| <i>waqf khayri</i> (Ar.) | see <i>waqf^camm</i> . |
| <i>waqf li llah</i> (Ar.) | see <i>waqf^camm</i> . |

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| <i>waqf nama</i> (Per.) | see <i>waqfiyya</i> . |
| <i>waqf nuqud</i> (Ar.) | cash <i>waqf</i> . |
| <i>waqif</i> (Ar.) | endower, or dedicator (female, <i>waqifa</i>). |
| <i>waqf mushtarak</i> (Ar.) | joint <i>waqf</i> established on indivisible shares of the property or <i>waqf</i> designated for both public and private benefits. |
| <i>wasiyya</i> (Ar.) | bequest setting aside at most a third of one's wealth as charity. |
| <i>xenodochia</i> (Lat.) | charitable institutions in Byzantine Christianity. |
| <i>zakat</i> (Ar.) | alms. |
| <i>zakat al-fitr</i> (Ar.) | alms given out during celebrations of <i>ʿid</i> holiday to mark the end of Ramadan. |
| <i>zawiya</i> (Ar.) | Sufi order. |
| <i>zedakah</i> (Heb.) | charity. |



Kenya's coast province: The legal jurisdiction of the *Waqf* Commissioners Act (1951). Source: <http://veil.unc.edu/wp-content/uploads/2012/11/kenya-coast-map.gif>

Chapter One

Introduction

1.0 Background of the Study

This study examines the practices of *waqf* (religious endowment) among minority Muslims in a predominantly Christian society and within a secular state milieu. *Waqf* is an Islamic socio-cultural heritage that lies at the intersection between the law of *mirath* (inheritance) and *sadaqa* (charity) for the purpose of attaining *qurba* (divine closeness) and *sawab* (divine rewards, merit) from God.¹ It is an undertaking where a *waqif* (dedicator) consecrates some property in perpetuity to be held in trust by a *mutawalli* (also *nazir*, custodian) so that its *manfa'a* (usufruct) could be channeled towards predetermined religious objectives (van Leeuwen, 1999).

Unlike other religious charitable institutions such as *zakat* (alms) and *sadaqa*, *waqfs* have no precise textual foundation in the Qur'an. Islamic traditions, however, trace the institution to some *hadiths* (sayings) attributed to Prophet Muhammad from the seventh century when he encouraged his companions to spend in charity for the benefit of the society (Barnes, 1986; Hennigan, 2004; Lev, 2005; Kozlowski, 2008). Throughout the eighth to thirteenth centuries, the institution evolved by adapting to varying theoretical and practical realities growing into an important economic and social institution in the Muslim community before attaining stability following establishment of the various *madhhabs* (schools of jurisprudence). As a matter of fact, during the fourteenth century, *waqfs* became significant element of the civil society in Islam providing the socio-economic mainstay of the endowers' progeny as well as plethora of community welfare initiatives including education, housing, health care, and water among others, supplementing efforts of several governments of the time (Hodgson, 1974; Hoexter, 2002; Hennigan, 2004; Dafterdar and Cizakca, 2013).

However, despite immense contribution to the society, development of the institution of *waqf* always depended on the state facing periodic turbulence in most parts of the Muslim world.

¹ *Waqfs* have several synonyms as used in different regions and among adherents of various *madhhabs* (schools of law) in Islam, including *habs*, *hubs*, *hubus*, [North Africa], *vakif* (pl. *evkaf*) [Asia], as well as *mahbusa muharrama*. See Barnes, J. (1986). *An Introduction to Religious Foundations in the Ottoman Empire*, Leiden: Brill; Benthall, J., & Jordan, B. (2003). *The Charitable Crescent: Politics of Aid in the Muslim World*, London: I. B. Tauris & Co. Ltd.; Hennigan, P. (2004). *The Birth of a Legal Institution: The Formation of the Waqf in Third-Century A. H. Hanafi Legal Discourse*, Leiden: Brill; El Daly, M. (2010). "Challenges and Potentials of Channeling Local Philanthropy towards Development and Social Justice and the Role of *Waqf* (Islamic and Arab-Civic Endowments) in Building Community Foundations", Berlin: Humbolt-Universität zu Berlin.

Many factors, including institutional corruption, jurisprudential rigidity, poor management, and state (both Islamic and colonial) interference were attributed to the sorry state and near collapse of the institution in the eighteenth and early nineteenth century (Schoenblum, 1999; Shatzmiller, 2001; Kahf, 2003). Nonetheless, concerted efforts begun in earnest across Muslim societies, particularly in the last decades of the twentieth century, like Iran (1984), Sudan (1987), Kuwait (1993), Malaysia (2004), and Qatar (2007), to revive and modernize *waqfs*. These coincided with the upcoming of the concept of civil society where in Islam, the model Islamic civil society included efforts to free *waqfs* from state control and supervision. These developments resulted into (trans-)national charitable organizations; establishment of policies and institutions; as well as reviewing perceived rigid jurisprudential interpretations regarding *waqfs* by predominant Muslim states with a view to returning the institution to its pristine time (Shatzmiller, 2001; Dafterdar and Cizakca, 2013). Accordingly, this study is an attempt to understand the contours of the institution among Kenya's Muslim community since the last decades of the twentieth century and more specifically, to interrogate Muslims' negotiation of the secular state milieu in practicing *waqfs*.

1.2 Statement of the Problem

Renowned investigations on *waqfs*, (Barnes, 1986; Powers, 1989; Hennigan, 2004; Kozlowski, 2008), have extensively focused on the institution as lived in historically predominant Muslim communities like the Mamluk (1250-1517) periods, Ottoman Empire (1299-1922), and in the Asian sub-continent. Observations made in these studies portray *waqfs* as primarily practiced according to Islamic normative precepts under Muslim political, administrative, and juridical institutions. However, figures by the Kenya National Bureau of Statistics (KNBS) derived from the National Housing and Population Census (2009), place Muslims in Kenya at 11.2 per cent (i.e. 4.3 million) of the thirty eight million people. This makes Muslims to be the largest minority religious group in the country. Above all, the institution of *waqf* is managed by a state agency, the *Waqf Commissioners of Kenya* (WCK) under the auspices of a secular law, the *Waqf Commissioners Act* (1951) rather than the Shari'a.² Clearly, conclusions drawn from the

² The statute and the state agency governing *waqfs* are cited as *Waqf Commissioners of Kenya*. See the WCK Act (1951), chapter 109, which is a revised version of the *Waqf Commissioners Ordinance* (1900).

experiences of predominant Muslim communities would not adequately explain the same among minority groups in predominant Christian societies, especially where administration of *waqfs* is strictly by secular state policies and civil statutes like in Kenya.

Accordingly, some perceptions by studies on *waqfs* drawn from the predominant Muslim communities that endowers were accorded economic security through tax exemption for return in public investments leading to large scale consecrations (Kuran, 2001), do not apply to the present community under investigation. This is not to deny that some *waqfs* in Kenya provide social welfare services transcending religious boundaries. Nonetheless, for various reasons, they were either not registered as *waqfs* or were regarded as insufficient by the state and municipal authorities to warrant tax exemptions. This is mainly informed by the population of Muslims that dims significantly in the face of their Christian compatriots as well as the jurisdiction of the civil statute that controls *waqfs* which is limited to one region in the country, the coast province.

Owing to the foregoing, the argument that some Muslims, particularly of ‘the politically dominant class’, appropriated *waqfs* as a means to shield their wealth against confiscation and taxation, or even legitimizing laundered public properties (Barnes, 1986; Kuran, 2001; Hennigan, 2004; Kozlowski, 2008) is also untenable in the Kenyan context. Confiscation of private property warranting invocation of *waqfs* to protect them was informed by the political culture of the Mamluk and Ottoman periods. During that age, political adversaries who lost in battles also had their wealth confiscated by the victors exposing them to economic, political, and social ruin. Apart from the non-existence of the ‘Mamluk/Ottoman-like’ political culture in Kenya, the demographic disadvantage of Muslims in the country could not sufficiently sustain the argument on the use of *waqfs* to protect wealth against confiscation. Moreover, although Muslim administrative institutions of the *liwali* (district governor) and *mudir* (director) established during the Bu Sa^cidi Sultanate (1698-1888) were incorporated as part of the British colonial government, occupiers of the positions were very few compared to ordinary believers.³ This emphasizes the fact that Muslims who composed of the political class were not only negligible but their *waqfs* were also outnumbered by those of the ordinary Muslims, rendering

³ *Liwalis* and *mudirs* were mainly Arabs who worked as administrators of the Sultanate, normally stationed in urban centers. There were only six Muslim administrative officers of the *liwali* in the Protectorate, i.e. Gazi (south coast), Mombasa (central); Takaungu, Mambrui, Malindi, and Lamu (north coast); and four *mudirs* in Vanga (south coast), Mtwapa, Witu, and Faza (north-coast). See Partridge, M. & Gillard, D. (Eds.) (1995). *British Documents on Foreign Affairs: Reports and Papers from the Foreign Office Confidential Print*, vol. 17. London: University Publications of America.

the assumption that the former appropriated *waqfs* “as a means of ensuring their families against loss of political influence and earning capacity” superfluous (Kuran, 2001:857).

Based on this background, the scenario of *waqfs* in Kenya is a sharp departure from the popular Islamic understanding bringing into fore two significant considerations: First, the recognition of the institution in the constitution makes it an important socio-cultural heritage albeit with few, if any, studies on its various manifestations in a minority Muslim community. Second, the administration of *waqfs* is by a state agency and mainly through a secular statute rather than the Shari‘a under which the institution subsists. Then, how did *waqfs* develop over time from the British colonial period to postcolonial times? To what extent did secular state policies and Common law judicial rulings influence the development of *waqfs* in Kenya? How do Muslims negotiate the secular state and Common law judicial constructs vis-à-vis the *waqf* practices in the country? And how do Muslims in Kenya use *waqfs* in socio-cultural development? This study was, therefore, undertaken to answer the pertinent questions raised in the ambiguous relations between an Islamic institution and a secular state cum civil institutional milieu.

1.3 Research Objectives

Based on the foregoing, the study endeavors to:

- i. Explore the development of the institution of *waqf* from the British colonial rule (1900) to postcolonial Kenya (2010).
- ii. Examine the secular state legislative policies and Common law judicial orders that influenced the development of *waqfs* during the two historical periods in the country.
- iii. Interrogate how Muslims negotiate the secular state and Common law juridical milieu vis-à-vis the practices of *waqfs* in the country.
- iv. Establish the various types of *waqfs* prevalent in Kenya’s Muslim community.
- v. Describe how Kenyan Muslims use the various types of *waqfs* in the socio-cultural development of the society.

1.4 Justification of the Study

Despite the seeming significance of the institution of *waqfs*, both among the minority Muslims as a socio-cultural heritage and in the state as evident in the constitutional recognition of the same, there are very few studies on the subject along the East African coast, and fewer still in Kenya in particular, that explicitly discuss the institution. These include studies by Carmichael (1997), Sheriff (2001), Fair (2001), Bang (2001a), Oberauer (2008), Yahya (1995; 2008), and Hashim (2010). On their part, Sheriff, Fair, Bang, and Oberauer mainly investigated the institution among predominant Muslims in Zanzibar during the colonial period.⁴ Bang's article, "Intellectuals and Civil Servants: Early 20th Century Zanzibar *'Ulama* and the Colonial State" bears testimony on studies in *waqfs* during the colonial period where the institution was subjected to an array of secular state policies that put it under supervision and control.⁵ The problem, however, in virtually all of the studies carried out in Zanzibar is the tendency to perceive *waqfs* from the viewpoint of predominant Muslim societies and institutions. Hence these works could not be relied upon in presenting a contemporary picture of the institution among minority Muslims in Kenya on the face of secular state policies and civil institutions in the postcolonial times.

On the other hand, Tim Carmichael's article, "British Practice towards Islam in the East Africa Protectorate: Muslim Officials, *Waqf* Administration and Secular Education in Mombasa and Environs, 1895-1920", sketches the ambiguous relations between Muslims and the colonial government in an array of socio-cultural matters with no serious attempt at addressing the issues raised by the present study.⁶ On their part, Hashim (2010)⁷ and Yahya (1995; 2008)⁸ lament the challenges bedeviling the institution including mismanagement though they echo the sentiments

⁴ Bang, A. K. (2001). Intellectuals and Civil Servants: Early 20th Century Zanzibar *'Ulama* and the Colonial State. In B. Amoretti (Ed.), *Islam in East Africa: New Sources* (pp.59-98). Herder Editrice E Libreria; Sheriff, A. (2001). Records of the *Waqf* Commission as a Source of Social and Religious History of Zanzibar. In B. Amoretti (Ed.), *Islam in East Africa: New Sources* (pp.27-45). Herder Editrice E Libreria; Fair, L. (2001). *Pastimes and Politics: Culture, Community, and Identity in Post-Abolition Urban Zanzibar, 1890-1945*, Athens: Ohio University Press; Oberauer, N. (2008). 'Fantastic Charities': The Transformation of *Waqf* Practices in Colonial Zanzibar. *Islamic Law & Society*, 15(3), 315-370.

⁵ Bang, A. (2001). Intellectuals and Civil Servants, op.cit.

⁶ Carmichael, T. (1997). British Practice towards Islam in the East Africa Protectorate: Muslim Officials, *Waqf* Administration and Secular Education in Mombasa and Environs, 1895-1920. *Journal of Muslim Minority Affairs*, 17(2), 293-309.

⁷ Hashim, A. (2010). Administration of *Waqf* Institutions in the Kenya Coast: Problems and Prospects. *Refereed Biannual Journal Specialized in Waqf and Charitable Activities*, 18, 56-66.

⁸ Yahya, S. (1995). The Uses and Abuses of *Waqf*. In M. Bakari & S. Yahya, (Eds.), *Islam in Kenya* (pp. 214-223). Nairobi: MEWA Publications; Yahya, S. (2008). Financing Social Infrastructure and Addressing Poverty through *Waqf* Endowments: Experiences from Kenya and Tanzania. *Journal of Environment and Urbanization*, 20(2), 427-444.

on reviving *waqfs* as the panacea to the biting poverty afflicting the Muslim society in the region. Yet, as articles, they also suffer the academic limitation of in-depth analysis of the subject. Consequently, my investigation, in seeking to fill the knowledge gap, departs sharply from the preceding academic pieces as an ethnographic interrogation on how Muslims negotiated the institution of *waqf* in the midst of secular state political, economic, and socio-cultural policies from the British colonial era to postcolonial period.

1.5 Scope and Limitations

The study was conducted in four administrative regions (counties) of Mombasa, Malindi/Kilifi, Lamu, and Kwale, in the coast of Kenya. The choice of these research areas demonstrates a strategic and purposeful underpinning because the WCK Act is limited to the coast province, particularly, the predominant Muslim areas of the former British East Africa Protectorate (Sw. *mwambao*). The Protectorate was a narrow coastal strip stretching ten miles inland from the sea shore from Kipini in the north to Vanga in the south (Hailey, 1979:105; Eliot, 1996; Ndlovu, 2014). Although it would have made a lot of sense to include regions outside the former Protectorate for the purpose of diversity and comparison, but the limitation of the statute implies that Muslims outside the coast province could not establish *waqfs* in the legal definition of the Act. At best, theirs could only be regarded as *non-labeled waqf* initiatives. More so, owing to the concentration of Muslims in the former Protectorate, *non-labeled waqfs* outside this region have, for several reasons, been systematically overlooked by the state agency. In view of this, only areas defined by the Act as legally capable of endowing, and whose *waqfs* are captured in the state registry could be sampled.

Moreover, the institution of *waqf* encountered some transformation between the fifteenth and seventeenth centuries to include cash in its various forms as corpus (*waqf nuqud*) as well as other adaptation facilities; and the upcoming of the Muslim civil society since the last decades of the twentieth century to free the institution from imperial supervision and control. These developments led to the establishment of private foundations and community based associations to provide socio-cultural welfare (Kuran, 2001; Kahf, 2003; Siraj and Hillary, 2006; Daftardar and Cizakca, 2013). Nonetheless, the discussion in this study was based on *waqfs* in their

‘traditional’ sense as the new developments in Muslim civil society were largely yet to find footing in the community under investigation.⁹ Not oblivious of these limitations, hopefully, the findings of the study would be sufficient in drawing a general picture of the institution of *waqf* among minority Muslim groups in predominant Christian societies or secular state policies and civil institutions in contemporary times.

Events in the post 9/11 largely shaped the global stage on (in-)security as evident in Kenya’s involvement in the ‘war against terror’ with *al-Shabab* militias in the neighboring Somalia. Since then, Kenya endured sporadic retaliatory attacks and the regions of interest were not spared either. As a matter of fact, the visit to Lamu was delayed several times owing to such incidents. While at Mombasa, I also came face to face with the scenario in two different occasions when the town was engulfed in riots following the extra-judicial extermination of two *‘ulama* (Muslim clerics) – Abu Bakar *Sharif* Makaburi and Aboud Rogo Mohammed - alleged to have harbored links with the terrorist group. This made visit to some *waqfs* in the town, even in the guide of WCK secretariat staff, quite challenging including the now famous *masjids* Mlango wa Papa, Bahero, and Musa in Mombasa that were claimed to be radicalization and recruiting centers for the militant group.

Coupled with the question of (in-)security was the ambivalence of some respondents. Since I largely had to be referred to my respondents by the WCK, more often than not, some mistook me for a Commission mole. My initial over-reliance on referrals by WCK from which I snowballed was informed by the lack of identification mechanism for *waqfs* in the community. Only the state agency kept records of physical addresses of *waqfs*, their endowers, as well as current beneficiaries and *mutawallis*. Therefore, because of the sensitivity of the subject, especially where private wealth and properties were concerned, and my indispensable connection with the state agency, requests for interviews were granted after several postponements and change of venues when respondents were satisfied that I was not a threat to their interests. This was particularly so where beneficiaries were locked in legal battles against the state agency. This scenario aptly illustrates the competing and conflicting interests in the institution of *waqf*

⁹ Among contemporary changes in *waqfs* evident in transnational charitable organizations include according the institution a juristic personality. This puts the management in a board of *mutawallis* that enjoys powers akin to those of a private enterprise. This does not, however, stop the board from harnessing resources in form of *waqf* shares and certificates for specified causes in the *umma*. See Kuran, T. (2001). The Provision of Public Goods under Islamic Law: Origins, Impact, and Limitations of the *Waqf* System. *Law & Society Review*, 35(4), 841-898.

between various actors in the community. In this regard, my choice and sampling of respondents was basically purposeful and through snowball. Nonetheless, some informants like ordinary Muslims and the *‘ulama* were randomly sampled and informally interviewed.

Important also to mention is the bureaucracy and delays I had to endure with regard to accessing state offices and repositories like court registries (both *kadhi*'s and civil) and the acquisition of research permit from the National Commission of Science, Technology, and Innovation (NACOSTI) that required frequent rescheduling of my fieldwork plan. Finally when time came to visit those sites, I also had to put up with disorganized and overwhelmed staff in accessing vital documents and information. Not to be forgotten is the social and moral ethics in the Muslim community in relation to free mixing of the genders. Interviewing female respondents, for instance, demanded that they be accompanied by their *mahram* (close relatives), thereby requiring that I fit into their schedule. Coincidentally, these restrictions provided rarest opportunities for group talks that would have otherwise been difficult to organize in ordinary circumstances.

Like any ethnographic undertaking, therefore, my study was no exception to the various challenges but, paradoxically, also immensely benefitted from the merits associated with an ‘insider’ researcher. By ‘insider researcher’ I mean “social research and interactions conducted between researchers and participants who share similar cultural, linguistic, ethnic, national, and religious heritage” (Ganga and Scott, 2006, as quoted in Bryant, 2010:45). I regard myself as an ‘insider researcher’ because I am a Kenyan Muslim from the region where this study was undertaken. Accordingly, this puts me in equal pedestal with my respondents in the socio-cultural, and at some instances, even ethnic milieu. Within this context, My study was enriched by the closeness with respondents that I easily engaged with owing to shared experiences and empathy that accorded me access to some sensitive information that an ‘outside researcher’ would be difficult to be privileged.

My ‘insider researcher’ position notwithstanding, I also had to contend with the challenges of negotiating the asymmetrical power relation with my respondents. Researchers are perceived to wield power against participants on the view that they decide the subject of discussion, ask questions, and finally make analysis independent from the respondents (Kvale, 1996, cited in Alan and Arthur, undated, 3). To avoid demonstrating too much power against my respondents, I

identified myself as a *learner* rather than a *researcher*. In the eyes of informants, I was curious to learn and make sense of the situation placing them as my mentors, thereby working *with* rather than *on* them. As a matter of fact, I often allowed my respondents to decide on the venue, time, the sitting arrangement, and even who to include in the discussions. This explains the numerous cancellations and rescheduling of meetings. Effectively, this did not only accord room to my respondents to exercise their discretion but, eventually became a blessing in disguise. By inviting their relatives and friends, it in turn gave me the opportunity to conduct group talks. Among senior members in the community including the Chief *Kadhi* (both current and former) on their part, this also allowed them the convenience of being in their offices where they undoubtedly felt more at ease and in control than they would possibly have been elsewhere. Most times, I held informal talks with the Executive Secretary of the WCK in his office instead of the boardroom from where I was working. This ethnographic reflexivity underlines the view held by several authors including Munro et. al (2004), Thapar-Bjorkert and Henry (2004) that exercising power in a research undertaking is not an exclusive privilege of the researcher (cited in Alan and Arthur, undated, 3).

‘Insider researchers’ on the other hand, as experienced during fieldwork, often face the challenge of potential biasness and confidentiality with sensitive information that, if mishandled, it could harm the respondents (Serrant-Green, 2002, cited in Kerstetter, 2012:100). To gain and sustain trust that enabled me to access sensitive data from my respondents, I sought their audience through second and third parties whom they knew and trust beforehand. This partly explains my initial reliance on the WCK to access my informants. My initial access to the WCK was, for instance, through referral by a serving Commissioner. While with respondents, I was also constantly aware of my inadequacies to access them without such referrals and made it a point to appreciate them as a matter of security. This eased their potential suspicions against me that developed to good levels of trust and confidence that enabled me to obtain the much needed information. All in all, engaging in the project accorded me a rare opportunity to encounter the *other side* of the Muslim community and Kenya at large which I have always been oblivious of.

1.6 Theoretical framework

The present study is an ethnographic undertaking to understand the enacting of an Islamic practice by a minority group and the trends it generates in a predominantly non-Muslim but secular milieu. This involved a multi-disciplinary approach covering slightly over a century of negotiations by the Muslim community in the administration and development of the institution of *waqf* vis-à-vis secular policies and civil structures. Invoking Pierre Bourdieu's theory of practice (1977), specifically the concepts of field, capital (social, economic, political, and symbolic), and symbolic violence, was thus relevant as it appropriately fits the state-society negotiations between the Muslim community and the British colonial government and subsequent postcolonial regimes on one hand, and among socio-ethnic groups of Muslims on the other. According to Turner (2011), and Echtler and Ukah (2015), centrality and marginality of religion in Bourdieu's works equally compete for space. This is in the sense that despite his limited works precisely dealing with religion, Bourdieu's concepts in the theory of practice, drawn mainly from sociology of religion, occupy an important position in the study and practices of religions as a whole (Turner, 2011:102-123; Echtler and Ukah, 2015:1-32).¹⁰ For Bourdieu, the religious field is only "one of numerous distinct yet interrelated fields that together constitutes human society" (Rey, 2007:81; Echtler and Ukah, 2015). This understanding was, therefore, significant in deconstructing essentialist perceptions in the theory of practice and to demonstrate its applicability to wider concerns affecting human societies beyond its parent geographical and conceptual framework.

Accordingly, the constituent concepts in the theory of practice are "apt for studies of the relationship between religion, class and power; religion, race and ethnicity; and religion and colonial conquest" (Rey, 2007:82) that this study endeavored to investigate under the lenses of *waqfs*. This is not to be oblivious of the aversion by the theory of practice to obstruct in-depth understanding of the 'fantasy life' of the subordinate groups in the society by reducing "field relations to the power binary of the dominant and the dominated" (Friedland, 1999:305, as quoted in Rey, 2007:124; Martin, 2000). Bourdieu portrays the subordinate groups in the society

¹⁰ According to Rey (2007), Bourdieu published ten essays on religion that were mainly confined to Roman Catholicism (France) and Islam (Algeria). See Rey, T. (2007). *Bourdieu on Religion: Imposing Faith and Legitimacy*. London: Lightning Source UK Ltd, pp.58-80; Turner, B. (2011). *Religion and Modern Society: Citizenship, Secularization and the State*. Cambridge: Cambridge University Press, p.109.

as “virtually and structurally un-free and thus unable to rise up, resist, and act to change the very social order that enables their oppression” (Rey, 2007:122; Martin, 2000). This inadequacy was, however, complemented by two paradigms: James C. Scott’s (1976) symbolic (ideological) resistance (also hidden transcripts) and *umiji-wamiji* (locale identity and belonging) suggested by the researcher. In the manner of Martin, I argue that subordinate groups in the society also have the understanding and ability to decipher “contradictions in the established order and have the capacity to critique them, [hence] hidden transcripts demonstrate hidden grievances, alternative social organization, and other practices that are assumed to be repressed by the hegemony of the dominant” (2000:72-73).

Within this context, Scott’s concept of symbolic resistance proved efficacious in explaining Muslims’ response to the secular state legislative policies and Common law judicial rulings in the development of *waqfs* in the country. It was established that colonial and postcolonial regimes appropriated secular policies and civil institutions to control resources, particularly land that, created a community of ‘Muslim peasants’ who were effectively disillusioned and condemned to economic, political, and cultural domination. Thus, the establishment of the WCK in 1899 that herald state domination, supervision, and regulation of *waqfs* was only but a microcosm. In expressing dissent against state sponsored socio-cultural subordination, Muslims did not comply with the imposed compulsory registration of *waqfs*. Above all, they silently ‘exited’ from state controlled *waqfs* to express piety and *qurba* in *non-labeled waqfs* including *sadaqa*, private trusts, and community based associations.

These alternative forms of attaining *qurba* were (still are) not only uncontrolled and uncoordinated, but also accorded Muslims the control over resources and privileges similar to those of *waqfs* while at the same time helped in fulfilling the religious obligations of giving back to the society. This subtly illustrates that resistance by subordinate groups in the society could as well be passive with a view to making “a total reversal of the established order where power, wealth, status, and material goods are in their hands” (Martin, 2000:73). Using Scott’s symbolic resistance was, therefore, crucial in understanding the ‘social world’ from the perspective of the subordinate Muslims’ strategies and improvisations to re-create autonomy and control over resources and the religious sphere.

Significantly, the view that Muslims are not a monolithic but rather a supra-community is not far from the truth. Muslims in Kenya are characterized by competing and, at times, fluid conflicting ethnic, jurisprudential, regional, and political affiliations. To understand how this diverse community uses *waqfs* in socio-cultural development, my study coins the concept of *umiji-wamiji* in exploring the non-state-society engagement in the Bourdieu's concept of capital among the various ethnic Muslim groups in the community. Apparently, religion (Islam) among Kenyan Muslims, though significant, but is not the main factor of identity and mobilization. The concept of *umiji-wamiji* thus, goes beyond the binary power struggles between the dominant and the subordinate groups over legitimacy in the society.

Umiji-wamiji unravels the internal dynamics in the Muslim community that informed the constantly shifting borders of identity and belonging among diverse socio-ethnic Muslim groups in relation to access to resources and privileges in the region. This is true considering how *waqfs* were consecrated, their control negotiated, and eventually used in socio-cultural development as a microcosm. More importantly, since *waqfs* existed before and after colonization, the concept provides a significant framework in understanding the local trends and dynamics in the institution during these periods that could not be adequately explained by the two foreign concepts. Accordingly, fusing Bourdieu, Scott, and *umiji-wamiji* calls for an understanding of Muslims' switch to uncontrolled and uncoordinated *non-labeled waqfs* not merely as a response to colonial and postcolonial state control of *waqfs*, but as "building social spaces relatively free from, and alternative to, life under domination" (Rey, 2007:116), the life outside secular state subordination, and the period thereafter.

1.7 Methodology

Knowledge on the history and traditions of the people is significant in understanding the circumstances that inform their contemporary trends. This explains the central place of historical approach in the study. The approach was used to identify the secular state legislative and Common law judicial constructs that influenced the development of the institution of *waqf* over time from the British colonial period (1900) when it was first placed under state supervision and control to the postcolonial era in 2010. More importantly, historical approach helped in

understanding the trends in Muslims' responses vis-à-vis the transition from practicing *waqfs* under the Shari'a normative precepts to secular state control of the institution. The approach also made it possible to interrogate the extent at which various ethnic Muslim groups used *waqfs* in relation to the internal socio-cultural negotiations of the former governorates at the coast region.

Although the study draws from anthropological insights, it goes beyond mere recording and presentation of political and socio-cultural negotiations between Muslims and the state on the one side and among diverse Muslim groups in the community on the other. For instance, other than establishing and describing the secular statutes and Common law judicial rulings that influenced *waqfs* in the community, using normative Shari'a precepts, the analysis further explored whether or not Muslims' responses to such constructs could be situated within the broader concept of Islamic charity, *qurba*, and resource distribution in the society. Again, using normative precepts, it was possible to relate the compatibility or otherwise of established *waqfs* with the preponderant opinion about Shari'a, especially where legal heirs were involved in the distribution of the usufruct. To this end, analysis of qualitative and quantitative data that formed the basis of this discussion was both contextual and normative according to the Shari'a under which the institution of *waqf* subsists.

The primary data, collected from over ten months of field research (November to December, 2014; July to December, 2015; October to mid-November, 2016) consisted of *waqfiyyas* (*waqf* deeds); informal talks and group discussions with *Waqf* Commissioners (both current and former); *Waqf* Commission agents in Malindi and Lamu; *waqf* secretariat at Mombasa; beneficiaries and *'ulama*. These talks were conducted in the local lingua franca, Kiswahili, and captured in voice recorders and field notes before being transcribed and translated in English by the researcher. Other documents that were reviewed during the study included court records (both *kadhi's* and civil); archival records; lease contracts; records of appointment for the Commissioners and *mutawallis*; certificates of trusteeship; the WCK minutes; and compensation notices. Secondary data was collected through analysis of relevant existing works on the subject in public and private libraries and archives in Germany, Kenya, and Zanzibar. Some of the cutting edge information on the subject was also sourced through the internet.

Registration of *waqfs* became mandatory upon establishment of the WCK failure of which was punished by law. The WCK secretariat, therefore, holds a repository of significant documents

including *waqf* deeds dating from the time when compulsory registration was introduced by the British colonial government. By the period of research (2014-2017), however, the WCK was yet to establish a digital archival system. Therefore, all vital records reviewed during study were not ordered and organized to enable preservation and retrieval in the conventional sense of an archive, but were rather piled in bundles and old files in several rooms of the Commission building. I was, however, privileged to see some of these records before they were availed to me in piece meal for review and analysis in the boardroom from where I worked. The ‘piece meal revelation’ of the bundles of *waqf* deeds alone lasted for three weeks during which I made a random sample realizing a total of 104 from about 350 deeds. While precise details of the sampled *waqf* deeds were noted and short notes made, some were photocopied or photographed partly becoming the basis of this discussion. Moreover, owing to age and poor preservation of these important documents, some of which were hand written and are of various lengths ranging from one to about ten pages, several of them were worn out before they were laminated. Subsequently, portions of some of the *waqf* charters were missing. Nonetheless, none of the sampled *waqf* deeds had serious defects that could radically interfere with the analysis.

Waqf charters are the backbone of *waqf* practices in the Muslim world as they are the primary documents establishing a valid endowment. They identify the type of *waqf*, the *waqif*, and describe the type and nature of corpus. They mention the *mutawalli(s)* and how the position would be filled in future should it fall vacant. *Waqf* deeds also mention the primary beneficiaries and how usufruct should be distributed among them. Finally, the documents would essentially identify the residual beneficiaries, normally the indeterminate poor (*masakin*) and needy (*fuqara*) of the Muslim community or some other public worthy causes. Residual beneficiaries are invaluable means of encoding the special attachment a *waqif* had with certain socio-religious groups and localities in the community.

The Shari^ca provides for *istibdal* (exchange), *‘ana* (lease), and rent (*hikr*) of both revenue-generating and revenue-consuming *waqfs* for the acquisition of better alternatives with a view to attaining perpetuity of the consecrations. Lease agreements contain details of the lessee(s), the leaser, *salf* (advance payment for lease, premium) charged, period of lease, and the agreed rent. Clearly, analysis of lease contracts was significant in ascertaining the considerations including *ijar al-mithal* (prevailing market rates) in relation to sound investment of *waqf* properties that

informed such transactions in the socio-cultural development of the institution. As WCK is a body corporate (with the powers to sue and be sued), court documents – court orders, judgments, summons, affidavits, and certificates of trusteeship of *waqfs*, were precise demonstration of the legal contestations involving ownership and control of *waqf* properties that also enriched this study. This information was collected and collated through visits to *waqfs* in the four administrative regions in the coast of Kenya and preserved through note taking, tape recording, and photography.

1.8 Summary of Chapters

In presenting the findings of the study, historical, descriptive, and analytical methods have been incorporated with the discussion adopting a spiral design. This makes every chapter to be the foundation upon which the proceeding discussion and analysis is built. Chapters one and two are the building blocks of the study. Chapter one sets the stage by identifying the main concerns, how they were investigated, and limitations of the study. Chapter two gives the interpretative insight into the normative precepts of *waqf* in Islam - the legal foundations; how and why *waqfs* are consecrated; and how they were established and managed in the formative periods. This aims at providing a broader understanding of the institution as practiced and mediated among Muslim communities in different historical epochs according to the Shari‘a with the view of setting the background for the normative analysis of *waqfs* among the Muslim community under investigation.

Secular legislative policies, civil institutions and Common law judicial strategies established during the British colonial period that placed *waqfs* under state control are the focus of chapter three. Importantly, the chapter explores relevant scenarios to illustrate how secular policies and civil constructs influenced the development of the institution. Using an array of legal ordinances and civil court judgments that applied the Shari‘a as understood by the British, the colonial government determined the relationship with the Muslim community vis-à-vis the establishment, management, and use of *waqfs*.

Secular policies, civil institutions and Common law courts’ precedents established during the colonial period that put the institution of *waqf* into imperial supervision and control were

inherited by subsequent postcolonial regimes. As illustrated in chapter four, this suggests that political elites in the independent state mainly echoed and perpetuated control of resources and political power. This put *waqfs*, and by extension, the Muslim community, into an extended period of state control and socio-cultural subordination. Unwittingly though, it also gave impetus to the flourishing of the internal socio-ethnic dynamics in the Muslim community as diverse groups and individuals sought to adapt and exploit the extended state control of resources to safeguard temporal group and private interests.

Chapter five is an in-depth analysis of Muslims' response to state regulation of *waqfs* since the colonial period. Muslims' response is perceived in terms of spontaneous and continuous negotiation for control of resources against secular state policies and civil constructs as well as internal dynamics in the institution of *waqfs*. Accordingly, Muslims' 'exit' from state controlled *waqfs* to *non-labeled waqfs* through non-compliance with official rules; establishment of community based organizations; preference to uncontrolled and uncoordinated charitable institutions of *sadaqa*, community organizations, and private trusts are the concerns of this section of the study. These draw our attention to efforts by the subordinate Muslim community to regain control over resources without attracting the wrath of the state while at the same time fulfill the religious obligations under a wider concept of charity as provided by the Shari^ca.

Chapter six analyzes how the minority Muslim community negotiated the contours of *waqf* outside the secular state, civil institutions and Common law judicial constructs. This draws mainly from the diverse types of *waqfs* in the community, to demonstrate how *waqfs* are lived, mediated, and generate trends under the prism of *umiji-wamiji. Shurut al-waqif* (conditions of the endower) in *waqfs*, particularly, offered the avenue through which inter- and intra-socio-cultural and locale negotiations were mediated. Endowers designated specific socio-ethnic groups, institutions, and regions, as beneficiaries of their *waqfs* demonstrating close and special attachment between them in relation to the internal dynamics of identity and belonging in the Muslim community. The chapter closes with the analysis on how the concepts of ^c*ana*, *hikr* and *istibdal* are exploited for the economic (dis-)advantage of entrepreneurs and the diverse groups of beneficiaries as influenced by locale dynamics.

Chapter seven is a recapitulation of the entire discussion and makes general observations on the negotiations between various actors in the institution of *waqf* in the country. As arguments in

preceding sections demonstrate, state (both colonial and postcolonial) involvement had significant ramifications on the institution. Secular policies, civil institutions and Common law judicial constructs placed the control of resources, and *waqfs* in particular, in the hands of the state. This did not go down well within a section of Muslims who resorted to the uncontrolled and uncoordinated charitable institutions with a view to reversing control of resources and fulfill the religious obligations for the attainment of *taqwa* and *qurba*. Paradoxically, this in essence enabled the perpetuation of internal socio-ethnic and cultural negotiations for identity, belonging, and access to resources and privileges in the Muslim community appropriately captured under the concept of *umiji-wamiji*.

Chapter Two:

The Concept of *Waqf* in Islam

2.0. Introduction

This chapter provides the interpretative insight into the normative precepts of the institution of *waqf* in Islam. The discussion opens with a broad analysis of the several definitions of *waqf* as advanced by different scholars before zeroing on a working definition for this study. The discussion also meanders into the recurrent views in relation to the origin of the institution of *waqf* highlighting the strengths and weaknesses of the prepositions as elaborated in various investigations. The chapter further discusses the contours of the practice of *waqf* upon its formalization during the formative years of Islam: what constitutes a legal *waqf*; how *waqf* was managed during its formative age; how efforts were made to categorize the different forms of *waqfs* in early studies with a view to highlighting the underlying substantive features of each category; and most importantly, how ruined and economically un-supportive revenue-bearing *waqfs* could be revived to secure the principle of perpetuity. Finally, the discussion closes with an analysis on how and why *waqfs* were appropriated during earlier periods in the history of the Muslim society before the institution came to be controlled and supervised by Muslim states and invading colonial powers. The proceedings in this chapter are not only significant in understanding the rudiments of the institution and how it developed through different epochs in Islamic history, but also to lay the basis for analysis of the practices of *waqf* among Muslims in Kenya in the subsequent chapters.

2.1 What is *Waqf*? Problem of Defining the Concept

The Islamic institution of *waqf* has aroused intense academic interests from diverse backgrounds that have invoked various approaches including law (Powers, 1989; Engin and Alexandre, 2005; Anderson, 2008), history (Duff, 1926; Hathaway, 1994; Gil, 1998), economics (Cizakca, 1998, 2004; Haneef, et al, 2014), and religion (Barnes, 1986; Qureshi, 1990; Banday, 2013) among others. Given the different approaches adopted by these research works, it has become difficult to have a unanimous definition of *waqf*. Van Leeuwen (1999:9-10) captures this difficulty and explains why:

Defining the institution of *waqf* is both at the same time simple and extremely difficult. It is simple because the concept of *waqf* has been described in legal handbooks of various kinds, in a terminology which is especially molded to avoid ambiguity and misinterpretations [...] The question what a *waqf* is, is difficult, however, since the phenomenon is not confined to the realm of legal theory and juridical handbooks. It is also part of a historical reality and it touches upon the material and spiritual conditions of societies beyond the sphere of legal systems.

As part of historical reality, *waqf* is, according to van Leeuwen, naturally integrative and has two basic incongruent manifestations – theoretical and the other occurring in the material world. More often, what is textually and theoretically described as constituting *waqf* may not necessarily and exactly be what is happening in the material world. Nevertheless, events in the later environment may not be invalidated as they are significant manifestations of *waqf* that seek to complement the texts in enabling the institution adapt to various situations (Hoexter, 1995; van Leeuwen, 1999).

The scholar further postulates that for centuries, studies on *waqf* were based on either legal precepts with a view to developing convenient administrative frameworks; or on theoretical assumptions that being divine, the Shariʿa from which the institution draws its mandate and operative structures are two sides of the same coin (1999:10). Such studies, as van Leeuwen opines, are consequently limited to specific aspects of *waqfs*, thereby making it difficult to arrive at a conclusive end of what *waqf* is.

Literally, *waqf* is derived from the Arabic root verb *waqafa* - implying to stop, prevent or restrain. Barnes (1986), Sheriff (2001), and Hennigan (2004) agree in their definition of *waqf* as a process where “-‘a revenue-bearing property’ is withdrawn from commercial transaction and is made inalienable for some beneficent end; taken out of the condition of private ownership, the property is said to belong to God, and its revenue is assigned for some religious or charitable purpose” (Barnes, 1986:5, emphasis added). In other words, revenue-producing properties (*asl al-mal*) are withdrawn from commercial transactions to become mortmain under the watch of a *mutawalli* that, allegedly, do not contribute to any economic growth though their *manfaʿa* is assigned to specified individuals, institutions, and other public welfare causes. This definition of *waqf* by Barnes does not depart sharply from that commonly adopted by the Shafiʿi legal code, as explained by *Imam* al-Nawawi. To the Shafiʿi *madhhab* (school of law) of Sunni Islam, *waqf* is “the alienation of ‘revenue-generating property’ with the principal remaining inalienable, while

its revenues are disbursed for a pious purpose, in order to seek God's favor" (al-Nawawi, AH 13855:314, as quoted in Sabra, 2000:70. See also El Daly, 2010, emphasis added).

The major challenge in perceiving *waqfs* in the context of revenue-bearing corpuses as emphasized in the above definitions is to place great prominence on material (economic) benefits. In turn, this perception, observes Shatzmiller (2000:97-113), negates properties and institutions incapable of revenue-bearing that could as well, and have since immemorial times, been consecrated as *waqfs* based on the services they rendered to the community. Such revenue consuming corpuses may include, but not limited to hard copies of the Qur'an (*mushaf*), books of religious sciences, *madrasas* (Quranic schools), as well as *masjids* (mosques) among others also established by this study.¹ The exclusive view on *waqfs* as revenue-bearing properties also fails to capture the spiritual facet, which - arguably, is the back bone of the institution in Islam (Hoexter, 1998; van Leeuwen, 1999).

In the Ottoman understanding, Barnes (1986:5) posits, *waqf* means "to prevent the giving and taking possession of a thing so that the substance belongs to God, while its benefits pertain to mankind." This perception to *waqf* is shared by others (Miran, 2009; Peters, 2000, as cited in El Daly, 2010).² Two aspects of this definition merit brief comments - ownership of the corpus being divine and intended objective as for the service of humanity. The definition, nevertheless, falls short in giving the precise purpose forming the foundation of the institution of *waqf* in Islam – *birr* (righteousness) or for the soul of the endower. It also leaves unanswered questions with regard to how the benefits are to be expended among the beneficiaries in the legality of *waqfs* according to the preponderant view about Shari'ah on the same. As pointed out earlier by van Leeuwen, some of the attempted definitions of *waqf* emphasize certain aspects of the institution ending up not being inclusive to all elements, at least as being perceived by the majority Muslim schools of theology.

¹ Qur'an 72:18 emphasizes the ownership of mosques (and other places of worship like *musala* – informal mosques) to Allah. The emphasis on the verse is twin fold – it stresses the absolute divine ownership of such places thus making them *waqfs* as well as the prohibition of invoking other beings in the mosque besides Allah. On non-revenue bearing *waqfs*, see Shatzmiller, M. (2000). *The Berbers and the Islamic State: The Marinid Experience in Pre-Protectorate Morocco*. Princeton: Markus Wiener Publishers; Sanjuan, G. (2007). *Till God Inherits the Earth: Islamic Pious Endowments in al-Andalus* (9th -15th Centuries). Leiden: Brill.

² Similar positions are held by the Malik *madhhab* and some Hanafi scholars. See Layish, A. (1983). The Maliki *Waqf* According to Wills and *Waqfiyyat*. *Bulletin of the School of Oriental and African Studies*, University of London, 46, 1-32; Cattani, H. (1984). The Law of *Waqf*. In M. Khadduri & H. Liebesny (Eds.), *Law in the Middle East: Origin and Development of Islamic Law* (pp. 203-222). Washington D. C.: The Middle East Institute; Qureshi, M. (1990). *Waqfs in India: A Study of Legislative and Administrative Control*. New Delhi: Gian Publishing House.

Nevertheless, their non-inclusivity notwithstanding, majority of the definitions seem to agree on significant pillars of *waqf* including inalienability (untouchability) and perpetuity. That the item, once declared as *waqf* would never be sold, purchased, inherited, or even given out as a gift. These and other principles are conflated in the definition of *waqf* by van Leeuwen (1999:11-12):

Essentially a *waqf* consisted of an object which was endowed to a specific pious purpose for eternity. The founder (*waqif*) gave up his property rights and determined the pious purpose and the regulations for the exploitation of the object, which became the property of God. The object was dissociated from the market circulation and any form of alienation (sale, pawning, donation) was strictly forbidden. *Waqfs* were often founded for the benefit of mosques, which themselves also had the status of *waqf* [...] *waqfs* could thus either be possessions yielding revenues and profit, or objects consuming these revenues and serving as religious or social institutions.³

Proceeding from van Leeuwen's definition, we discern that: (a) *waqf* has to be endowed for a specific pious cause; (b) the endowment has to be permanent; (c) once endowed, the endower surrenders his right of ownership to God; (d) the endower reserves the right to determine the pious purpose and exploitation of the corpus; and (e) disposal of the corpus is strictly forbidden. Within this context, the study perceives *waqf* as a valuable income generating or service rendering (non-)item that an individual voluntarily cedes private ownership and consecrates it to God through a management system that holds it in trust during which period its value would be improved, sustained, and appropriated for specified pious objective(s). The position adopted by this study on the definition of *waqf* is anchored on Qur'an 3:92 where attaining righteousness and piety is contingent on giving out freely in charity what one loves in truth, not merely as a means of disposing the (non-)item for being invaluable. Emphasis is placed on spending (non-)properties that have utility and whose value could be improved for the benefit of both the giver and the recipient, while the rest of the conditions with regard to *waqfs* in Sunni Islam remain.⁴

³ The *Ahmadiyya* view of *waqf* goes beyond objects to include human beings. 'Waqfi Nau', established during the reign of the fourth *khalif*, Hadrat Mirza Tahir Ahmad (1982-2003), allows believers to consecrate their children (*waqfin*) to the service of the *jama'at* (community). These children are catered for under 'waqfi jadid' established during the reign of the second *khalif*, Mirza Basheer-ud-Din Mahmood Ahmad (1914-1965). The *Ahmadiyya* view, undoubtedly, draws from Qur'an 3:35-37 where Mariam, the mother of Jesus (Issa bin Mariam) was consecrated for the service of God. See Simon, V. (2008). *Islam and the Ahmadiyya Jama'at: History, Belief, Practice*. London: Hurst & Co., pp.184-185.

⁴ Shi'a Islam has a different perception of *waqf* as a contractual agreement between the endower and the beneficiary requiring an offer (*ijab*) from the endower and acceptance (*qabul*) by the beneficiary. In this case, the Shi'a view does not recognize testamentary *waqfs* since offer and acceptance has to trigger an immediate transfer of the property to *waqf*. In view of the principle of *ijab* and *qabul*, *waqf*, opines Makdisi (1981), could thus be rejected by the recipient. In the majority opinion, however, such refusal may not necessarily invalidate the *waqf* as usufruct could be channeled to the residual beneficiaries like the poor, the needy, or to other public causes for the general good. See Makdisi, G. (1981). *The Rise of Colleges: Institutions of Learning in Islam and the West*. Edinburgh: Edinburgh University Press; Zaid, A. (1986). *The Islamic Law of Bequest*. London:

2.2 Practices of ‘*Waqf*’ in other Traditions: A Borrowed Institution Discourse

The question regarding origin of *waqf* has remained controversial pitting two schools of thought on this issue. On one side of the argument is a team which opinions that *waqf* is a borrowed concept or practice from other civilizations, while on the other end is one which holds that the institution is Islamic, all foreign elements notwithstanding.

A cross section of scholars argues that Muslims borrowed the institution of *waqf* from other civilizations that came into contact with during different epochs in history. This school of thought gives credit to civilizations like the Roman, Greek, Mesopotamia, Jewish, Sassanid, and Buddhism who are alleged to have practiced *waqfs* in different forms before they interacted with Muslims who adopted and ‘refined’ the practice as part of their socio-religious act. This position is captured in the observation by Cizakca (1998:48):

Charitable endowments have a history considerably older than Islam and it is also very likely that Islam may have been influenced by earlier civilizations. Ancient Mesopotamia, Greece, Rome as well as the pre-Islamic Arabs certainly knew of charitable endowments... While Roman origins have been rejected, primarily Byzantine, but also Mesopotamian, Sasanid, Jewish and Buddhist influences have been accepted as plausible.

It is argued that the development of the institution of *waqf* in Islam is formulated along several foreign doctrinal and judicial concepts compounding the view that it is not originally Islamic. The Byzantine practice of *piae causea* is among the ideologies along which *waqf* was allegedly founded.

Under the *piae causea*, Barnes (1986:13-14) argues that, charitable institutions were established in favor of an “anonymous and ever-changing collectivity” of the poor, the aged, orphans, widows, free-born girls, and for the ransoming of slaves. This view is also shared by others (Hennigan, 2004; Macuch, 2004).⁵ Barnes (1986:16) further explains that under the practice of *piae causea*, “the ownership of property dedicated to eleemosynary ends could be possessed by no one, but was given to God, and the fruits of its revenue were assigned to aid mankind.” According to the author, a specific legislation was established in the law code of Justinian (527-

Scorpion Publishing Ltd; Kozlowski, G. (2008). *Muslim Endowments and Society in British India*. Cambridge: Cambridge University Press.

⁵The Babel Civilization is also said to have had similar practice where benefits of some properties were apportioned for the poor and widows. Among Egyptians, such properties were for the welfare of gods, temples, graves of kings, education and cultural services. See El-Daly, M. (2010). Challenges and Potentials of Channeling Local Philanthropy, op. cit.

565 C. E.) that exempted such institutions against the Roman and Byzantine laws which prohibited designating charities to indeterminate beneficiaries as invalid legal entities.

Later developments in the Roman law allegedly saw the category of anonymous invalid legal identities expanded to include institutions and towns giving rise to *legatum sub modo* (indirect legacy). Under this arrangement, a group of persons was accorded legal identity as trustees to whom the testamentary gift was given to administer on behalf of the institution and exercise judicial and legal personality over the charitable foundation (Barnes, 1986; Macuch, 2004). Nonetheless, the contending side that upholds *waqf* as an original Islamic institution faults the *piae causae* trajectory on the basis that Byzantine influences were confined to Egypt. They argue that the practice of *piae causae* did not last to the reigns of the Fatimid dynasty (909-1171 A.D.) who are alleged to have introduced *waqf* in the region (Hennigan, 2004).

Another religious practice associated with *waqf* is the Roman legal concept of *res sacrae* (sacred objects). Under the Roman doctrine of *res sacrae*, Barnes and Hennigan again explain that, there were two levels of jurisdiction - heaven and earth.⁶ *Divini juris* (heavenly jurisdiction) was concerned with sacred objects and phenomena including religious symbols and institutions withdrawn from private ownership and dedicated to gods where they could not be sold, bought, or even alienated (Barnes, 1986; Hennigan, 2004; Bhala, 2011). Different from the Islamic concept of *waqf*, however, in *res sacrae*, Morand, (1910) clarifies that, it was the material subject of offer that was withdrawn from private ownership to *res nullius* (no one but God). It neither included its benefits nor other usufruct bearing properties that could be devoted for their perpetual maintenance and spiritual use. Morand further posits that establishing *res sacrae* required direct permission and requisite statutes from the state (*senatus consultum*). Once an item became under *divini juris*, it was the state that managed it (Morand, 1910, as cited in Hennigan, 2004:54). This is a sharp departure from the institution of *waqf* in Islam where it is the individual on his own volition who establishes it, manages it, or appoints a *mutawalli* to oversee the growth of the institution and channel the usufruct to prescribed beneficiaries and causes.

⁶ The Roman, and similar other connections to *waqf* like the pre-Islamic Iranian law have also been contested by various studies. See Arjomand, S. (1998). Philanthropy, the Law, and the Public Policy in the Islamic World before the Modern Era. In W. Ilchmann, S. Katz, & L. Queen II, (Eds.), *Philanthropy in the World's Traditions* (pp.109-132). Indianapolis: Indiana University Press; van Leeuwen, R. (1999). *Waqfs and Urban Structures: The Case of Ottoman Damascus*. Leiden: Brill.

More so, foreigners and exiles were prohibited from establishing legacies under the Roman laws. To circumvent this prohibition, there arose the practice of *fidei commissum* in which properties were entrusted to trustees who transferred the usufruct to the intended beneficiaries, mostly relatives, for a specified period of time or until their extinction. Thus the corpus became inalienable. *Fidei commissum*, allegedly, resembles *waqf ahli* (also *waqf dhurri*, family or prosperity *waqf*) and was claimed to have been the origin of the institution of *waqf* in Islam. Notwithstanding the apparent similarities, this conclusion is, however, often dismissed as flawed owing to the several differences between *waqf* and *fidei commissum*. According to Schacht (1957), the later is said to have been strictly a post-mortem transaction unlike the former which could take either form – prompt or testamentary (Schacht, 1957, as cited in Hennigan, 2004:55-56). Besides, *fidei commissum* did not envisage any pious cause as residual beneficiary other than to ensure that an individual's progeny was well taken care of upon the death of the endower. A pious religious cause of public charity and *qurba*, whether designated or assumed, is a significant element of *waqfs* in Islam according to the majority opinion of Sunni theologians.

On their part, Perikhanian (1983) and Macuch (2004) trace the origin of *waqf* to the institution of *pat ruvan* (also *ruvanagan*, to the soul) under the Sassanid Persian law of property. Under this arrangement, the scholars explain, a principal property, (non-)revenue bearing as well as (im-)moveable, was endowed 'for the soul' and considered inalienable. The property was then administered by a trustee(s) who channeled its benefits either to the progeny of the endower or some other pious public causes as predetermined by the dedicator in the endowment deed. The pious public benefits continuum ranged from the holding of services, distribution of alms, and provision of meals for festivals to works of social utility such as canals, bridges, or aqueducts and monuments (Perikhanian, 1983, as cited in Yarshater, 1983, vol. 3:2; Macuch, 2004:181-196). And "once declared 'for the soul', the property could not revert to the endower's ownership since it was dedicated for pious goals", adds Hennigan (2004:59-61). The Sassanid *ruvanagan* practice is, therefore, held as a compelling foreign legal precursor of *waqfs* in Islam since it carried with it even the differences between proprietary and usufructory rights.

As a means to wealth distribution in the society, *waqf* is also linked with the concept of charity as explained in different terms in other monotheistic beliefs like Judaism and Christianity. In Judaism, the concept of *zedakah* (charity) is considered as a significant *mitzva* (religious duty)

and a pre-qualification for a pious life. Under the Jewish practice of *hekdesh* (dedicated or consecrated), a property could be withdrawn from private ownership to become perpetually inalienable and managed by an *apotropos* (trustee) appointed by the endower. The *rabbi* (religious leader) or court though, customarily retained the overall supervisory rights of the property whose benefits could be channeled to charitable purposes in the society. It is further believed that *hekdesh* properties were owned by God like those in *waqf* (Stillman, 1998; Hennigan, 2004; Deguilhem, 2008). Among the Byzantine Christians, the Church also got widely involved in the *xenodochia* (charitable institutions) that were concerned with among other services like helping the aged, providing health care, taking care of orphans, and though to a limited extent, for the repair of religious institutions and for the benefit of the clergy (van Leeuwen, 1994:30-33; Lev, 2005).

Therefore, the Byzantine *piae causae*, the Roman *res sacrae*, the Sassanid *ruvanagan* and the various forms of charity among monotheistic beliefs are among legal trajectories traced to various civilizations that allegedly influenced the institution of *waqf* in Islam. Yet, Muslim traditions, opines Kuran (2001:848), hold that “the *waqf* is sufficiently different from each of its pre-Islamic forerunners to be considered a distinct Islamic institution.” In view of this position, we now turn to the argument that seeks to justify the institution as uniquely Islamic.

2.3 Textual and Historical Evidence of *Waqf* in Islam: An Islamic Discursive View

Talal Asad (2009:20) espouses an Islamic discursive tradition as “a tradition of Muslim discourse that addresses itself to conceptions of the Islamic past and future, with reference to a particular Islamic practice in the present.”⁷ In essence, the concept seeks to explain Islam and its religious institutions as lived and negotiated across the *umma* (community of believers) not as fossil set of rules unrelated to the beliefs and practices of the faithful and incompatible with contemporary realities, but as a progressive discourse that relates to the past and the future

⁷ Discursive tradition was suggested as a concept to the anthropological studies of Islam owing to the alleged inseparability of ‘experience’ and ‘tradition’ in the faith vis-à-vis the Western conceptualization of religion and politics. For further discussion, see Asad, T. (1997). *Genealogies of Religion: Discipline and Reasons of Power in Christianity and Islam*. London: The John Hopkins University Press; Asad, T. (2003). *Formations of the Secular: Christianity, Islam, Modernity*. Stanford: Stanford University Press; Anjum, O. (2007). Islam as a Discursive Tradition: Talal Asad and His Interlocutors. *Comparative Studies of South Asia, Africa, and the Middle East*, 27(3), 656-671; Asad, T. (2009). The Idea of an Anthropology of Islam. *Qui Parle*, 17(2), 1-30.

through a present. In view of this, proponents of the institution of *waqf* as uniquely Islamic perceive it as a discursive tradition. Though not textually enshrined in the Qur'an, the institution is attributed to some *hadiths* of the Prophet during the seventh century, (*i.e. past*) which grew progressively through assumed rigid legal forms before reaching its peak in the thirteenth century (Hennigan, 2004). During the last decades of the twentieth century, *waqfs* adopted internal regulation mechanisms against earlier operational and jurisprudential rigidity transforming to a modern institution capable of responding to challenges and demands in relation to charity and wealth distribution in the society (Kuran, 2001), (*i.e. present*) and more significantly, as a religious practice meant for the attainment of *qurba* and *sawab* for the spiritual afterlife (*i.e. future*).

Based on the foregoing, proponents of *waqf* as originally an Islamic tradition are further split into two ideologies – one purely theological and the other academic Islamic scholarship. While the latter group draws and appreciates existing similarities between *waqfs* and various *waqf*-like non-Islamic practices as discussed above, Muslim theologians strictly draw inspiration from traditions of the Prophet; some companions' acts of endowment; acts of individuals and those of other Muslim societies as their major points of reference to the genesis of *waqf* in Islam. Academic Islamic scholarship, as exemplified in Hennigan's study (2004:50), holds the view that trust practices existed among Muslim societies "before the *waqf* treatises came into existence." The generic term *waqf* was allegedly adopted in the first and second-century A.H. Islamic legal discourse in place of a wide range of trust-like terminologies in the Near Eastern cultures including *sadaqa*, *hubs*, *sadaqa mahbusa*, and *habis sadaqa*. The Shari'a is claimed to have adopted these terms and incorporated the practices as it did various other customs that were not antithetical in demonstration of the social heterogeneity of the society. Within this context, academic Islamic scholarship, as summarized in Hennigan (2004:52), concedes that *waqf* incorporated some foreign practices in its body polity though such foreign elements do not necessarily make it to be an alien concept in Islam.

To reconcile the foreign and indigenous trajectories on the origin of *waqf*, Hennigan, suggests the concept of 'unconscious borrowing' of foreign non-Islamic or pre-Islamic practices by Islam. He contends that foreign elements infiltrated the nascent Shari'a when Muslim *'ulama* unconsciously adopted local cultures of the people they conquered in "attempts to bring order" to

the legal discourse (2004:52). The author summarizes the notion of ‘unconscious borrowing’ in the following way:

As a result, [...] there was likely no overarching Islamic law of trusts, but merely a collection of local practices – Roman, Byzantine, Persian, Jewish, and Arab – that all shared some similar features, and almost certainly used different terminologies. The task confronting jurists [...] was how to bring some measure of uniformity to this diverse landscape of trust practices and terminologies. The legal institution these authors devised to bring order to this milieu of trust practices – the ‘*waqf*’- permitted Roman, Byzantine, Persian and /or Jewish practices to enter (perhaps unnoticed) in to Shari’a (Hennigan, 2004:68).

By extension, the espoused view on ‘unconscious borrowing’ partly seeks to account for the existence of foreign elements in the Shari’a not only with regard to *waqfs*, but also to various other socio-economic and cultural practices in justification of the perception of continuity and heterogeneity of the *umma* as having been established before and during Abrahamic (2510-2329 B.H.) times. Most importantly perceived as an incorporative civilization, Islamic traditions recognize the principle of *istihsan* (also *maslaha*, common social good or welfare) where *‘urf* or *‘adat* (local customs) that are not adverse to Islam could be adopted as secondary sources of Shari’a (Stockreiter, 2015:29). As such, *waqf* in its different un-Islamic strands as a concept, could have probably and unconsciously permeated the Islamic tradition. Nonetheless, Hennigan (2004:107) observed that, whereas “the substantive law of *waqf* developed through rationalist discourse, the institution’s cultural (and hermeneutical) legitimacy rested upon the traditions of the Prophet and his companions.”

Muslim theologians on their part draw evidence from historical events before and after the Prophet’s time to argue that *waqf* is originally an Islamic institution. Drawing reference from early Abrahamic Muslim society (*Hunafa’*) in Arabia, it is claimed that some rudimentary type of *waqf* was practiced from which the contemporary form developed (Barnes, 1986; Isin and Lefebvre, 2005). Moreover, both historical and religious texts identify Abraham as a person of immense wealth that he appropriated for the service of God and for the welfare of humanity. The *ka’ba* (house of Allah), for instance, is commonly quoted as a living testimony of Abraham’s works of charity that he built with his son, Ismael, and dedicated it for the worship of one God (Barnes, 1986; Lev, 2005). The Qur’an (2:125) affirms this opinion:

And [mention] when We made the House a place of return for the people and [a place of] security. And take, [O believers], from the standing place of Abraham a place of prayer. And We charged Abraham and Ishmael, [saying], "Purify My House for those who perform *Tawaf* and those who are staying [there] for worship and those who bow and prostrate [in prayer]."⁸

In the above verse, God talks of 'my house' implying the divine ownership of the property as *waqf*. Above all, looked at from the wider definition of *waqf*, the *ka'ba* is a permanent dedication by Abraham (i.e. perpetuity), hence could neither be sold (i.e. inalienable) nor its dedication revoked (i.e. irrevocable), and more importantly, it was dedicated for prayers (i.e. religious cause), (Qur'an 24:36). Thus, the *ka'ba* allegedly carries with it all the necessary prerequisites of a valid *waqf* (Benthall and Jourdan, 2003; Khan, 2008). Through such acts of charity, Abraham is said to have accorded his followers a living example from which they established numerous charities. On the strength of this account with Abraham regarded as the father of Islam, *waqf* is claimed to have existed in Islam since immemorial times.

Barnes also agrees with the above account of Abraham constructing and dedicating the *ka'ba* for charity to be credible as advanced by renowned scholars of *waqf*. In his opinion, however, "such acts as altar building and alms giving more correctly fall within the realm of individual instances of charity, or *sadaka*, and not *vakif*" (1986:6). It is submitted in this study that Barnes' perception of this charity not being *waqf* falls within the exclusive definition that emphasizes some elements in the expense of others. The author does not appreciate the holistic perception of *waqf* as a "religiously motivated behavior combined with or unrelated to altruism translated into practice to assume the different forms of assistance relevant to the needs of the society" (Lev, 2005:144). His repudiation of Abraham's act of *waqf* should, therefore, be understood from his exclusive definition of *waqf* as strictly *a revenue bearing property*. Accordingly, he contends that any "simple open courtyard and sun-dried brick *masjids*" do not qualify to be *waqf* in the first place, hence should not be conceived as being "in need of landed endowments for their support" (1986:7).

The author further asserts that the account of Abraham's act of *sadaka* as being the foundation of *waqf* "is more properly in the realm of belief than historical fact" (Barnes, 1986:6). It is an undisputed maxim that while all *waqf* is *sadaka*, not all *sadaka* is *waqf*. However, in the

⁸ See also Qur'an 72:18; footnote 3 above.

contested account above as corroborated by Qur'an 2:215, Qur'an 24:36, and Qur'an 72:18, Abraham's charity is a living historical reality attracting millions of Muslims across the globe for the annual *hajj* (pilgrimage) rites. Therefore, it carries with it the "embodiment of a life of piety, the key to salvation, and an instrument of repentance and expiation for sins" (Lev, 2005:144). These are spiritual foundations on which the institution of *waqf* is claimed to be built qualifying Abraham's charity as *waqf* and not merely *sadaqa*.

More closely drawn from the formative period of Islam to be the genesis of *waqf* is the concept of lands subject to *fay'* (tribute) as advocated by Bercham (n. d., as cited in Barnes, 1986).⁹ According to Bercham, spoils of war, both *fay'* (also *fai*, property gained without fighting) and *ghanima* (booty) during the pre-Islamic times used to be distributed among the winning side in specific shares with the tribal chief entitled to *khums* (one-fifth) of the entire collection (*Sahih al-Bukhari*, 4:327). Upon the establishment of Islam and subsequent conquest of the Bani an-Nadir, Bani Hawazin, Khaybar, and Fadak, the Prophet is claimed to have deviated from the pre-Islamic norm of distributing booty by dedicating the collection partly for his personal use and for the welfare of the *umma* (Quran 59:7-8; *Sahih al-Bukhari*, 4:153). This trend was upheld by his companions after his demise as illustrated during the reigns of Abu Bakr (r. 632-634 C.E) and 'Umar bin al-Khattab (r. 634-644 C.E) when *fay'* was managed by the *khalifa* (caliph) for the course of God (*Sahih al-Bukhari*, 4:324-326). Therefore, "'*fay'* lands annexed to Islam through force of arms (*'anwatan*) were in effect *wakif* by virtue of their not being divided, but having their revenue restrained for the good of the entire Muslim community", concludes Bercham (as quoted in Barnes, 1986:9).¹⁰

⁹ *Fay'* is explained as booty acquired through surrender to Muslims by invaded territories as was the case of Bani an-Nadir. These properties were centrally managed by the Prophet at the *bayt al-mal* (public treasury) who used them for his family upkeep as well as charity for the cause of God. See Qur'an 59:6; *Sahih al-Bukhari*, 4:153, 325-326; Frenkel, Y. (1999). Political and Social Aspects of Islamic Endowments ("*awqaf*"): Saladin in Cairo (1169-73) and Jerusalem (1187-93). *Bulletin of the School of Oriental and African Studies*, University of London, 62(1), 1-20.

¹⁰ Two options were open to claim ownership of conquered properties: divide them among Muslims or allow the local community to retain ownership but pay land tax (*kharaj*), hence becoming a form of *waqf*. The Prophet, upon conquest of Khaybar, allowed Jews to retain and plough their lands but pay half of the produce to the Muslims before they were expelled to Taima and Ariha during the reign of *khalif* 'Umar bin al-Khattab (See *Sahih al-Bukhari*, 3:522, 524, 527, 531; 4:380). *Waqf* on *kharaj* was also upheld during the reign of caliph 'Umar upon the conquest of the Sawad province in Iraq. There is evidence, though, suggesting that booty used to be divided amongst Muslim warriors even during the period of the Prophet. See *Sahih al-Bukhari*, 4:359-360, 363-366, 375, 378-379; Gil, M. (1998). The Earliest *Waqf* Foundations. *Journal of Near Eastern Studies*, 57(2), 125-140; Sanjuan, A. (2007). *Till God Inherits the Earth*, op. cit., p.400; Kozlowski, G. (2008). *Muslim Endowments and Society in British India*, op. cit., pp.11-12.

It is debatable, however, whether or not *fay'* constituted valid Islamic *waqfs* since *fay'* were allegedly not anybody's private property among the victorious Muslims. Rather, they were owned by non-Muslim subjects in the conquered territories and it was its *kharaj* (land tax) instead that was channeled to the Islamic state for distribution to beneficiaries (Barnes, 1986). According to the preponderant view, consecrated properties must be legally, whether singly or jointly, owned by the endower. Thus, the question of ownership of *fay'* faults the legal trajectory in tracing the origin of *waqf* in Islam. Nevertheless, advocates of the theory assert that as community properties, legal ownership of *fay'* rested with the central authority (i.e. first the Prophet then the caliphs) on behalf of all Muslims. They opine that since the Prophet's (and caliphs) word was law unto itself, his not dividing the lands, which was one of two options of owning appended properties, became a norm in the establishment of *waqfs* for the benefit of the general Muslim public (*Sahih al-Bukhari*, 4:324-326; Hoexter, 1995; Gil, 1998). In essence, the argument that *fay'* revenue benefitted all Muslims subtly suggests that it was communally (i.e. jointly) owned putting into rest the question of legal ownership.

On the extreme end of the Islamic scholarship continuum is a section of Muslim jurists who hold the view that "there is no evidence that such a complex system of appropriating usufruct as a life interest to varying and successive classes of beneficiaries existed prior to Islam" (Cattan, 1984:205). As a matter of fact, this group of jurists is aptly informed of the fact that the Qur'an does not make direct reference to *waqfs*. For this reason, they endeavored to seek for evidence from the text where general references to wealth distribution are made before turning to precise traditions attributed to the Prophet as having established *waqf* in Islam so as to give the practice a textual legitimacy. In one of the various inferences where Qur'an is interpreted to have enshrined the concept of *waqf* as a form of charity, God says:

Righteousness is not that you turn your faces toward the east or the west, but [true] righteousness is [in] one who believes in Allah, the Last Day, the angels, the Book, and the prophets and gives wealth, in spite of love for it, to relatives, orphans, the needy, the traveler, those who ask [for help], and for freeing slaves; [and who] establishes prayer and gives *zakat*... (Qur'an 2:177).¹¹

¹¹ See also Qur'an 2:215; Qur'an 2:264; 270, 280; Qur'an 3:7, 86; Qur'an 3:180; Qur'an 58:12, 13; Qur'an 73:20; and Qur'an 111:92.

In Qur'an 2:215, again, beneficence to charity is foremost for parents and kindred before other deserving cases - the orphans, the needy, and travelers. The 'parents and kindred' category of beneficiaries is further protected in the wealth distribution scheme by Qur'an 4:11-12 in the Shari'ah guidelines of *mirath*. This brings into light the relationship between the concepts of charity and inheritance as manifested in *waqf ahli*. The subsequent section of Qur'an 2:215, - "orphans and the needy and the traveler"- is often interpreted to mean recipients of *sadaqa* that could either take the form of *zakat* or better still, *waqfs* (Barnes, 1986; van Leeuwen, 1999; Hennigan, 2004).

In light of this, the compound noun *sadaqa mawqufa* (immobilized alms) is often used in Islamic theology to mean *waqfs*, demonstrating the close knitting between the parent idea of charity and the several manifestations in which the institution could be practiced and mediated in the community (McChesney, 1991; Singer, 2003; Sanjuan, 2007). Al-Kasani (d.587/1189) also opines that *waqf* is a form of *sadaqa jariyya* (perpetual charity) for the course of God (al-Kasani, 1910, 4:221, cited in Hoexter, 1995:137). This view is enshrined in a Prophetic tradition:

Abu Huraira (may Allah be pleased with him) reported Allah's messenger (Pbuh) as saying: when a man dies, all his acts come to an end, but three; recurring charity (*sadaqa jariyya*) or knowledge (by which people benefit), or a pious offspring, who prays for him (*Sahih Muslim*, 3:14).

The above tradition mentions three forms of perpetual charity all of which could be coalesced in the institution of *waqf* as observed by Cizakca (1998:49):

Muslims needed an institution that would enable them to perform all three of these good deeds. This institution was the *awqaf* which can, indeed, assure ongoing, recurring charity for many years, even centuries, after the death of the founder. It can finance scholars whose lasting works would benefit mankind for a long period and the *sawab* that accrue to them would be shared by the *waqf's* founder who had provided for their sustenance in the first place. Finally the management of the *waqf* can be entrusted to the offspring of the founder so that while, on the one hand, careful and loyal management is assured, on the other, the offspring would pray for the deceased for, thanks to his *waqf*, he or she is not destitute.

In a similar tradition attributed to Muhammad, it is related that during the first year A.H., he wished to purchase a piece of land from the Bani an-Najjar to construct a mosque in Medina. The Bani an-Najjar, however, refused to take the money and gave out the piece of land freely instead

in the course of God (*Sahih al-Bukhari*, 4:32). In the opinion of some Muslim theologians, this dedicated piece of land was in essence a *waqf* in itself. The most recurrent tradition attributed to the Prophet as having established *waqf* in Islam, nonetheless, concerns a second year A.H. episode where ‘Umar bin al-Khattab (577-644 C. E.) is claimed to have sought the Prophet’s guidance with regard to his acquired date-palms at Khaybar (Thamgh). The tradition relates that the Prophet advised ‘Umar “to give it in charity (i.e. as an endowment) with its land and trees on the condition that the land and trees will neither be sold nor given as a present, nor bequeathed, but the fruits are to be spent in charity” (*Sahih al-Bukhari*, 4:26).¹² Among designated beneficiaries of the charity were the kinsmen with some portion also used in the cause of Allah, the emancipation of slaves, feeding the poor, guests, and travelers. This tradition is claimed to have summed up the necessary pillars of a valid *waqf* further augmenting the view that the institution is originally Islamic.

To emphasize the foregoing argument, Muslim theologians cite several other instances when companions of the Prophet allegedly established *waqfs* immediately following the one endowed by ‘Umar bin al-Khattab.¹³ This is evidenced in one tradition attributed to the Prophet in which Abu Talha allegedly gave the Prophet his favorite garden (Bairuha) in Madina. The tradition relates that the Prophet mostly enjoyed the garden because of its shade and cool waters and Abu Talha surrendered it to him following the revelation of Qur’an 3:92 when Allah warned Muslims of not being able to attain piety until they spent in charity what they loved most. The Prophet is,

¹² In other versions of this tradition, the Prophet is alleged to have advised ‘Umar, “If you wish you can keep it as an endowment to be used for charitable purposes”; and “If you like you can give the land as endowment and give its fruits as charity.” See *Sahih al-Bukhari*, 3:895; 4:33-34.

¹³ Debate regarding the question of first (*awa‘il*) *waqf* during the period of the Prophet seems inconclusive with reports from the Helpers (*Ansar*) and Migrants (*Muhajirun*) apparent. Besides the *waqf* by ‘Umar bin al-Khattab, there was allegedly one by Abu Talha al-Ansari who endowed the well of ‘Bir ‘aa’ to his progeny and cousins (*waqf ahli*). Hennigan. (2004), McChesney, (1991) and Sanjuan (2007) point to sources which claim the first *waqf* (in form of *sadaqa*) as having been established by the Prophet himself out of seven walled gardens (*hawa‘it*) in Medina before the fall of Khaybar in 7A.H /629 A.D., from some property willed to him by a Jewish convert, Mukhayriq, who was killed in the battle of Uhud (3. A.H). On a similar note, Qureshi proposes that the house of Arqam in which the Prophet stayed after the declaration of Islam in Mecca could probably be the earliest *waqf* since Arqam endowed the same for his children (1990:4). According to Sanjuan (2007), however, ‘Umar’s *waqf* came to be regarded as the first since it was recorded in all six Sunni collections of *hadiths*. Several other companions are said to have endowed *waqfs* including Ali bin Abu Talib (Yenbo, valley of Q’ara), Aisha, Asma, Um-e-Habib, and Zaid bin Thabit. See McChesney, R. (1991). *Waqf in Central Asia: Four Hundred Years in the History of a Muslim Shrine, 1480-1889*. New Jersey: Princeton University Press, p.7; Hoexter, M. (1998). *Endowments, Rulers and Community: Waqf Al-Haramyn in Ottoman Algiers*. Leiden: Brill, p.7; Gil, M. (1998). *The Earliest Waqf Foundations*, op. cit. pp.125-140; Sheriff, A. (2001). *The Records of the ‘Waqf Commission’ as a Source of Social and Religious History of Zanzibar*. In S. B. Amoretti (Ed.), *Islam in East Africa: New Sources* (p.27). Roma: Herder Editrice E Libreria; Hennigan, P. (2004). *The Birth of a Legal Institution*, op. cit., pp.169-175; Sanjuan, G. (2007). *Till God Inherits the Earth*, op. cit., p. 58; Khan, A. (2008). *Commentary on the Law of Waqf in India (The Waqf Act, 1995)*. Hyderabad, Saraswathi Printers, p.95; El Daly, M. (2010). *Challenges and Potentials of Channeling Local Philanthropy*, op. cit., p. 49.

however, said to have given it back to Abu Talha and advised him to endow it for his relatives. Consequently, he endowed the garden for Ubaiy bin Ka'b and Hassan bin Thabit as posterity *waqf* (*Sahih al-Bukhari*, 4:30).¹⁴

In conclusion, this is but a cross section of the several textual and historical evidences that Muslim theologians cite to demonstrate that *waqf* is originally an Islamic institution. As we have established before, however, both sides of the scholarship divide unanimously agree that the institution, as is understood in the contemporary times, grew rapidly from the seventh century until the thirteenth century when it found its footing in the legal field as an established religious practice in Islam.

2.4 Essentials of *Waqf*: Significant Pillars and the Validity of an Endowment

Conservative interpretations, arguably informed by Qur'an 2:125 and Qur'an 72:18 where God emphasizes divine ownership of *masjids* that are themselves *waqfs*, holds that consecrations are charities for the cause of God, hence *milkiyat Allah* (divine properties of God).¹⁵ In the words of Qureshi (1990:31), "the creation of a *waqf* is essentially based on the legal fiction being that the property vests in God, in perpetuity, but income from the property is permitted to be utilized for certain specified purposes which under the Muslim law are recognized as pious or religious." The causes could be outlined in the *waqf* deed, e.g. for mosque A, or institution B. Under this context, such *waqf* becomes *ahbas mu'ayyana* (purpose-specific *waqf*). On the other hand, *waqfs* could also be generic, e.g. for the benefit or maintenance of the poor, needy, *fi sabil Allah* (in the cause of God), etc.

Once a property is declared as *waqf*, its ownership permanently changes from private to divine and the consecration could not be revoked with a view to withdrawing the property from the divine ownership (Lev, 2005; van Leeuwen, 1999). As such, even in the circumstances when the endower turns out to be the *mutawalli* at the same time, his position remains that of a custodian

¹⁴ See also *Sahih al-Bukhari*, 3:511; 4:15, 33-34.

¹⁵ Muslim theologians, nonetheless, hold divided opinion regarding the question of ownership of *waqfs*. Three positions abound: (a) that ownership of *waqfs* belongs to the beneficiaries. This view is also shared by Shi'a Islam and posits that beneficiaries could alienate the corpus in whatever way they deem fit provided that it does not prejudice the rights of succeeding beneficiaries; (b) the dedicator assumes ceremonial ownership without the power to exercise other privileges associated with private ownership including sale or exchange of the corpus. This is the position held by Abu Hanifa; and (c) the *waqf* falls under divine ownership of God. This is the position shared by the majority of Sunni theologians. See Qureshi, M. (1990). *Waqfs in India*, op. cit., pp.29-30, 97; Lienhardt, P. (1996). *Family Waqf in Zanzibar. Bulletin of the School of Oriental and African Studies*. University of London, 27(2), 95-106.

of the corpus charged with the responsibility of developing and sustaining it to fulfill its designated causes (El Daly, 2010). According to the *hadith* in relation to ‘Umar bin al-Khattab, the property was permanently dedicated to God and could not be sold, mortgaged, given out as gift, or inherited as this would have impeded the aims of the *waqf*. Neither could the corpus be attached to settle debts owed by the *waqif* nor become subject of private ownership due to the law of adverse possession. Thus, a consecrated property is believed to be “in perpetuity, till God inherits it, He who will inherit the heavens, the earth and its inhabitants, for He is the best heir” (Al-Khassaf, undated, as quoted in Sanjuan, 2007:64. See also van Leeuwen, 1999; Hennigan, 2004).

What the endower, however, allegedly gets in exchange for the loss of private ownership (*milk*) of the corpus to God is the perpetual *sawab* during the entire life span of the usufruct of the property, hence, the essence of *sadaqa jariyya*. This emphasizes the view that the further the value of the property is invested for the intended objectives the better as its multiplier effect is believed to greatly benefit the endower until the Day of Judgment (Hoexter, 1998; van Leeuwen, 1999; Tohirin, 2010). Therefore, majority of Sunni Muslim theologians holds that *waqfs* could not be established for a limited period of time. In their opinion, *ta‘abbid* (also *mu‘abbad*, perpetuity) of *waqfs* implies that the aim for which an endowed property is made could not be altered.

The principle of *ta‘abbid* of *waqfs* has, nonetheless, been the subject of debates across the scholarship divide. Opinion is sharply divided between perpetuity of *asl al-mal* and that of *manfa‘a* in relation to the strict adherence of the conditions of the endower vis-à-vis the pragmatic realities of prevailing socio-economic circumstances according to the doctrine of *istihsan*. The preponderant view espouses the position of non-extinction of *waqf* by virtue of expiry of the objective for which it was created. Rather, it advocates for adaptability of *waqfs* to changing circumstances with a view to perpetuating the underlying principle of charity by channeling the usufruct to other deserving causes in the community upon failure of the initial purpose (Cattan, 1984:207; Lev, 2005; Sanjuan, 2007). Therefore, *ta‘abbid* in the majority opinion, requires that both realms (of corpus and benefits) be applied to make it possible to harmonize stipulations of the dedicator and prevailing public realities (*haja* or *darura*) as propounded in the doctrine of *cy press* (as near as possible) that provides:

Where the dedication is to a religious or charitable institution, which in course of time, ceases to exist, the property so dedicated instead of reverting to the grantor or his heirs, would be applied [...] to some other religious or pious institution, similar in character to the one which has failed, or to any other object by which benefit may accrue to human (Qureshi, 1990:132).¹⁶

The popular opinion draws from this narrative to postulate that *waqfs* could not become extinct. However, a revisit to the canon that established *waqfs* clearly reveals that except for inferences, no direct mention of irrevocability is alluded to in the tradition. Nonetheless, understood on the prism of *sadaqa*, *waqfs* cannot be revoked because, “one who takes back his gift (which he has already given) is like a dog that swallows its vomit”, warned the Prophet (*Sahih al-Bukhari*, 3:762, 790-792, 804). A parallel could also be drawn with religious teachings regarding *nadhir* (vows), - what is pledged and consecrated for the service of God must eternally remain as such as explained in Qur’an 3:35-37.¹⁷ Thus, looked at from the wider perspective of consecrated properties, *waqfs* could not be withdrawn from the causes for which they were pledged. At most, this is the opinion widely advocated by the majority of renowned Sunni Muslim jurists including ibn Hanbal (A.D. 780-855), al-Shafi’i (c. 767-820) and the disciples of Abu Hanifa, *imams* Abu Yussuf and Muhammad.

However, according to Abu Hanifa (A.D. 699-767), *waqf* would be deemed null and void when the cause for which it was created becomes obsolete. Hence, failure of the principal purpose, opines Abu Hanifa, necessitates return of the corpus to the endower or his heirs upon his demise (Qureshi, 1990). By implication, therefore, according to Abu Hanifa, a *waqf* could as well become extinct. The *imam* also advances a contrary opinion from the majority that allows the cancelation of an existing *waqf* upon change of economic circumstances by the endower (Qureshi, 1990; Kozlowski, 2008; Banday, 2013). Clearly, he does not accept the idea by the majority on the principle of *cy press* where usufructs of the *waqf* could be used on similar causes in the community.

¹⁶ See Cattán, H. (1984). *The Law of Waqf*, op. cit., p.207.

¹⁷ In Qur’an 3:35, God says; “[Mention, O Muhammad], when the wife of ‘Imran said, ‘My Lord, indeed I have pledged to You what is in my womb, consecrated [for Your service], so accept this from me. Indeed, You are the Hearing, the Knowing.’” The context here was in reference to Mary (Mariam), the mother of Jesus (Isa, A.S), who was consecrated for the service of God. The pledge was not cancelled or the consecrated withdrawn thereafter. Consecrations in the Jewish tradition could also not be withdrawn. It is commanded that; “Whoever states ‘I give such and such an object to charity ...may not retract’”. See Qur’an 2:270-271; Qur’an 19:26; ‘*hekdesh*,’ Encyclopedia Judaica. Retrieved from http://www.jewishvirtuallibrary.org/jsource/judaica/ejud_0002_0008_0_08693.html. (Accessed April, 2016).

Imam Malik (c. 708-795), on the other hand, propagates the view of conditional temporality of *waqfs*. He opines that *waqfs* could be “limited as to time or as to a life or series of lives, and after the expiration of the time or the extinction of the life or lives specified for beneficence, it reverted in full ownership to the *waqif* or his heirs” (Cattan, 1984:207). Under Shi’a Islam, however, until the *waqf* property has already been transferred for administration to the appointed *mutawalli*, it could as well be revoked. This suggests that Shi’a Islam equally espouses some measure of temporality in *waqfs* (Qureshi, 1990).

2.4.1 (In-)alienability of *Waqfs* and *Shurut al- Waqif* (Conditions of the Endower)

The principle of inalienability as advanced by the majority opinion of Sunni theologians implies that since *waqfs* belong to God, no human person should confiscate them with a view to changing their ownership into private establishments. The principle of inalienability, does not, however, in case of revenue-yielding properties, prohibit *istibdal*, *‘ana* or *hikr* of the corpus with a view to improving its input or acquiring a better one to fulfill the wishes of the endower once the original property is ruined or fails to yield sufficient income to sustain itself. Nonetheless, in either of the circumstances, the consent of the *kadhi* (or court) has to be obtained (Qureshi, 1990; Banday, 2013).

Similarly, *waqfs* have, since immemorial times, not been immune to the law of compulsory acquisition by the state. However, the majority opinion of Muslim scholars holds that if *waqf* is alienated under such schemes the proceeds must be re-invested in another property to replace the initial one that would be managed in accordance with the *shurut al-waqif* (Banday, 2013). On consecrating *waqf*, therefore, the endower enumerates how the institution would be managed, disposed of, used, the designated beneficiaries with their respective portions, and other conditions attached to the beneficiaries. Among conditions often attached to beneficiaries include age, gender, and lineage. Others are social status, particularly among females, like being married, single, divorced, or widowed, in case of *waqf ahli*. Some *waqfs* also require the observance of certain rituals aimed at immortalizing the endower. These include recitation of the Qur’an or *mawlid* (commemoration for the birth of the Prophet) where *waqifs* are believed to benefit from

du'as (supplications) made for them during such rites (Shoenblum, 1999; Lev, 2005; Ghazaleh, 2011).¹⁸

Nevertheless, it is the conviction of the majority of scholars that *shurut al-waqif* could be changed (*ta'bid*) if they are perceived to be harmful to the society, beneficiaries, or when not beneficial to the *waqf* itself without necessarily invalidating the endowment (Oberauer, 2008; Powers, 2011). This prevailing view is ostensibly meant to instill a balance between legal theory and socio-economic practical realities of *waqfs*, an undertaking that is also sanctioned by Qur'an 2:180-182 on *wasiyya* (testamentary bequests). In light of the text, it is strongly held that necessary changes could be made to the conditions of the *waqf* with a view to "make peace between parties", and by extension, between specified wishes of the endower and practical needs on the ground.

Included among *shurut al-waqif* that are often disregarded involve investment of the corpus. Conditions prohibiting lease of the corpus beyond a given period of time could be overlooked as circumstances may warrant longer period for economic viability. If on the other hand an endower had appointed his progeny as *mutawalli* but turns out to be ineffective, the *kadhi* reserves the right to disregard this provision and replace him for the benefit of the *waqf* (Makdisi, 1981; van Leeuwen, 1999). Further reasons that may necessitate change in *shurut al-waqif* include loss of the original *waqf* deed; ambiguity of purpose as spelt out in the clauses of the *waqf* deed, where purpose(s) for which *waqf* was established become obsolete; or when the purpose(s) was not mentioned at all. In all cases where *shurut al-waqif* are changed or completely disregarded, the usufruct of the *waqf* could be used for other pious causes in accordance with the doctrine of *cy pres* as held by the majority opinion (Layish, 1983; Sanjuan, 2007; Banday, 2013).

¹⁸ The question of reciting Qur'an and devoting the (spiritual) rewards to somebody else remains contested. A section of scholars hold such rite as void and sufficient reason for the nullification of the *waqf* (or bequest). Ibn Hanbal is said to have held this practice as un-Islamic innovation (*bid'a*) ruling that "bequests for the mere reading of the Qur'an and hiring the readers, as such, causes degeneration towards the merits of the Qur'an, such as, diverting people from pious reading and causing people to read the Qur'an rather for the sake of earning money." Ibn Taimiyya is equally claimed to hold a similar view that "no reward is obtained from reading the Qur'an for the sake of money;" and one cannot, therefore, confer to another person what he could not earn. However, in a *fatwa* (advisory opinion) issued at the Grand Court in Makka in A.H. 1377 (c.1957) regarding the validity of a *waqf* with the provision of hiring reciters of the Qur'an for the immortality of the endower, the recitation requirement was annulled and usufruct channeled to other residual pious causes. See Zaid, A. (1986). *The Islamic Law of Bequest*. Op. cit., pp.54-55.

2.5 Classical Administration of *Waqfs*: The *Mutawallis*, *‘Ulama*, and the *Kadhi*

Essentially, *waqf* is an autonomous enterprise managed by a *mutawalli* appointed by the endower upon its establishment.¹⁹ In the words of El Daly (2010:61), “[*waqf*] is an individual act seeking the consent of Allah or the consent of one’s conscience, and their management remained subject to the choice of the endower by either taking over the *nizara* or by appointing a *nazir*.”²⁰ A *mutawalli* could be an individual(s) or a corporate body (Qureshi, 1990).²¹ Moreover, unless provided for in the endowment deed, “the founder has no legal capacity to dismiss an administrator formerly appointed by himself due to the fact that the beneficiaries’ right to make use of the *hubs* is directly linked to the way it is managed” (Sanjuan, 2007:307).²² In case of eventualities, however, the *kadhi* could dismiss any *mutawalli* “guilty of wrongdoing either as a result of negligence or because he has squandered the revenues under his control” for the good of the *waqf* (Sanjuan, 2007:307; Hoexter, 1995).

It is expected that the *mutawalli* would be a mature person of sound mind and legally responsible, with the capacity to carry out the functions of the office with knowledge and experience. He must be *‘adl* (just), i.e. have an honorable record to preserve the *waqf* “and not to depart from the intentions of the founder or from any rule fixed by him as to the objects of the benefactions” (Qureshi, 1990:240). Like a manager of a commercial enterprise in the case of revenue-bearing *waqf*, the *mutawalli* is further empowered “to do all those acts which are reasonable and necessary for the protection and administration of the *waqf* properties under his supervision” (Qureshi, 1990:264). These include seeking to improve the income of the *waqf*

¹⁹ The title ‘*mutawalli*’ has several generic terms including *nazir*, *qayyim*, *mushrif*, *wali*, *mubashir*, *muqaddam*, and *sahib al-ahbas* which could either be used interchangeably or in reference to different capacities and duties to denote trusteeship. See Makdisi, G. (1981). *The Rise of Colleges*, op. cit., pp.45-48; Sanjuan, A. (2007). *Till God Inherits the Earth*, op. cit., pp.268; 297; 327-336.

²⁰ The endower of a *waqf*, except under the Malik *madhhab* could as well become a *mutawalli* of his *waqf* and merely an administrator without legal ownership of the property. This makes *mutawallis* to be of two types: by inheritance rights (*al-nazir bi’l-asala*) and by stipulation (*al-nazir al-mashrut*) i.e. not a legal heir of the endower. See Makdisi, G. (1981). *The Rise of Colleges*, op. cit., pp.54-55.

²¹ According to the majority opinion, it is illegal for one *mutawalli* of a jointly administered *waqf* to make unilateral decisions. In the long absence or tender age of one of them where affairs of the *waqf* would be affected, the *kadhi* could appoint a temporary replacement until the return or maturity of the initial *mutawalli*. See Zaid, A. (1986). *The Islamic Law of Bequest*, op. cit., pp.126-128.

²² *Imam* Abu Yusuf, though, holds a contrary opinion that whether the *waqif* has provided for or not, the *kadhi* retains the authority to remove the *nazir* when he is proved to be inefficient for the good of the *waqf*. See Qureshi, M. (1990). *Waqfs in India*, op. cit., p.261.

through hire, lease, or charge with the approval by the *kadhi*;²³ protect the property against encroachment; apply the income to the designated objectives of the *waqf*; and where necessary, employ other agents to help him in discharging the administrative responsibilities. For reasons of good management practices, *mutawallis* are also expected to keep proper records and be open for auditing though they could not be compelled to spend the usufruct of the *waqf* in ways not provided for by the endower (Barnes, 1986; Hennigan 2004; Lev, 2005; Kozlowski, 2008).

The Shari‘a does not bar women or non-Muslims from becoming *mutawallis* (Qureshi, 1990). Customary practices have, nonetheless, in most times taken precedence in deciding how the position is filled particularly in favor of male descendants of the endower. This is especially true in patriarchal societies with the view to preserving the management of family wealth in the hands of men. In such cases, appointed *mutawallis* accrue economic and social privileges as they get double shares of the generated revenue both as beneficiaries and administrators.²⁴ The position of *mutawalli* has also been dominated by males where the functions of the office demanded execution of certain spiritual rites. These may include leading prayers, delivering Friday *khutba* (sermon) or sounding the *adhan* (call for prayers) (Layish, 1983; Barnes, 1986; Kozlowski, 2008). Within this context, the position accords *mutawallis* socio-cultural and symbolic privileges associated with the power to decide on the distribution of the revenues and beneficiaries, especially where limited resources are concerned.

The ‘*ulama* and the *fuqaha*’ (jurists) on the other hand hold a very significant position under the Shari‘a for the general wellbeing of *waqfs* in the community. *Waqfs* provided a steady source of income for a large segment of the community of ‘*ulama* and the *fuqaha*’ “who, apart from performing religious duties, had a monopoly on the interpretation of the Shari‘a and accumulated the most influential bureaucratic, judicial, and administrative state offices” (Sanjuan, 2007:419; Kuran, 2001). Since mosques, Qur’an schools, and the *zawiyas* (Sufi orders) were among the major beneficiaries of *waqfs*, it goes without saying that “it is the *fuqaha*’ [and ‘*ulama*] who, by

²³ Despite the sanction of the *kadhi* (courts) being necessary in contracts of lease or rent for *waqfs*, it is opined that if found beneficial, such contracts would not be regarded as invalid even when not sanctioned. See Qureshi, M. (1990). *Waqfs in India*, op. cit., p.269.

²⁴ The Shari‘a does not clearly define the remuneration of the *mutawalli*. He is, moderately though, allowed to draw his, and even that of his friends’ providence from the *waqf*. The position of a *mutawalli* was mostly honorary with occupants working on voluntary basis for unspecified tokens in case of revenue-generating *waqfs*. However, *kadh*is could fix the tokens up to ten percent where endowers failed to provide for them in the *waqf* deeds. See *Sahih al-Bukhari*, 3:507, 895; Barnes, J. (1986). *An Introduction to Religious Foundations in the Ottoman Empire*, op.cit.; Qureshi, M. (1990). *Waqfs in India*, op. cit.; Kozlowski, G. (2008). *Muslim Endowments and Society in British India*, op. cit.

virtue of their knowledge in the cultural and legal realms, monopolized the religious and educational functions performed in those institutions” (Sanjuan, 2007:420). Such institutions became the conduits through which the *‘ulama* and the *fuqaha*’ greatly enjoyed the usufruct of *waqfs* while some even became dedicators themselves.

The *kadhi* could as well be appointed by an endower as the first *mutawalli* apart from bearing witness to the endowing process or prepare the *waqf* deed for an illiterate endower. The *kadhi* could further assume *mutawalliship* if the post fell vacant without predetermined provisions on how it was to be filled, or when the beneficiaries of the *waqf* included the indeterminate legal entities, i.e. the poor, ill, or the general Muslim public. Once the *kadhi* assumes *mutawalliship*, he also retains the final decision on determining the deserving among beneficiaries and their relative portions, unless initially provided for in the *waqf* deed (Makdisi, 1981; Hoexter, 1995; Sanjuan, 2007). Thus, in deciding who and how much to give at any given point and time, *waqfs* accorded the *kadhi* a symbolic and material power and authority over a wider socio-religious constituency of Muslims.

As a matter of fact, the Shari‘a does not empower a *mutawalli* to commit to commercial contracts that could ‘alienate’ *waqfs* like leases. It is the jurisdiction of the *kadhi* to sanction or undertake any such contracts necessary for the good of the *waqfs*.²⁵ Besides, from a legal perspective as an authoritative source of Islamic jurisprudence, all disputes related to *waqfs* fell within the *kadhi*’s jurisdiction. He settled disputes between *mutawallis* and beneficiaries with regard to their inclusion or exclusion, and clarified legal clauses relating to the functionality of *waqfs*. These included, but not limited to, transfer of revenues between endowments and use of revenues on pious purposes vis-à-vis prevailing community needs, and recovering illegally alienated *waqfs* (Makdisi, 1981; Sanjuan, 2007).

Such was the role that *kadhis* and, generally, the *‘ulama* held in relation to *waqfs* in Islam that accorded them an expansive social, economic, and ‘symbolic capital’ in the community. Looked at from a different perspective, however, it ought to be appreciated that *kadhis*, as judicial

²⁵ The Shari‘a allows intra-*waqf* borrowing, i.e. *tasrif* (also *sarf*) among mixed or charitable *waqfs*. *Waqf* development loans in the contemporary times could also be secured through Islamic commercial banks as well as the two subsidiaries of the Islamic Development Bank (IDB) - the World *Waqf* Fund (WWF) and the *Awqaf* Properties Investment Fund (APIF). See Makdisi, G. (1981). *The Rise of Colleges*, op. cit.; Sanjuan, G. (2007). *Till God Inherits the Earth*, op. cit.

officers, were always part of the government and their independence could not be taken for granted. To a larger extent, it was *kadhis* who were used by some rulers to usurp control and administration of *waqfs*. In Egypt, for example, state control of *waqfs* started as early as A.D. 737 during the reign of the tenth Umayyad *khalifa* - Hisham bin Abd al-Malik (691-743 A.D.) when the management was assigned to a state department, *diwan al-awqaf*, at the behest of *kadhi* Tawba b. Namir al-Hadrami (Rashid, 1978; Sanjuan, 2007). This was in addition to his judicial tasks of settling civil and criminal disputes with a view to ensuring that usufruct of *waqfs* were channeled towards the designated purposes.

Similar trends were also noted in the Samanid Empire (A.D. 819-999) where a *diwan al-awqaf* was established (Rashid, 1978). By the reign of Abu Tamim Ma'ad al-Mu'izz (953-975 C.E.), the Fatimid dynasty ordered the complete handing over of *waqfs* and their related records to the state treasury. The state hence forth edged out the *mutawallis* to directly manage *waqfs* with beneficiaries and the state sharing the usufruct.²⁶ Neither was the situation different during the reign of the Ottoman Empire where the department of *waqf* was elevated to ministry of Imperial Religious Endowments during the reign of Sultan Mahmud II (1808-1839). Its main mandate was to register, control, and manage *waqfs* thereby, strengthening state grip over the institution (Barnes, 1986; Lev, 2005; El Daly, 2010).

There are three paradigms adopted in explaining the deviation from classical administration of *waqfs* by individual *mutawallis* and *‘ulama* to state control: First, it is alleged that government takeover and control of *waqfs* was at times necessitated by the need to reign on inept and corrupt *mutawallis* and *kadhis*. The establishment of the ministry of Imperial Religious Endowments during the Ottoman Empire, for instance, was born out of such necessity as summarized by Barnes (1986:102):

...it was charged that the *kadis* would give judgments both for and against litigants in some cases. What is more, they would recommend for office both successors and predecessors of religious posts, issue statements that were contradictory to one another, and charge exorbitant fees as bribes to appoint unqualified persons to religious offices...

²⁶ On state control of *waqfs* during the Abbasid Caliphate (A. D. 750-1258) by the Buwayhids, see Kozlowski, G. (2008). *Muslim Endowments and Society in British India*, op. cit.

With inept and inefficient *kadhis*, justice was not only a preserve of the highest bidders, but occupation of the positions of *mutawalli* by unqualified cronies also became the norm contrary to *shurut al-waqif* (van Leeuwen, 1999). This gross misconduct amounted to auctioning *waqfs* to people who were ready to pay high prices, consequently, turning the institution to a private property enterprise. It was presumed laudable under such circumstances, therefore, for the state to institute strict control and supervision of the administration of *waqfs* by requiring that *mutawallis* submit periodic reports to the state office, carry out quarterly auditing of office records and personal accounts. *Mutawallis* were also threatened with further investigation into their conduct and possible auction of their private properties to recover stolen *waqfs* should claims of misappropriation be proved against them (Barnes, 1986).

Secondly, state involvement and supervision of *waqfs* was justified in instances where aims of the *waqfs* were closely related to some of the primary responsibilities of the state like provision of health care, education, housing, and other social-welfare services. Under such situations, therefore, state control of *waqfs*, particularly where the official line between *din* (religion) and *dawla* (state, politics) was unclear, was necessary ostensibly to defend the interests of the general public. This was evident in Persia, Egypt, and the Ottoman Empire (Hoexter, 1995, 2002; Sheriff, 2001; Sanjuan, 2007). Thus, where governments were involved in *waqf* affairs under this pretext fit into the role as part of their obligations as legitimate political establishments ‘concerned’ with the welfare of the citizenry.

Thirdly, state involvement in *waqfs* was perceived as a conscious political strategy aimed at stemming the rising popularity and independence of the *‘ulama* and the general Muslim community. Among colonial governments as manifested in British Zanzibar, India, and Palestine; British East Africa Protectorate (1888-1963) as established by this study; French Algeria, Syria, and Lebanon; and the Italian colony of Libya (1911-1941), the underlying reason was, arguably, to consolidate political power by controlling the economic mainstay of the *‘ulama*, *zawiyas*, and the diverse groups of beneficiaries (Deguilhem, 2008; Medici, 2011). Significantly, it also accorded Muslim political establishments an opportunity to use this religious institution to legitimize political authority and demonstrate its responsibility to the citizenry as it was the case in the Ottoman Empire from 1826. Powers (1989:538) summarizes this position in the following way:

In pre-modern times, the endowment system had been controlled by Muslim religious scholars (*ʿulama*), who were the primary beneficiaries of public endowments and who, in their function as judges, oversaw the proper functioning of both public and family endowments. The endowment system had provided the *ʿulama* with an extensive economic base that made them largely independent of Muslim rulers. During the 19th century, however, the religious scholars came in to conflict with Muslim and non-Muslim rulers who wanted to weaken the power of the *ʿulama* and gain access either to revenues generated by religious endowments or to endowment property itself.

Although basically a religious institution, the economic potential of *waqfs* could not, therefore, go unnoticed by other interested parties like the state. The material assets accruing from the various *waqf* transactions offered a significant ‘economic, social, and symbolic capitals’ as well as a spiritual symbol that the political authorities could not easily neglect for the enhancement of their public image and policy (Kozolowski, 1996, 2008; Arjomand, 1998; van Leeuwen, 1999).

2.6 A Brief History on the Classification of *Waqfs* in Islam

It is debatable as to when and where formal attempts to categorize *waqfs* in Islam begun, or if it was necessary in the first place to do so. This is because, as Anderson (1959:154) posits, “classical texts on *waqf* make no distinctions whatsoever between what are now termed ‘charitable *waqfs*’ on the one hand and ‘family *waqfs*’ on the other. Both, alike, were regarded as perfectly valid.” Concurring with Anderson, Baer (1969) and Hoexter (1995) hold that classification of *waqfs* is indeed a later development in the institution aimed at highlighting the underlying differences between initial beneficiaries of individual endowments. In their view, efforts to categorize *waqfs* were informed by Western legislations and ideologies (Hoexter, 1995:141; Baer, 1969).

Hoexter, Anderson, and Baer among others, further argue that categorizing *waqfs* on the bases of beneficiaries is misleading as beneficiaries tend to straddle between the various types of *waqfs*. As a matter of fact, beneficiaries cutting across several *waqfs* are a feature regarded as reminiscent with the institution since earliest times. Conversely, *mutawallis* could end up disregarding *shurut al-waqif* in relation to purposes of the *waqf*. Thus, they observe that, it is the aspect of perpetuity that necessitates the apparent lack of differences in *waqfs* since to maintain this requirement, all *waqfs* must designate the indeterminate poor and needy as ultimate

beneficiaries. Consequently, this makes the different types of *waqfs* to have no legal differences (Baer, 1969; Gil, 1984, 1998; McChesney, 1991; Hoexter, 1995).

Lev (2005) identifies four distinct forms of *waqfs* based on the types of properties as adopted during the period of Mamluk Egypt. First was the *al-rizaq al-ahbasiyya* (endowed agricultural land) mainly created from approximately 130,000 *faddan* (acres) in the rural territory. These *waqfs* were administered by a *nazir* appointed among the civilian notables by the dynasty and supported mosques and *zawiyas*. Second was *al-awqaf al-hukmiyya*, normally administered by the chief Shafi'i *kadhi*, consisting of revenue-bearing estates in the towns of Fustat and Cairo. These were designated for the ransoming of Muslim prisoners of war, maintenance of the two holy mosques of Mecca and Medina, and other charitable purposes.

At third position was *waqf ahli* administered either by *mutawallis* appointed by the dedicator, the *kadhi*, or the Sultans. This type of *waqf* departs sharply from the above classification criterion as is based mainly on purpose and designated beneficiaries rather than endowed properties. Proceeds of *waqf ahli*, whose sources of revenue are not clear, mostly benefited the endower's progeny, religious, and educational causes. Finally, there was also *waqf al-turaha* established for the provision of burial rites of the indigents in the society. The first of such *waqfs* in Egypt is claimed to have been established by the Baybars before being common during the Mamluk period. Such social services were found mostly in hospitals including the eleventh century Samarkand and thirteenth century Mansuri hospital in Cairo (Lev, 2005).

Along the East African coast, the first formal classification of *waqfs* is believed to have been undertaken by *shaykh* Ahmad b. Sumayt (1861-1925), the Shafi'i *kadhi* of Zanzibar (Oberauer, 2008). On his part, *shaykh* Sumayt classified *waqfs* into private (*waqf al-khassa*) and public (*waqf 'amm*) continuum.²⁷ While the former catered for the endower's descendants and dependants, including manumitted slaves, concubines, and religious institutions like mosques and *madrasas*, the later was meant for the support of the poor in the society. At times, however, strict demarcation between the two types of *waqfs* was not observed as demanded in accordance

²⁷ Hoexter argues that these distinctions existed since earliest times as mentioned in the works of Mawardi though they were not strictly different types of *waqfs* according to beneficiaries as propounded in later studies. Rather, they involved how and who administers the *manfa'a* of the *waqf* in relation to the claims of God and those of the community. See Hoexter, M. (1995). *Huquq Allah and Huquq al-Ibad as Reflected in the Waqf Institution. Jerusalem Studies in Arabic and Islam*, 19, 133-156 (here, pp.140-141).

with the endower's wishes, further blurring the differences between the two categories (Oberauer, 2008). The majority of contemporary academic discourses, however, classify *waqfs* as indicated below:

2.6.1 *Waqf Dhurri* (Family or Private *Waqfs*)

Also known as *waqf ahli* or *waqf al-awlad*, these consecrations are established to cater for the maintenance of the endower's progeny with a provision to benefit the indeterminate *masakin*, *fuqara*, or other public worthy causes upon extinction of the family chain (Deguihem, 2008). In the several traditions attributed to the Prophet encouraging people to provide for their progeny, one typically stands out advising:

...it is better for you to leave your inheritors wealthy than to leave them poor begging others, and whatever you spend for Allah's sake will be considered as a charitable deed even the handful of food you put into your wife's mouth...(Sahih al-Bukhari, 4:5).

The moral teaching of this tradition informing establishment of *waqf dhurri* is that providing for one's family is a revered religious obligation and a form of charity that draws one closer to God. Among properties that were frequently endowed for the maintenance of the family include immovable possessions like agricultural lands, buildings, and plantations. Contrary to the majority opinion, however, the Hanafi *madhhab* requires that the endower provides for an eternal public cause as residual beneficiary upon extinction of the progeny as a prerequisite for validity of the consecration (Layish, 1983:4). The practical reality is, nonetheless, that the possibility of such corpus passing over to the benefits of the general poor and needy or some other charitable causes for the interest of the general public could be very slim, almost non-existent. This is because *waqifs* often stipulate how benefits should trickle down from one *ta'qib* (generation of descendants) of the endower to the other, including the yet to be borne, until all the beneficiaries in this long chain have been exhausted (Sanjuan, 2007; Powers, 2011).

According to Abu Hanifa, an endower could as well designate himself as a beneficiary of the family *waqf*.²⁸ *Imams* Abu Yusuf and Muhammad (Abu Hanifa's disciples) and the Maliki

²⁸ The *Ithna' Ashari* sect (Shi'a Islam) is also not in favor of the endower being a beneficiary. The validity of family *waqfs* became a subject of protracted court battles in India in 1894 owing to the long chains of beneficiaries making the charitable cause almost non-existent. This was, however, settled by the passing of the *Waqf Validating Act* of 1913. See Qureshi, M. (1990). *Waqfs in India*, op cit., pp.83-84; Khan, A. (2008). *Commentary on the Law of Waqf in India*, op. cit., pp.103-104.

madhhab, nonetheless, object this view. In the majority opinion, therefore, a provision in the *waqf* deed according the endower a share of usufruct renders the *waqf* invalid (Makdisi, 1981; Layish, 1983).²⁹ To circumvent the prohibition of an endower benefitting from his own *waqf* as opposed by the majority opinion, endowers occasionally dedicated the usufruct of *waqf ahli* to their minors or unborn children. This in turn accorded them the opportunity to remain as custodians, hence attaining unlimited access to the *waqf* until the birth and or upon maturity of the assigned beneficiaries (Layish, 1983; Powers, 2002).

Significantly, endowers were morally obliged not to exploit *waqf ahli* to discriminate among heirs as beneficiaries of *waqf* or even give undue advantage over others (*Sahih al-Bukhari*, 3:760). Accordingly, family endowments created in favor of males to the exclusion of females are abhorrent and could be invalidated according to the majority opinion of Sunni theologians (Powers, 2011). There are, however, various strategies employed by *waqifs* to circumvent moral and religious prohibitions in using *waqfs* to the disadvantage of descendants. A *waqif* could infuse equality between genders on the distribution of the usufruct of family *waqf* contrary to the Qur'an guidelines on inheritance and preponderant view on validity of *waqfs* by renowned Muslim theologians. By designating the distribution of usufruct of *waqf* "in equal parts" between the beneficiaries, he clearly refutes the divine guidelines in *ilm al-faraid* (law of inheritance) requiring that to "the male the like of the portion of two females" (Qur'an 4:11-12).³⁰

Waqifs could also choose to discriminate between beneficiaries (i.e. to make the *waqf* exclusive), by employing certain measures including: (a) privileging the males in administering the *waqf* where they would have double shares as wages and shares of beneficence; (b) omitting females from the chain of beneficiaries; or (c) putting a conditional clause to females' shares, e.g. providing that they shall benefit only if they do not marry, or upon divorce, or being widowed; and (d) excluding the daughters' children to prevent the family wealth from trickling to the 'outsiders'. According to the Malik *madhhab*, however, unless specifically mentioned by the endower, preference to one gender over the other is an exception rather than a rule in the

²⁹ Shi'a Islam allows a dedicator to be a beneficiary of his *waqf* if he provides for the poor and later becomes impoverished himself. See Qureshi, M. (1990). *Waqfs in India*, op. cit.

³⁰ *Waqifs* could also invoke such phrases as *thumma* (thereafter) and *awwalan fa-awwalan* (one generation after another) in the *waqf* deeds to prohibit the progeny from sharing but draw the usufruct following each generation. They could, nonetheless, use *waw* (and) to indicate concurrence in the drawing of usufruct between generations of beneficiaries. See Powers, D. (2011). *The Development of Islamic Law and Society in the Maghrib: Qadis, Muftis and Family Law*. Burlington: Ashgate Publishing Ltd.

institution of *waqf*. Equality of gender in the sharing of usufruct of *waqf ahli* has to be maintained in accordance with the Prophet's traditions (Sanjuan 2007; Powers 2011).

2.6.2 *Waqf Khayri* (Charitable) and *Mushtarak* (Mixed) *Waqfs*

Endowers of charitable *waqfs* usually dedicate their usufruct to public causes or institutions from which they are believed to benefit from supplications made for them by the beneficiaries in return. Beneficiaries of *waqf khayri* could, therefore, range from the indeterminate disadvantaged social groups like the *masakin*, *fuqara*, and socio-religious groups inhabiting certain regions in expression of the endower's attachment with them. Others could be public welfare institutions or projects such as education, health care, *masjids*, and road networks. Often included also are welfare programs like *iftar* (meal at the end of fasting day), sponsoring of *hajj* rites, burial rites, and organizing for marriage among others (Hoexter, 1998; Lev, 2005; Deguilhem, 2008).

The beneficiaries' base under *waqf khayri* is thus, 'the indeterminate legal entity' enabling widening of the family circle and strengthening the social fabric of the *umma* (Ghazaleh, 2011:8-9). As such, honest disposition of the usufruct to the greater public would, undoubtedly, rely on the *mutawalli* or it is otherwise susceptible to abuse. To avoid such abuses, *mutawallis* often zero in the beneficiaries base and distribute the usufruct among a few deserving cases, which according to some jurists, are "sufficient to discharge the executor from the duty related to such bequests" (Zaid, 1986:99). This analogy is said to be informed on a *fatwa* by *shaykh* Ibn Duhaish, head of the Grand Court of Makka (A. H. 1377) which provides:

If a person makes a *waqf* (or bequest), with its revenue defined to be spent on the poor and needy people, and if among the children of the dedicator one is found to fit such a description, he or she is more entitled to it than the known poor or needy. Hence, he is to be given only the amount considered to suffice his or her need (as quoted in Zaid, 1986:99).

Waqfs could also be consecrated simultaneously as *mushtarak* (mixed, i.e. *dhurri* and *khayri*) on specified proportions as identified by the endower (Powers, 1989; McChesney, 1991; Deguihem, 2008). Thus in predetermined shares, beneficiaries could range from family members of the endower to public welfare institutions within or outside the endower's geographical region of abode. Included among beneficiaries could also be the indeterminate poor of the two holy cities

of Mecca and Medina as an expression of religious attachment with the two in the Muslim world (Hoexter, 1998; Leeuwen, 1999).³¹

2.7 Purpose and Objectives of *Waqfs* in Islam: The Spiritual Motivation

The underlying purpose for establishing *waqfs* is, ostensibly, to respond to the numerous divine calls in the Qur'an and Prophet's traditions to relieve the economic hardships of the less fortunate in the community. By doing so, therefore, it is presumed that one aligns himself with the divine teachings so as to acquire *sawab* and *qurba* from God by appropriating the established charity as a means rather than an end in itself. In the several such divine calls, God says:

They ask you, [O Muhammad], what they should spend. Say, "Whatever you spend of good is [to be] for parents and relatives and orphans and the needy and the traveler. And whatever you do of good - indeed, Allah is knowing of it." (Qur'an 2:215).

While encouraging believers to seek divine grace, God is at the same time warning against selfish accumulation of wealth without regard to the economically disadvantaged in the society. He warns such defaulters of dire consequences where "their necks will be encircled by what they withheld on the Day of Resurrection" for being irresponsible with what had been entrusted to them weakening the social fabric of the *umma* (Qur'an 3:180; *Sahih al-Bukhari*, 2:485-486). Within this context, therefore, establishing *waqf* becomes "a worthy moral gesture and piously religious act" (Doumani, 1998:15).

Such demonstration of individual piety could be discerned in the *waqf* deeds as "most commonly, the founder indicates that he or she is seeking the face of God the Almighty and the abundance of His momentous reward" (Powers, 2011:384). As a matter of fact, the urge to seek the pleasure of God is not a preserve of any socio-economic group of believers in the community in the sense that, even a ruler who established *waqfs* "never did so as a representative of the

³¹ Another type – *waqf nuqud* (cash *waqfs*) relies on money, whether cash, shares or government promissory notes, as its corpus. The corpus is lent out in a business contract called *mudaraba* that attracts a percentage fee as profit which is channeled to the designated beneficiaries as directed by the endower. See Mandaville, J. (1979). Usurious Piety: The Cash *Waqf* Controversy in the Ottoman Empire. *The International Journal of Middle East Studies*, 10, 289-308; Suhrawardy, A. (1911). *Waqf* of Movables. *Journal of the Asiatic Society of Bengal*, 7, pp.342-358; Hoexter, M. (2002). The *Waqf* and the Public Sphere. In M. Hoexter, S. Einsstadt & N. Levton N (Eds.), *The Public Sphere in Muslim Societies* (p. 126). New York: State University of New York Press.

realm. His act of endowment, like that by anyone else, was the act of a private individual”, opines Hoexter (2002:121). This view is also shared by the study as established among consecrations by former *liwalis* and *mudirs* in Kenya’s Muslim community.

The desire to seek *sawab* and *qurba* through endowments is also not restricted to Islam. Religious minority groups like Jews and Christians in the predominantly Ottoman Muslim society, for instance, are claimed to have established ‘*waqfs*’ because “charity and pious endowments were concepts shared by the three monotheistic religions” as a way of communicating with God (Lev, 2005:53). Jews (like those in Qayrawan, Tunisia) and Christians (in medieval Egypt) allegedly established and managed ‘*waqfs*’ that benefited their individual progenies, the indeterminate poor public, their religious institutions as well as the clergy (van Leeuwen, 1994:30-33; 1999; Macuch, 2004; Lev, 2005). Neither is the religious motivation restricted to the male gender as established by Doumani (1998). The author observed in his study, for instance that, forty seven per cent of *waqfs* in Tripoli and between twenty five and forty per cent in Istanbul, Cairo, Aleppo, and Jerusalem were established by women during the period 1800-1860.³²

Waqfs fit in the vast purview of charity, and *sadaqa jariyya* in particular. This partly explains the provision for social welfare causes or religious rites by some endowers of *mushtarak* and *waqf khayri* where beneficiaries would perform supplications for them (Doumani, 1998; Ghazaleh, 2011). This was also observed by the present study as contained in some of the reviewed *waqf* deeds. In a nutshell, the spiritual viewpoint informs the principal reason for consecrations. Seeking *qurba* and *sawab* was encapsulated in the endowments whether by ensuring that one’s progeny would be catered for upon his demise (in the case of *waqf ahli*); or the non-revenue bearing religious institutions and causes would function uninterrupted for the service of the community (in the case of *waqf khayri*); or both (*waqf mushtarak*). It would be erroneous, nonetheless, to deny that *waqfs* could be used for various socio-political and economic reasons by different actors in the society since “politics and religion were not separate spheres but had an intricate entanglement” in the majority of Muslim societies (Lev, 2005:28). As Hennigan (2004), however, opines such circumstances should be viewed within the perspective of *uses* rather than

³² On distribution of endowers by gender in Syria, see Doumani, B. (1998). Endowing Family: *Waqf*, Property Devolution, and Gender in Greater Syria, 1800-1860. *Journal of Society for Comparative Study of Society and History*, 19(52), pp.3-41; Sanjuan, G. (2007). *Till God Inherits the Earth*, op. cit., p.95.

essence of *waqfs*. Taking cue from this background, we thus, in the following section of the discussion, seek to highlight the historical uses of *waqfs* among various Muslim communities.

2.7.1 Politicization of *Waqfs* in Islam

The appropriation of *waqfs* as a political tool was manifested in two perspectives: establishing *waqfs* to legitimize political authority as charitable and concerned with the public welfare or use existing *waqfs* to control the *‘ulama* and by extension, the *umma*, by appointing the former as administrators that political elites could manipulate. For instance, “the Fatimids, the Ayyubids after them, and the Mamluks non-native dynasties, employed pious endowments as a means of cultivating an image of themselves as legitimate rulers, also supported by the creation of *madrasas* and hospitals that would foster the image of the ruling family as philanthropic monarchs,” argues Sanjuan (2007:410).

Significantly, appropriating *waqfs* as an economic tool for political ends was not a preserve of the ruling class, but also those with immense wealth with a view to gain entry into and negotiate the political field. Expounding this view, Kozłowski (1996:203) notes:

...individuals controlling surplus wealth who possessed or aspired to social, cultural and political prominence established endowments as a way of expressing as well as preserving social influence [...] When the *ra’is* built a mosque, it was usually located within his home compound and served needs of his own retinue [...] the communities activities of prominent men and women.

Religious minority groups like the Jews and Christians in the predominantly Ottoman Muslim society were also alleged to have established ‘*waqfs*’ as a means to political legitimacy and identity (van Leeuwen, 1994, 1999; Doumani, 1998; Lefebvre, 2005; Deguihem, 2008). To such minorities, endowing and managing their ‘*waqfs*’ “by applying to the Shari‘a court, basing their applications on Shari‘a” accorded them the economic and social wherewithal to contribute to the socio-cultural welfare of the community as a block (Reiter, 1996:34). This in turn made them conspicuous and assertive as socio-political communities than it would have been were they to act as individual adherents. This suggests that it is not only individuals who could appropriate *waqfs* for political purposes, but also minority socio-ethnic and theological groups within the Muslim society as was established by the present study among some Asian migrants in Kenya.

A cross section of scholars, however, holds the view that the line between religion and politics in Islam has always been blurred (Sheriff, 2001; Hoexter, 1998, 2002; Mwakimako, 2007). Eickelman and Piscatori observed that, there is a tendency to claim the inseparability between *din* and *dawla* in Islam. In their opinion, this was contingent on the belief that “religion and political power needed to be combined in one office to allow Shari‘a implementation and protection of the *umma*” (2004:46). In this context, therefore, it becomes impossible or even unnecessary at times, to ascertain with clarity the primary objective of a believer, especially among the ruling elites, when undertaking a religious act involving charity. This is demonstrated in a study by van Leeuwen on the thirteenth century Damascus under the Ayyubid. Accordingly, he maintains that endowments established by members of the ruling circle, were appropriated “to accord spiritual legitimacy to the policies of the ruling elites, express their personal inclinations, or even reflect official state ideology as all the while they remained covered under the veneer of religion” (1999:97-101).

The view was further compounded by sultans who established *waqfs* or removed from the direct control of individual *mutawallis* those already established *waqfs* that produced considerable income and supported certain religious rites like *hajj* and *zawiyas* by appointing administrators on the basis of theological dispositions. Consequently, as Makdisi (1981:39; van Leeuwen, 1994) observed, *waqfs* enabled the “control of the popular masses by having their religious leaders in one’s pay.” Corroborating this view is Barnes (1986:43) who submits that “a significant majority of *waqfs* during the 18th century Ottoman caliphate were founded by the ruling class with those endowed by the *reaya* accounting for only ten percent.”³³

The argument also finds credence in the establishment of ministries and departments in-charge of *waqfs* across Muslim governments and invading colonial powers like the British East Africa Protectorate as established by the present study. These state bodies were managed by staff appointed by the rulers charged with the mandate of ensuring that control of *waqfs* remained under close imperial supervision (Barnes, 1986; Lev, 2005; Medici, 2011). As a result, almost every educational institution, health care facility, mosque, and orphanages, particularly, around the Ottoman cities, that were established on *waqfs* became under state control. Within this

³³ Barnes explains ‘*reaya*’ as consisting of the Muslim and non-Muslim peasantry and merchant class of citizens in the Ottoman Empire who formed the bulk of the population then. See Barnes, J. (1986). *An Introduction to Religious Foundations*, op. cit. p. 43.

context, it was opined that “the foundation of *waqfs* by the examples of the ruling family should be seen as a deliberate policy to enhance the grip of the ruling elite on the urban infrastructure” (Isin and Lefebvre, 2005:15).

As life in the political sphere became unpredictable with those falling out of favor losing their fortunes, some Muslims allegedly consecrated *waqfs* to protect their wealth against confiscation. “By dedicating his estate as a family *vakif*, a government official could place his property in a condition of untouchability for the enjoyment of his family and his posterity,” posits Barnes (1986:16-17). The argument is also supported by research findings of Isin and Lefebvre (2005), that between ninety five and ninety eight percent of all forms of *waqfs* in Tripoli and Nablus respectively from 1800 to 1860 identify the endower as the first *mutawalli*. Based on these observations, the authors conclude that *waqf* as an institution, offers a dedicator a “protective shield against imperial confiscation while obligating the founder for benefaction” (2005:14).

The overwhelming incidences where *waqfs* were appropriated as a tool for entry in to and negotiation in the political sphere is not, however, in denial of several other *waqfs* by members of the ruling circle that could have been solely established for the salvation of individual souls as shown in the works of Singer (2003) and Lev (2005).³⁴ The two authors assert that in the majority, if not all of the Muslim political establishments, women and eunuchs were the least expected to hold political offices. This was demonstrated in the *waqfs* of “the mother of Abbasids caliph Harun al-Rashid (786-809), and his wife, Zubayda; Khatun Safwat al-Mulk, mother of Duqaq; the Seljukid prince of Damascus; and wife of Tughtakin, the powerful Atabek and ruler of Damascus” (Lev, 2005:31). Other *waqfs* were those by Safiye Sultan, wife of Murad III (1574-1595) and mother of Mehmed III (1595-1603) in Eminönü, Istanbul (Singer, 2003). Also making it to the list were *waqfs* of the eunuchs like Masrur and Husam al-Din Lu’lu at the Fatimid palace and Fa’iq from the Abbasid caliph al-Mu’tamid (870-892) (Hathaway, 1998; Lev, 2005; Sanjuan, 2007). These represent the exceptions within the ruling circles whose *waqfs*

³⁴ The term ‘ruling class’ was used to denote people and families that had political authority. However, not all people within this class wielded political power, for instance slaves, eunuchs, and women who belonged to the ruling families. These people, with or without political power, could thus be put together in a broader class of the ‘ruling circles’. See Lev, Y. (2005). *Charity, Endowments, and Charitable Institutions in Medieval Islam*. Florida: University Press of Florida, p.29.

could not be satisfactorily explained by political motivations making the perception that the consecrations were solely appropriated for political ends untenable.

The foregoing argument on the use of *waqfs* as a means to protecting wealth against confiscation elicits two significant considerations: first is the composition and political culture of the Mamluk and Ottoman societies. Apart from being predominant Muslim societies, the prevailing political culture allowed victors to confiscate private properties from their victims exposing them to social, economic, and political ruin. This, undoubtedly, necessitated the placing of ‘properties in a condition of untouchability’. As established by the present study, however, the ‘Mamluk/Ottoman like’ political culture did not exist in Kenya. This is, nevertheless, not to deny that there were seasoned politicians and Muslim administrators - *liwalis* and *mudirs*, who could be regarded as ‘ruling elites’ in the society associated with several *waqfs*.³⁵ More so, though the administrative positions of the *liwali* and *mudir* were retained as part of the British colonial policy of indirect rule, the occupiers of such positions were very few in the Protectorate (only ten, according to Partridge and Gillard, 1995) to sustain the argument on using *waqfs* as a protection against confiscation of ill-gotten wealth.

More importantly, statistics drawn from National Housing and Population Census of 2009 by the KNBS place Muslims at 11.2 per cent, translating to about four point three million of the thirty eight million Kenyans.³⁶ With the predominant Muslim regions falling way below national averages in the provision of socio-cultural services and general development (see Appendices 1 and 2), it clearly illustrates that Muslims are not only a minority, but also a marginalized group in a predominantly Christian society. Moreover, the institution of *waqf* is controlled by the government through a state agency, secular policies and civil institutions that not only make registration obligatory but also alienate normative precepts. Accordingly, this compounds the

³⁵ On consecration of *waqfs* by wealthy merchants as part of social responsibility but turn to use the beneficiaries as political constituency. See Fair, L. (2001). *Pastimes and Politics: Culture, Community and Identity in Post-Abolition Urban Zanzibar, 1890-1945*. Athens: Ohio University Press; Sheriff, A. (2001). The Records of the ‘*Waqf Commission*’, op. cit., pp.27-45. Oberauer, N. (2008). ‘Fantastic Charities’: The Transformation of *Waqf* Practices in Colonial Zanzibar. *Islamic Law and Society*, 15(3), 315-370.

³⁶ The population of Muslims in Kenya is a controversial and emotive subject on the account of a state policy that allocates resources on the basis of group population. Though contested, figures given by the KNBS derived from the 2009 National Population and Housing Census remain the only official statistics. Several sources, though, put the figure of Muslims between eight and twenty five percent. See KNBS, Population and Housing Census, Nairobi, 2009. Retrieved from [file:///C:/Users/USER/Downloads/Volume%202-Population%20and%20Household%20Distribution%20by%20Socio-Economic%20Characteristics%20\(1\).pdf](file:///C:/Users/USER/Downloads/Volume%202-Population%20and%20Household%20Distribution%20by%20Socio-Economic%20Characteristics%20(1).pdf). (Accessed April, 2016); Ndzovu, H. (2014). *Muslims in Kenyan Politics: Political Involvement, Marginalization, and Minority Status*. Evanston, Illinois: Northwestern University Press.

view that state control of *waqfs* was geared towards control of resources, and by extension, the Muslim community through the socio-cultural heritage. Significantly, Muslims' marginality and the absence of a 'Mamluk/Ottoman like' political culture render the argument on the use of *waqfs* as a means to protecting wealth against confiscation or taxation untenable in the present circumstances.

2.7.2 Use of *Waqfs* to Circumvent Laws of *Mirath*

There is a dogma in Islam that "there is no *hubs* in circumvention of the shares of God, the Exalted", (Shurayh al-Harith, d. 695-717 C.E. as quoted in Powers, 1983:22; Hennigan, 2004). However, this ethical precept did not deter some endowers from using *waqfs* to retain control of wealth by leaving it with preferred descendants and protect it against supposed fragmentation after their demise. Allegedly, other endowers resorted to *waqfs* to perpetuate age-old customs of locking out certain heirs, especially women, from inheritance. "Since Islam bars individuals from making wills as they choose, founding a *waqf* was the only possible way of circumventing the Shari'a laws of succession," argues Reiter (1996:36). The perception of fragmentation of wealth through Shari'a guidelines of inheritance could not have been explained better than by Layish (1983:27):

The Islamic system of succession is destructive of family property in that it causes its division among a great number of heirs and into uneconomic units. Succession involves a great number of participants; Qur'anic and agnatic heirs participate simultaneously (not successively) – subject, of course, to the rules of priorities and exclusion – and this increases the fragmentation of the property and the shrinking of the shares of the participants *ad infinitum*.

More often, testamentary *waqfs* were particularly appropriated as a vehicle for circumventing the Shari'a guidelines of *mirath* (inheritance). This is due to the view that "it does not involve quantitative or personal restrictions and that an estate could fully be withdrawn from the rigors of *mirath* and dedicated exclusively in favor of an otherwise legal heir," alleges Layish (1983:28).

In his study, Layish established that 79 per cent of 211 *waqfs* in Tripoli and over 96 per cent of 138 in Nablus from 1800 to 1860 were *waqf dhurri*. This led the author into concluding that *waqfs* could at times be appropriated by 'un-Godly minds' to circumvent the divinely fixed laws of *mirath* "so as to preserve the integrity of the property and provide for a select group of descendants in the exclusion of others" (1983:28). Another investigation by Doumani

compounded the view that *waqfs* accord the endower an opportunity to define social and family relations and structures in contradiction to the laws of *mirath*. He observes:

Family endowments were flexible because, first, the endower could alienate his or her entire estate, not just the one-third maximum allowed for gifts [...] The endower's choice redefined his or her family members' and descendants' material base by restricting their rights of access to and ability to dispose of certain properties while committing them to follow a pre-determined formula for sharing the revenues or use of these properties. Second, the endower could choose what individuals or whole lines of descent can or cannot benefit from the use and the revenue of the endowed property (Doumani, 1998:7).³⁷

Owing to the perceived flexibility of the law of *waqf* as opposed to the law of *mirath* with regard to wealth distribution, endowers of *waqf dhurri* could as well decide who to appoint as *mutawallis* (mostly sons or close male relatives) and beneficiaries within the family. This, thereby, accorded endowers the excuse to prevent their estates, power, and prestige from being fragmented; retain connection to their properties; and by extension, perpetuate the age-old customary ideas of patriarchy in family descent and gender preference (Layish, 1983; Shoenblum, 1999; Hennigan, 2004; Lev, 2005).

Significantly, however, it is not entirely true that testamentary bequests and *waqfs* lack quantitative and personal restrictions allowing complete withdrawal of estates from the confines of *mirath* laws as opined by Layish (1983). The Shari'ah, based on traditions related to the Prophet, restricts the establishment of testamentary charities up to one-third of the total estate of a testator. Neither is a bequest in favor of a legal heir valid under the Shari'ah (*Sahih al-Bukhari*, 4:5-7; Powers, 1990:23).³⁸ This law is strictly applied in the Hanafi *madhhab* (Ghazaleh, 2001:8-9). More so, according to the Malik *madhhab*, "a *waqf* in favor of males to the exclusion of daughters is void (*batala*)" (Layish, 1983:9).

Accordingly, appropriation of *waqf ahli* for the mentioned purposes is illegal in theory according to all Sunni Schools of law. This prohibition, nonetheless, as shown in various studies remains in

³⁷ Testamentary *waqfs* (*waqfs* established on the basis of legal bequests) are prone to contradicting the one-third rule on charities, date of effect of the *waqf*, as well as the disposition of a legal heir as either a beneficiary or even an administrator. An endower could implicitly state in his bequest that the *waqf* would only take effect after his death, i.e. he reserves the right to revoke it during his life time, and even appoint a legal heir as administrator, hence giving him an undue advantage over other heirs. Legal limitations on testamentary *waqfs* were thereby at times not observed, hence leading to the violation of the law of inheritance. See Layish, A. (1983). *The Maliki Family Waqf According to Wills and Waqfiyyat*, op. cit., pp. 1-32.

³⁸ In one version of the tradition, the Prophet advised Sa'ad who wished to make a charitable bequest of half of his estate saying, "...one third, yet one-third is too much." See *Sahih al-Bukhari*, 8:725.

principle, but violated in practice. Consequently, there ensued endless court battles to challenge the decisions by some endowers to exclude certain family members (particularly women) as beneficiaries of *waqfs* in the later period of the Ottoman rule as well as British India in the eighteenth and nineteenth centuries (Barnes, 1986; van Leeuwen, 1999; Powers, 2002). These legal contestations were also established among beneficiaries of some *waqfs* in Kenya by the current investigation. It is this susceptibility to abuse of the *mirath* law that partly accounted for the reforms in *waqf ahli* among predominant Muslim societies like Egypt, Turkey, Libya, Lebanon, and Syria. The reforms involved restricting the period of benefits to not more than sixty years from the death of the *waqif*. In the worst case scenario, *waqf ahli* were invalidated and the properties distributed among heirs as inheritance (Schacht, 1982; Pearl & Menski, 1998; Shoenblum, 1999; Kozlowski, 2008).³⁹

A sharp departure from the use of *waqf ahli* to deny women of their legal rights as heirs and to safeguard wealth against alleged fragmentation was, however, noted in Algeria. Layish (1983) observes in another investigation that after the World War 1, testamentary *waqfs* were particularly used in Algeria to favor wives and daughters so as not to fall into the mercy of male descendants and benevolence. Figures of beneficiaries provided in this study point to the view that, some endowers of *waqf ahli* designated their children as *mutawallis* and primary beneficiaries “to emphasize the immediate connection between the sequence of generations and entitlement to the *waqf*” without regard to gender (1983:8).

The author further observes in another study during the period 1940s to 1960s that “*waqf*, as far as it existed in the Israel Muslim society, was not used as a means to deprive women of the family property or to curtail their rights” (1975:298). This development was also noted among some *waqfs* that designated female relatives as beneficiaries in the exclusion of males in Kenya by the present study. In some of the identified cases, for instance, women took half of the share of usufruct alongside pious causes in mixed *waqfs*, or even all of it in some family *waqfs*, apart from being appointed as *mutawallis*. Thus, this protected females culturally considered as ‘weak’

³⁹ Changes effected in majority of these communities were allegedly in line with Malik and Hanbali *madhhabs*. They included temporality and revocability of *waqfs*; reversion of *waqf* corpus to the *waqif* or his heirs upon expiry of purpose for which *waqf* was established; and invalidation of restrictive conditions on the freedoms of (female) beneficiaries such as marriage, and residence. Consequently, between five and twenty percent of the value of each dissolved *waqf* was channeled to charitable causes where such residuary provisions were catered for. See Cattani, H. (1984). *The Law of Waqf*, op. cit., pp. 219-221.

against *al-asabat* (agnate heirs) who would have otherwise claimed a stake in the estate of the deceased under the law of *mirath* (See also Shaham, 1997:216-223).

In a similar investigation on *waqf ahli* in Jerusalem under British mandate, Reiter (1996:77-79) observes that ten out of forty seven endowers had designated their wives as first generation beneficiaries. According to the law of *mirath*, a wife is entitled to one-eighth share of the estate or one quarter in the presence or absence of direct descendants respectively. In the observed cases, therefore, spouses got more than what they were entitled to under *mirath* law. These later investigations particularly gainsay the generalization that *waqf ahli* were appropriated as an avenue for circumventing the Shari'a guidelines of inheritance to the detriment of female heirs and relatives.

By contrast as indicated, according to Reiter (1996), Layish (1983), Shaham, (1997), as well as the current study, establishment of *waqf ahli* could also ensure retention of property within the nuclear family to the interests of women as cognate heirs. Accordingly, this prevented some portion of it from falling into the agnates or the general public through *bayt al-mal* were it to be administered according to *mirath* law. Clearly, these observations underscore the view that no single reason could adequately explain the complexities in the establishment and use of *waqfs* in the Muslim society (Hoexter, 1998a, 2002; Hennigan, 2004; Lev, 2005).

Conclusion

This chapter has highlighted the significant elements constituting *waqfs* as proposed by the majority opinion in Sunni Islam. Clearly, perpetuity, irrevocability, inalienability, and divine ownership, are among the basic principles on which the institution of *waqf* was founded. We have also discussed the strength and weaknesses of various legal trajectories that seek to trace the origin of *waqfs* in Islam as espoused by authors across the scholarship divide. The institution of *waqf*, as is understood in contemporary times, bears striking similarities both in principle and practice with several other practices aimed at attaining *qurba* by early civilizations like *piae causea* (Byzantine), *res sacrae* (Roman) and *pat ruvan* (Persian). These apparent similarities were, allegedly unconsciously, adopted by the Islamic tradition in its contact with the different civilizations at alternating times in history. Thus, their existence in the institution of *waqf* is not a confirmation that the practice is strictly alien since several traditions of the Prophet and early

companions' practices attest to *waqfs* in Islam. Rather, they serve to demonstrate that charity and *qurba* are as old as humanity. In conclusion, therefore, charity is not a preserve of Islam as further evidenced in the practices of *hekdesb* and *xenodochia* among the Jewish and Christian communities respectively.

Significantly, we have seen how, besides the spiritual motivation to attain *sawab* and *qurba*, *waqfs* also became a means towards the attainment of varied worldly goals. Through *waqf*, an endower could retain control of his wealth; protect it against alleged fractionalization under laws of inheritance; decide on the beneficence pattern; and even seek to privilege certain people among his own progeny. *Waqfs*, therefore, became an invaluable tool by which dedicators negotiated social relations on the one side, and accorded *mutawallis*, *ʿulama*, and *kadhis* the immense economic, social, and symbolic wherewithal on the other.

Moreover, we have internalized how Islamic traditions envisage management of *waqfs* as opposed to state supervision. The *mutawallis*, *ʿulama*, and *kadhis* were at the center of *waqf* practices interpreting, executing, and mediating the institution. This centrality of the *ʿulama* and the *mutawalli*, arguably, accorded them access to revenue-bearing *waqfs*, exerting economic and socio-cultural influence in the community that made them apparent threat to some political establishments. To stem their influence with a view to consolidating political hegemony, Muslim and colonial governments established departments and ministries in which the *ʿulama* were conscripted to oversee *waqfs* according to formulated legislations and within strict supervision. In the following chapter we, therefore, endeavor to contextualize secular policies and civil institutions established by the British colonial government with a view to controlling resources that effectively influenced *waqfs*.

Chapter Three

Secular Legislations and Common Law Judgments on *Waqf* Practices in Colonial Kenya

3.0. Introduction

Colonialism is itself a word deeply imbued with political meanings, both unimaginable and difficult to discuss without reference to the power relationship it constitutes. Among Muslims in Kenya, the colonial experience was both historically and culturally specific. Its ways of knowing and ordering experience, that is, its power relations are inherently different for the colonizer and the colonized, [and most importantly], at the heart of the British colonial power was how to negotiate the relationship between the interlocutors of religious knowledge and authority in Muslim society (Mwakimako, 2010:109-110).

This chapter highlights the contours of power dynamics and negotiation of relationships witnessed between the Muslim community and the British colonial authorities in the East Africa Protectorate spanning over seven decades. The conflicts and negotiations foremost took place in the juridical field, hence the opening of this discussion with an overview of the *kadhi*'s courts in relation to the British colonial government's control of resources and *waqfs* in particular. The argument shows how significant it was for the British colonial government to gain control of the legal sphere (juridical and legislations) that informed their subsequent relations with the Muslim community in the economic, political, and cultural fields. We first witness the takeover of the Protectorate's political hegemony from the Sultan followed by rapid constriction of the legal jurisdiction of the *kadhi*'s courts to a narrowly interpreted Muslim personal status law. Then swiftly came the establishment of a state agency – the *Waqf* Commissioners of Kenya (WCK) - not only in filling the void left by the *kadhi*'s courts in the supervision of *waqfs*, but also to enshrine centralized administration and supervision hitherto unknown in the Protectorate. Several other legislations were also established to ensure control of resources by the colonial government. The discussion in this chapter is significant in laying the foundations for the proceeding argument in the postcolonial times where administration and control of *waqfs* by the state mirrors colonial policies as significant statutes, particularly on *waqfs*, are unchanged. This does not only profoundly influence the development of the institution but also provides the vehicle through which internal dynamics of identity, belonging, supremacy, and beneficence to

waqfs within the Muslim community are negotiated and mediated in adaptation to state control of the institution.

3.1 Limiting the Jurisdiction of *Kadhi*'s Courts and the Establishment of Policies to Administer *Waqfs* in Colonial Kenya

The year 1887 when the British East Africa Association was granted concession by the Sultan over his territorial hegemony is the appropriate starting point to understand the intricate relationship between *waqfs* and the *kadhi*'s courts on one hand, and the struggle for control of 'economic capital' for negotiating the political and social fields in the coast of East Africa between various actors on the other hand. Unwittingly, the concession not only made the Sultan concede political power but also the control of resources and 'economic capital' in the territory as the discussion hereunder reveals.

Extensive research on the coast of East Africa including those in legal studies (Anderson, 2008; Kimeu, 2011), history (Sperling, 1988; Stockreiter, 2015), and a host of Islamic academic endeavors (Hashim, 2006; 2010; Mraja, 2011; Mwakimako, 2011; Ndzovu, 2014b) agree that *kadhi*'s courts had largely been in existence in the region as an integral part of the Muslim judicial system from as early as the eighth century.¹ Though the Islamic legal system was uncodified, it is believed to have entrenched some rule of law that survived over two hundred years of Portuguese conquest from 1698 under the Bu Sa^cidi Sultanate of Zanzibar whose dynasty also extended to the coast of Kenya. Under imperial supervision of the Sultan, despite there being no formal courts to implement the Shari^ca, dispensation of justice drastically changed from the traditional arbitration model under councils of elders to a centralized Shari^ca driven judicial system. Since then, *kadhis* became mediators and juri-consultants issuing legal opinions and spiritual advices to the society (Stockreiter, 2015:35; Hashim, 2005). This judicial system, arguably, remained in use throughout the Sultanate preceding the British and the German colonial governments.

Upon their arrival, therefore, Salim observes, "the British and the Germans found the coastal areas of East Africa under the dominion of the Sultanate of Zanzibar who had representatives

¹ On introduction and spread of Islam along the East African Coast see Sperling, D. (1988). *The Growth of Islam among the Mijikenda of the Kenya Coast, 1826-1933*. London: School of Oriental and African Studies, University of London.

along the coast administering it on his behalf and resolving disputes among his Muslim subjects” (Salim, 1978, as quoted in Kimeu, 2011:20). This opinion is rightly shared by others (Carmichael, 1997; Hashim, 2005; Anderson, 2008). Stockreiter (2010:561) summarizes how the Islamic judicial system operated under the Sultan:

The law applied by *kadhis*, classical or uncodified Islamic law, was an ongoing discursive tradition driven by legal scholars’ consultation of the main sources of law, the Qur’an and *hadith* (deeds and sayings of the Prophet), and works of jurisprudence generated by legal scholarship of different schools, places and periods of time.

Further, *kadhi*’s courts across the sultanate applied the Shari‘a based on their individual *madhhab*, notably the predominant ‘Ibadi and Shafi‘i legal codes (Bang, 2001a; Stockreiter, 2010, 2015).²

Historical sources further posit that what prevailed along the Sultanate was a Muslim judicial system akin to what existed during the Islamic caliphate. It follows from logical deduction that with ‘full jurisdiction’ to Muslim subjects, hearing and determination of matters regarding *waqfs* were also within the mandate of the *kadhi*’s courts as evidenced across several Muslim societies.³ This presumption is further crystallized by the view that Muslim courts have historically no precedent of legal jurisdiction over matters affecting the society based on the nature of disputes. For instance, no separate courts for commercial disputes or civil litigations different from family law are recorded to have existed in the history of Islam (Reiter, 1996; Layish, 1997; Powers, 2011; Stockreiter, 2015).

According to Hashim (2005, 2010), and Mwakimako (2011), British colonial influence and control of resources started to be felt in Zanzibar, the seat of the Sultanate, spreading throughout the region from 1887 following the granting of concession to the British East Africa Association by the Sultan over his territorial hegemony. Consequently, “the Association assumed powers to pass laws for the government of districts, and to establish courts of justice and appoint judges”

² These differences were later abandoned following entrenchment of the *kadhis* and the Shari‘a under the Islamic Law (Restatement) Act of 1964, which provided that Islamic law of any sect shall be followed by the courts in matters of personal status. See Hashim, A. (2005). Servants of Shari‘a: *Qadis* and the Politics of Accommodation in East Africa. *Journal of Sudanic Africa*, 16, 27-51.

³ On Muslim communities where *kadhis* heard and determined cases involving *waqfs*, see Layish, A. (1975). *Women and Islamic Law in a non-Muslim State: A Study Based on Decisions of the Shari‘a Courts in Israel*. Jerusalem: Israel Universities Press; Lev, Y. (2005). *Charity, Endowments and Charitable Institutions in Medieval Islam*. Florida: University Press of Florida; Powers, D. (2011). *The Development of Islamic Law and Society in the Maghrib: Qadis, Muftis and Family Law*. Burlington: Ashgate Publishing Company.

(Mwakimako, 2011:330). Under the concession arrangement, however, the Islamic judiciary framework was exempted from the British authority and the Sultan continued to appoint *kadhis* who administered justice according to the Shari‘a under his authority (Hashim, 2005, 2010; Anderson, 2008; Chesworth, 2011). Mwakimako (2011:330) explains the philosophy for the exemption of the direct control of the Islamic judiciary from the British positing:

The agreements deliberately emphasized the sovereignty of the Sultan so that the public understood that judicial or government powers and functions conceded to the Association were to be exercised by it only in the name and under the authority of the Sultan.

In 1888, the Association experienced economic constraints that forced it to transfer its mandate to the Imperial British East African Company (IBEAC). Consequently, IBEAC inherited the concession earlier granted to the Association by the Sultan. As its predecessor, IBEAC also agreed to abide by earlier ratified terms of the concession that, “these possessions [i.e. Protectorate] are to be held by the Company as His Highness’ *wakil* (plenipotentiary and agent) and they are to be administered according to the Shari‘a” (Anderson, 2008:82). This suggests that the Association officials were administrators with no judicial training or powers to exercise in the territory, hence the agreement that they utilize existing Islamic judicial institutions. As a matter of fact, “the first judge appointed by the British arrived in Mombasa with the title of ‘Legal Vice Consul’” (Mwakimako, 2011:330). Incidentally, this arrangement perfectly suited the in-direct rule policy adopted by the colonial government.

Clearly, the British administrative officers also exercised extra-territorial jurisdiction of the Crown over British subjects. “In administering their jurisdiction over the Sultan’s and British subjects, the administrative officers, thus, sat in dual capacity as the Sultan’s judges administering Islamic law or as consular officers administering the English laws,” continues Hashim (2010:222). Similar observation was made by others (Ogot, 1973; Hirsch, 1994). In essence, this dual capacity employed by the British administrators reduced the Sultan to a symbolic head of state (Bakari, 2001), a scenario that aptly demonstrates the struggle for control of political power and the economic wherewithal enveloped in what Hashim (2010:223) describes as “a self-appointed mission of civilization.”⁴

⁴ The concept of ‘self appointed mission of civilization’ is used in the study strictly drawing from the colonized subjects’ point of view in relation to political control by the British colonial government. This is because there was virtually no difference between the various administrative policies of colonial powers in the eyes of the colonized who perceived them as invaders who assumed

My examination of the negotiations between the British colonial government and the Muslim community on the control of resources, and *waqfs* in particular, draws from Bourdieu's concept of capital (power). Bourdieu (1986:241) conceives capital in terms of "accumulated labor (in its materialized form or its incorporated, 'embodied' form), which, when appropriated on a private, i.e. exclusive, basis by agents or groups of agents, enables them to appropriate social energy in the form of reified or living labor." In simple terms, capital in its various strands (economic, social, cultural, and symbolic), is the specific quantity and structure of resources that qualify an agent to enter and survive the daily struggles and interactions of a given social space (Bourdieu, 1986:241-243; Bourdieu and Wacquant, 2004). In the wider context, capital should be understood as "a social relation within a system of exchange, and the term is extended to all the goods, material and symbolic, without distinction, that present themselves as rare and worthy of being sought after in a particular social formation" (Bourdieu, 1987, as quoted in Mahr, Harker, and Wilkes, 1990:13).

Further, Bourdieu (1985:16-17; 1987:121) advances the concept of field, relevant to our discussion, not in terms of physical but "social space of objective relationships" where infinite amount of daily life and interactions of social agents (i.e. negotiation, competition, and even conflicts) take place. It is in the social space where various potentialities and networks of relationships determined by the positions of individual agents exist and infinite interactions of social agents take place. In other words, a field could be conceptualized in terms of dynamic sphere of forces or, "competitive arena of social relationships wherein variously positioned agents and institutions struggle over the production, acquisition, and control of forms of capital" (Rey, 2007:41-46; Mahr, Harker, and Wilkes, 1990). Not oblivious of the theoretical context in which the concepts were used, the study adopts them owing to their propensity to be applicable in "interpreting the relationship between religion, class, and power; and religion and colonial conquest" in the negotiation for control of resources taking *waqfs* as a microcosm (Rey, 2007:45, 82). This is manifested in the struggles between the colonial state and the Sultan and by extension, the Muslim community as discussed and among various ethnic and jurisprudential Muslim groups in the Protectorate. In view of this, the study perceives *waqfs*, religion, the

total control. This is, however, not to be oblivious of the differences between the British in-direct rule and the French assimilation policies in Africa. See further Seesemann, R. & B. Soares. (2009). 'Being as Good Muslims as Frenchmen': On Islam and Colonial Modernity in West Africa. *Journal of Religion in Africa*, 39(1), 91-120.

judiciary (law) as fields on one hand, and the *‘ulama*, beneficiaries, endowers, *kadhis*, *waqf* commissioners, and the British colonial government among others as actors and agents with varying amounts of capital and knowledge in the various fields on the other hand.

Significantly, each of the foregoing fields has tacit (non-formal) rules of engagement (i.e. field-specific rules), demands, features, and structures that agents or actors have to apply and adapt to future tendencies and opportunities in their daily interactions to survive (Wacquant, 2011). Therefore, the position of individual agents in the field is directly proportional to the capital they possess and bring into the field to access benefits and privileges. We also have to appreciate that, though different fields have relative autonomy from each other, they could as well influence one another since they are all embedded in one social space (Mahr, Harker, and Wilkes, 1990; Rey, 2007).

Accordingly, control of resources, and *waqfs* in particular, perfected through control of the judiciary and the legislative organs as it unfolds hereunder should be understood in terms of power contestation, i.e. both economically and politically. As part of strategies to realize the ‘self appointed mission of civilization’, therefore, it was imperative for the British colonial authorities to embrace, but gradually suppress existing ‘native’ customs and institutions by interpreting and applying them according to English (British) perception and not as per the traditional wisdom in which they were established. Undoubtedly, this required enormous economic resources (revenues and fortunes in terms of currency and property rights) and political capital to conscript and sustain human capital (i.e. those operating within and outside the ‘native institutions’ including the *kadhis* and *waqf* commissioners as agents) that would sanction and legitimize state policies.

It is also important to bear in mind that wielding and exercising political power subtly demonstrates symbolic capital - a quasi-magical power or credit that enables acquiring the equivalent of what is obtained by physical or economic force that is recognized and legitimized like a body of practices and representations (rites and beliefs). In essence, symbolic capital, according to Bourdieu (2000:242; 1990:112-121; 1977:171-183) “is not a particular kind of capital but what every kind of capital becomes when it is misrecognized as capital, that is, as force, a power or capacity for (actual or potential) exploitation recognized as legitimate.” This

encompasses language, charm, charisma, seduction, titles of nobility, and other human actions that lead to a relation of meanings that are socially founded and recognized, both internal and external. In other words, “to be seen as a person or class of status and prestige, is to be accepted as legitimate and sometimes as a legitimate authority. Such position carries with it the power to name activities and groups, the power to represent commonsense, and above all, the power to create the official version of the social world” (Mahr, Harker, and Wilkes, 1990:13). Thus, symbolic capital best explains what the British colonial government was assumed to wield upon imposing herself on the colonized subjects as “possessing the power to recognize, to consecrate, to state, with success what merits being known and recognized” (Bourdieu, 2000:242). Arguably, it is this power that enabled them to control the political sphere and the economic resources in the territory.

By 1895, the British officially took over the concession agreement making the coast a colony under full British executive and judicial authority before issuing the first comprehensive Order in Council for the administration of the region as a Protectorate two years later (Mwakimako, 2011). Within this context, the Commissioner for the Protectorate similarly assumed the position of an administrator and Governor though all cases and law suits between locals continued to be decided according to the Shari‘a. Thus, at the very least, “the British colonial government initially allowed local Muslim judges, primarily resident Arabs, to hear most civil and criminal cases involving Muslims” (Hirsch, 1994:214-215).⁵ This was under the ‘non-interference’ concession terms ratified earlier in 1887.

Of significance to the question under investigation, allowing *kadhis* to hear and determine civil and criminal petitions involving Muslims subtly underscores the argument that until the establishment of the Protectorate, there was neither a legal body in-charge of *waqfs* nor separate courts that heard and determined disputes arising there from. Hence, all litigations pertaining to *waqfs* also fell under the jurisdiction of the *kadhi*’s courts while administrative functions of the consecrations resided with *mutawallis* as Islamic traditions require. However, continued reliance of customary institutions and traditional *modus operandi* would not have worked to the colonial

⁵ In recognition of the office of the *kadhi* in dispensing justice among ‘native subjects’ professing Islam, the British colonial government expanded the jurisdiction of the *kadhi*’s courts beyond *mwambao* by appointing the first Muslim *kadhi* to the North Eastern Frontier District (NFD) in 1927. The law of *waqf* was, however, limited to the Protectorate. See Kerrow, B. (2010) as cited in Ndlovu, H. (2014a). Is the inclusion of *Kadhi* Courts in the Kenyan Constitution against the Principle of a Secular State? Berlin: Frei Universität Berlin, p.17.

project of political and economic control in the region. Hence, the British cautiously adopted the existing institutions in their in-direct rule policy while gradually reforming them for economic and political expedience.

Yet, as aptly asserted by Bang (2001a) and Hashim (2005), the colonial government's administrative policy to incorporate existing judicial institutions like the *kadhi's* courts to the state was not a sharp departure from the Sultan's policy that also employed the *'ulama* to consolidate his rule and grip on the judiciary. As a matter of fact, "under Sayyid Said the office of the Sultan combined the legislative, administrative, and judicial functions of the government," posits Lofchie (1965, as quoted in Hashim, 2005:29-30; Bang, 2001a). In essence, this illustrates that *waqfs* were not fully independent from the political establishment since *kadhīs* were an organ of the sultanate. More often, as discussed in chapter two, a section of the *'ulama* was occasionally appointed by Muslim rulers to oversee *waqfs*, particularly those with enormous significance to the community. True to this precedent, synchronized arms of government remained desirable to the British colonial authorities as *kadhīs* and cooperating *'ulama* were conscripted into the civil service and for the control and administration of *waqfs*.

The systematic restructuring of the Muslim administrative and judicial framework was undertaken in the auspices of the East African Order in Council of 1897. The Order in Council re-organized the judicial system into two categories of 'Native courts'.⁶ The first was composed of the High Court, the Chief 'Native court', Provincial courts, District courts, and Assistant Collector's courts. This category was presided over by a British judicial officer and guided by the Indian Civil Procedure Code (CPC) and the Indian Penal and Criminal Procedure Codes (PCPC). The second category consisted of the *kadhi's* courts and Court of local chiefs (African local courts). This cluster of courts was presided over by a local authority and guided by the CPC and PCPC as well as the local laws or customs existing in their respective jurisdictions (Stockreiter, 2015:35-41; Anderson, 2008; Hashim, 2010).⁷

⁶ The 'Native Courts' Regulations (1897) define 'native' as "[...] any native of Africa not of European or American origin and any person not of European or American origin, who, within the dominions of the Sultan of Zanzibar, would be subject to His Highness' jurisdiction, even though such person should not have been born in Africa." See Anderson, J. (2008). *Islamic Law in Africa*. London: Frank Cass & Co. Ltd, pp.82-83; Ndlovu, H. (2014b). *Muslims in Kenyan Politics: Political Involvement, Marginalization, and Minority Status*. Evanston: Northwestern University Press, p.36.

⁷ The provision by the colonial government that *kadhi* courts apply the CPC and PCPC was strategically geared towards creating what Schacht calls 'Anglo-Mohammedan jurisprudence', i.e. dispensing of Islamic law based on modern English jurisprudence

Classifying judicial institutions in a binary opposition of ‘Native’–Western was clearly a conscious strategy by the British colonial authorities that consequently put the colonized subjects to the trap of ‘symbolic translations’ in relation to control of the legal field and perceptions to life in general. Referring to a culture in the common derogatory terms as ‘customary’, ‘native’, or ‘traditional’ was in line with the adopted racial hierarchy policy in which Africans were placed at the bottom strata of the society. Precisely, it was a means for the British colonial government to disqualify ‘native institutions’ since “to be a native implied one being denied of human rights and important privileges that were reserved for the ‘civilized groups’” (Ndzovu, 2014b:36). This was characteristic of the civilization of Africa mission where African institutions were perceived in terms of being ‘native’ or ‘traditional’, according ‘civilizing agents’ the means of qualifying them as antithetical to their ‘officially established’ social and political order. This classificatory scheme fitted as part of the strategies that preceded racial and class negotiations witnessed between the British, Arabs, Asians, and Africans, in that order, in the Protectorate.

Further, categorization of the courts into ‘lower-higher’ or ‘native-English’ spectrum also meant that the lower chambers (*kadhis* and African local courts) became mere ‘subordinate courts’. Accordingly, this accorded the British colonial government the right to closely supervise and control the jurisdiction and powers of the local juri-consultants whom they conscripted, ostensibly, to sanction and implement their desired reforms (Bang, 2001a:59). ‘Native courts’ lacked appellate jurisdiction that only lied with the higher (read English) chambers that retained the mandate to interpret local customs using British lenses (Mwangi, 1995). While dealing with Muslim subjects in the Protectorate, ‘Native courts’ were to be guided by the CPC and PCPC, and have regard to the general principles of the Shari^ca as ratified in the concession charter.⁸ This consideration was, however, weakened by a contradictory provision that allowed the High Court when hearing appeals from the ‘Native courts’ to “take whatever steps it may deem right or

as they did in British India. Consequently, this had influence on some Islamic practices like *waqfs* as manifested in the Privy Council decision of 1894. See Schacht, J. (1982). *An Introduction to Islamic Law*. Clarendon: Oxford University Press, pp.94-96; Stockreiter, E. (2015). *Islamic Law, Gender, and Social Change in Post-Abolition Zanzibar*. Cambridge: Cambridge University Press, pp. 44-45.

⁸ Article 3 of the East African Order in Council of 1897 provides; “[...] all Muslims domiciled under the dominions of the Sultan of Zanzibar were to be governed by the Islamic law in matters related to criminal, civil and personal status laws.” See Hashim, A. (2010). Coping with Conflicts: Colonial Policy towards Muslim Personal Law in Kenya and Post-Colonial Court Practice. In S. Jeppie, E. Moosa, & R. Roberts (Eds.), *Muslim Family Law in Sub-Saharan Africa: Colonial Legacies and Post-Colonial Challenges* (pp.221-245). Amsterdam: Amsterdam University Press.

desirable for satisfying itself as to the Muhammadan laws and customs applicable to the case” (Article 57, Order in Council, 1897, as quoted in Anderson, 2008:83). Thus, while it affirmed to respect and not to interfere with the dispensation of justice according to the Shari‘a, the British colonial government also gave itself the right to define what is ‘Islamic’, albeit not according to established Muslim practices of jurisprudence, but English interpretations (i.e. ‘Anglo-Mohammedan jurisprudence’, Schacht, 1982:94-96) in clear exercise of the espoused symbolic capital.

Using section 17 of the Courts’ Ordinance of 1931, we could also shed light on the jurisdiction and mandate of the subordinate courts established by the East African Order in Council of 1897. Conveniently, they could be explained according to: (i) the type of offence to be handled by the court; (ii) amount of fine to be imposed there in; and (iii) the type and severity of punishment that the judgment was likely to confer upon a plaintiff in the said court (Hashim, 2005; Mwakimako, 2011; Stockreiter, 2015). More particularly, *kadhi’s* courts were accorded jurisdiction over Muslim Arabs, Baluchis, and Africans in matters relating to personal status, marriage, inheritance, and divorce in which the value of the subject-matter in dispute did not exceed one thousand Kenya shillings (Article 55, British Native Courts Regulations, 1897, as cited by Hashim, 2005:30; Anderson, 2008; Stockreiter, 2015).

Clearly, the reforms in the legal jurisdiction of the *kadhi’s* courts in the Protectorate were informed both by economic and political expediencies of the British colonial government as well as their experience of the *kadhi’s* courts in India,⁹ and Egypt.¹⁰ Prior to this limitation, matters of *waqf* lied within the jurisdiction of *kadhīs* as it applied to several Muslim communities including India and Egypt (Layish, 1975; Lev, 2005; Miran, 2009; Powers, 2011). “Although there was no clear definition, personal status usually included marriage, divorce, inheritance, and, following the *kadhīs*’ scope of jurisdiction in India, religious endowments (*waqf*)”, summarizes Stockreiter, (2010:562; 2015:45; Powers, 1990; Hoexter, 1995). Finally, and quiet significant to the development of Islamic judicial practices, the East African Order in Council also established the

⁹ See Makdisi, G. (1981). *The Rise of Colleges: Institutions of Learning in Islam and the West*. Edinburgh: Edinburgh University Press; Qureshi, M. (1990). *Waqfs in India: A Study of Legislative and Administrative Control*. New Delhi: Gian Publishing House; Kozlowski, G. (2008). *Muslim Endowments and Society in British India*. Cambridge: Cambridge University Press.

¹⁰ See Layish, A. (1983). The Maliki Family *Waqf* According to Wills and *Waqfiyyat*. *Bulletin of the School of Oriental and African Studies*, University of London, 46, 1-32; Powers, D. (1989). Orientalism, Colonialism and Legal History: The Attack on Family Muslim Endowments in Algeria and India. *Comparative Studies in Society and History*, 31, 535-571.

office of *shaykh al-Islam* (Chief *Kadhi*). The Chief *Kadhi* was mandated with supervising the *kadhi's* courts and hearing and determining appeals arising from therein and which could be channeled for decision at the High Court.

Subjecting local judicial institutions like the *kadhis* courts to European systems of justice; supervising, controlling them, and limiting their jurisdiction; and demanding that they apply alien procedures like the CPC and PCPC in the administration of justice mirrors what Bourdieu describes as symbolic violence. Bourdieu (1990:127; 2000:170) defines symbolic violence as the “gentle, invisible violence, unrecognized as such, chosen as much as undergone, that of trust, obligation, personal loyalty, hospitality, gifts, debts, piety, in a word, of all the virtues honored by the ethic of honor.”¹¹ Precisely, symbolic violence is vented upon a social agent with his or her complicity through the effects of misrecognition and encouraged by denial by those on whom that violence is exercised. This suggests that the victim, as a social agent, understands and “recognizes a violence which is wielded precisely in as much as one does not perceive it as such and, therefore, lead them to construct this relation from the stand-point of the dominant as ‘natural’ and which gives all its manifestations their hypnotic power” (Bourdieu and Wacquant, 2004:342; Rey, 2007). Symbolic violence thrives in an environment of symbolic domination and perpetuated through disguised strategies that conceal them. Accordingly, the power to represent the legitimate social world was best exemplified through the legal field by use of symbolic violence by the colonial state to enforce what it regarded as ‘legitimate’ versions of both the legislative process and the judiciary in the Protectorate. In this case, therefore, “symbolic violence is the imposition of systems of symbolism and meaning upon groups or classes in such a way that they are experienced as legitimate” (Jenkins, 1992, 104, as quoted in Rey, 2007:55; Mahr, Harker, and Wilkes, 1990).

As a matter of fact, majority, if not all the Arab *kadhis* were handicapped in the English legal training and procedures, and the British colonial authorities exploited this deficiency in cultural capital (i.e. English legal expertise) as a tool in defining the professional relations and negotiating the juridical field. Except for the submitted reasons as argued, it was illogical for the British colonial government to insist that *kadhi's* courts adopt non-Islamic laws of evidence and

¹¹ See also Bourdieu, P. and Wacquant, L. (2004). Symbolic Violence. In Bourgois, P. and N. Scheper-Hughes (Eds.), *Violence in War and Peace: An Anthology* (pp. 272–274). Carlton: Blackwell Publishing Ltd.

procedures to administer the Shari'ah.¹² Doing so, undoubtedly, led to miscarriage of justice. But owing to the political and symbolic hegemony coupled with the social ideology of the British, *kadhis* had to 'accept' the situation as a normal, even justifiable part of the judicial order, hence becoming unwitting social agents of symbolic violence.

In essence, categorizing the courts as explained above and limiting their legal jurisdiction in terms of the value of fines to be imposed was the final step in the British strategies towards removing the jurisdiction of *waqfs* from the Muslim courts. As indicated, the value of litigation a *kadhi's* court could hear and determine did not exceed one thousand Kenya shillings. Therefore, matters of *waqf* were taken out of the jurisdiction of the *kadhi's* courts for three counts: (a) the narrow and compartmentalized interpretation of Muslim personal status law along English (British) perceptions to mean marriage, divorce, and inheritance; (b) majority of revenue generating *waqfs* included properties that were worth than the stipulated amount that Muslim courts could legally handle;¹³ and (c) *waqfs* matters were categorized as real estate contracts whose procedures did not only require English legal training and expertise but were mainly in English language that the Arab *kadhis* were not culturally endowed in. Thus, "waqf administration was among the tasks previously handled by the 'ulama which now became increasingly governmentalized," observed Bang (2001a:75).

Having removed the hearing and determination of matters of *waqf* from the Muslim courts, it meant that *mutawallis* and the 'ulama would freely manage consecrated properties. However, from their experience in India and Egypt, the British colonial authorities were aware of the socio-economic and political influence of the institution of *waqf* in the society vis-à-vis the colonial project. Not being oblivious of this fact, the British colonial government established the WCK in March 1899. The official position on the establishment of the state agency was to register,

¹² According to Stockreiter, non-Shari'ah procedures of evidence were put in place in 1899 and later buttressed by the Evidence Decree of 1917 that ultimately excluded Shari'ah rules of evidence all together. See Stockreiter, E. (2015). *Islamic Law, Gender, and Social Change*, op.cit. p.43.

¹³ In Zanzibar, however, the value of the subject matter of the *kadhi's* courts was not only higher (five thousand shillings) than that of Kenya but *kadhis* also continued with the adjudication of matters of *waqfs* as part of the civil jurisdiction to personal status law spelt out in the Zanzibar Courts Decree of 1923. This piece of legislation did not apply to the Kenyan side of the Protectorate. See Bang, A. (2001a). Intellectuals and Civil Servants: Early 20th Century Zanzibar *Ulama* and the Colonial State. In S. Amoretti (Ed.), *Islam in East Africa: New Sources* (pp.59-98). Roma: Herder Editrice Libreria; Laura, F. (2001). *Pastime and Politics: Culture, Community, and Identity in Post-Abolition Urban Zanzibar, 1890-1945*. Athens: Ohio University Press. Hashim, A. (2005). *Servants of Shari'ah*, op. cit.

control, and administer the considerable amount of property endowed as *waqfs* for the benefit of families and Muslim institutions in the Protectorate (Bang, 2001a).

In essence, therefore, establishment of the WCK was, in itself, a noble idea that would have streamlined the institution and improve its efficiency. However, considering the political environment in which the state agency was conceived and operationalized, it became the vehicle through which popular modernizing capitalist ideals advocated by the colonial authorities were spearheaded (Fair, 2001). More so, it was used to check the social, political, economic, and symbolic influence of the *‘ulama* and the diverse groups of beneficiaries and *mutawallis* who mainly depended on the *waqfs* for their socio-cultural welfare (Kuran, 2001). As a matter of fact, the enactment of the *Waqf Commissioners Ordinance* that formed the secular guide for administration of *waqfs* by the colonial state came a year later in 1900.

The establishment of the WCK is indeed perceived by several authors to have been the last strategy in the overall control of resources (read economic capital) in the Protectorate by the British. This is because the colonial government had earlier interfered with *mikoko* (mangrove poles) business and abolished slavery denying plantation agriculture of the cheap labor that it relied on (Sheriff, 1991; Bakari, 2001; McIntosh, 2009; Mwinyihaji, 2014). Clearly, *waqfs*, according to the British, remained a potential economic and socio-cultural mainstay without whose seizure and control the local Muslim community could amass to challenge their political hegemony. The British understood the inherent power of *waqfs* to create a common identity of autonomous social groups keen on protecting and advancing particular interests of their members (Powers, 1989; Kozlowski, 1998; Hoexter, 2002). Carmichael (1997:209) articulates this fear saying:

Waqf is a uniquely Muslim institution rooted in religious ideals. Yet, its role at the interface of private property and various religious foundations, such as the mosques and Qur’anic schools that *waqf* funds support, make it an obvious instrument for exerting influence in many spheres of Muslim life. Therefore, it should not be surprising that the British sought a role in *waqf* management.

Thus, with limited jurisdiction of *kadhi’s* courts to Muslim personal status law and the WCK in place, the negotiation for control of *waqfs* as economic resources between the British and Muslim community was almost over in favor of the former. Therefore, controlling the judicial field turned out to be the perfect starting point in the Protectorate, and more importantly, to

prevent “the *‘ulama* who formed the core of the ideological apparatus” (van Leeuwen, 1994:33) that the society and institution of *waqf* relied for its interpretation and spiritual guidance on the one hand, and the community of endowers and beneficiaries “from acquiring a strong, independent economic basis” (1994:31) to contest the economic and political hegemony of the colonial government on the other.

3.2 Economic Space Control: The Effects of Colonial Policies on *Waqf* Practices in the Protectorate

This section of the discussion highlights the diverse secular policies instituted by the British colonial government in the control of the economic sphere, and *waqfs* in particular, in the Protectorate. As discussed hereunder, the new policies hitherto unknown to the local Muslim community involved different sectors of the economy ultimately impacting the practices of *waqfs* in the region. This was manifested in the way the state appointed Commissioners and influenced the decision making process in the state agency in light of the new secular policies.

Upon establishment, the WCK was composed of eight persons including the Civil Secretary (always a British) and the *liwali* as ex-officio members. Other members were Muslims, one appointed by the *liwali* and five others appointed by the Governor (also a British) from a panel of names submitted by the Civil Secretary. As Mwakimako (2010:118) argues, except for “one’s ethnic affiliation together with proven loyalty to the colonial state”, no qualifications were necessary for appointment as Commissioner. Commissioners were also remunerated by the state and served for a renewable term of five years unless they either resigned or were removed by the Governor. However, many of them were retained for longer periods to perpetuate the colonial legacy (Carmichael, 1997).¹⁴ Significantly, this suggests that endower’s and beneficiaries’ interests were neither represented nor taken into account when appointing the Commissioners.

More often, as Carmichael posits, decisions of the Commission had to be sanctioned by the colonial government though, when the state desired to undertake any dealings for its convenience, it did not have to seek the authority of the Muslim Commissioners. This partly explains the lack of specific qualifications for appointment as a Commissioner so as to ensure

¹⁴ The full board was for instance retained upon expiry of its mandate in 1957 to 1962, a trend that was repeated during the postcolonial period. See Appendix 3.

that only cooperating Muslims served in the state agency under close supervision by European officers who were co-opted as members of the Commission.¹⁵ Accordingly, this denied the Commissioners the independence and the right to use their judgment and discretion in accordance with the Shari‘a and ancient customs pertaining to *waqf* practices as they became mere instruments in discharging government orders (Carmichael, 1997:301).

State influence on the decision making process of the state agency was evident in several occasions interfering with the use of *waqfs* in ways not designated by endowers. For instance, from 1911 to 1912 the government through the provincial administration, i.e. the Provincial Commissioner (PC) and the District Commissioner (DC) in Malindi region, asked the WCK to use *waqf* funds in improving sanitation and public health as well as allocate undeveloped *waqf* lands to residents for farming (Carmichael, 1997:301). Although the Shari‘a allows *qabala* (also *mukhabara*, sharecropping) as a means of improving productivity of agricultural *waqf* lands, in the cited case, the government was not proposing *qabala* but opening the lands to private ownership.¹⁶ More importantly, the *waqf* lands in question had not become ‘unproductive’, but merely ‘undeveloped’. So, even the question of *qabala* becomes contestable under the Shari‘a, let alone using the same as private *shambas* or appropriate *waqf* revenues in total disregard of the *shurut al-waqif*.

Again, from 1954 to 1955 the colonial government pushed to have the closed cemetery of the Mazrui and the ruined *Jamia masjid* of Wakilindini declared national monuments under the Preservation of Objects of Archeological and Paleontological Interest Ordinance, Cap 314.¹⁷ As opined by J. S. Kirkman, the in-charge Royal Gedi National Park Malindi, since the cemetery was closed, the site could be converted to a public garden in line of “the policy of the city of London and most English cities for the last twenty years to convert closed cemeteries and ruined Churches into Public Gardens with flowers that is open to the public (sic).”¹⁸ Therefore, Kirkman

¹⁵ The last European WCK secretary, Mr. Hawkins retired around 1945 to give way to the first African secretary, *shaykh* Haidar Mohammad of Mombasa. WCK, archive, Mombasa; interview with Mohammed Shalli, Mombasa, November, 2014.

¹⁶ On *qabala* see *Sahih al-Bukhari*, 3:523, 532-537; Donaldson, W. (2000). *Share Cropping in the Yemen: A Study of Islamic Theory, Custom and Pragmatism*. Leiden: Brill; Sanjuan, G. (2007). *Till God Inherits the Earth: Islamic Pious Endowments in al-Andalus (9-15th Centuries)*. Leiden: Brill; Safari, M., Arif, M., & Muhammad, S. (2014). *Sukuk Securities: New Ways of Debt Contracting Debts*. Singapore: John Wiley & Sons Pte. Ltd.; Lahtasna, A. (2014). *Shari‘ah Non-Compliance Risk management and Legal Documentations in Islamic Finance*. Singapore: John Wiley & Sons Pte. Ltd.

¹⁷ The Ordinance is presently the National Museums and Heritage Act, Cap 216 [Revised 2012], Laws of Kenya.

¹⁸ Letter by J. S. Kirkman to the District Commissioner, Mombasa, January, 1955, WCK archive, Mombasa.

proposed that WCK leases out the two *waqfs* to the Municipal council of Mombasa to restore and protect them “as befitting the Mazrui family and also to maintain and beautify in the interest of Mombasa where it was seen by many visitors.”¹⁹

This proposal was opposed by the Muslim community citing the same statute (Preservation of Archeological and Paleontological Interest Ordinance) which also protected such areas of worship from being used inconsistent with their character.²⁰ Despite opposition, however, a seemingly skewed compromise was realized in favor of the colonial government and the Mazrui cemetery was gazetted as national monument. According to the compromise, the National Museums of Kenya (NMK) became co-trustees of the *waqf* with the WCK who retained the title of ownership bestowed upon it in 1909. Since both the NMK and the WCK are state agencies, it is clear that the colonial government influenced the decision making process in the dismemberment of the *waqf*.

3.2.1 Compulsory Registration and Takeover of *Waqfs*

For ease of supervision and control, the colonial government imposed compulsory registration of *waqfs* failure to which a *mutawalli* became “guilty of an offense and liable to a fine not exceeding two thousand Kenya shillings, or to imprisonment for a term not exceeding six months” (WCK Act, section 10, 4). *Mutawallis* were required to register their *waqfs* within two months from the date of consecration giving precise details of the physical address, endower, type of *waqf*, related properties, details of legal ownership (i.e. land title deed), and revenues expected.²¹ Enforced compulsory registration and fear of consequences for non-compliance clearly accounted for the large number of *waqfs* under state control during the colonial period as shown in Table 1. Of the 104 sampled *waqf* deeds, 83 (79.8 per cent) were registered during this period with the highest number at 71 (68.3 per cent) from 1920 to 1930.

¹⁹ Minute 2 of the meeting held in the DC’s Office, Mombasa, February, 1955, WCK archive, Mombasa.

²⁰ The National Museums and Heritage Act, CAP. 216, Section 42 (a) provides that, “[...] the Minister may acquire the monument by way of compulsory purchase [...] but that power shall not be exercised in the case of a monument which, or any part of which, is periodically used for religious observances.” See also Section 43 (3a); letter of reply by *shaykh* Mbarak Ali Hinawy, the *liwali* of the coast, to the Town Clerk, Mombasa Municipality and copied to the PC, coast; DC, Mombasa; Secretary for Education, Labor and Lands, Nairobi and Secretary for Forest Development, Game and Fisheries, Nairobi, January, 1955, WCK archive, Mombasa.

²¹ Interview with Muhammad Shalli, Mombasa, October, 2014.

| Period | 1900s | 1910s | 1920s | 1930s | 1940s | 1950s |
|---------------------|-------|-------|--------|--------|-------|-------|
| No. of <i>waqfs</i> | 2 | 3 | 24 | 47 | 3 | 2 |
| Percentage | 1.92% | 2.88% | 23.08% | 45.19% | 2.88% | 1.92% |

| Period | 1960s | 1970s | 1980s | 1990s | 2000s | Undated | Total |
|---------------------|-------|-------|-------|-------|--------|---------|-------|
| No. of <i>waqfs</i> | 2 | 0 | 1 | 1 | 11 | 8 | 104 |
| Percentage | 1.92% | 0% | 0.96% | 0.96% | 10.58% | 7.69% | 100% |

Table 1: Registration of *waqfs* from 1900 to 2000.

(Source: WCK, 2014)

There was, however, no survey of *waqfs* during the colonial period making it impossible to ascertain the volume of properties that the British colonial government seized control of. From available evidence, nonetheless, it could be argued that the lack of survey was a conscious tactical move by the colonial government not to bring into public knowledge the exact worth of *waqfs*. This was probably meant to pre-empt public outcry and court battles as witnessed in India following the invalidation of some *waqfs* by the Privy Council judgment of *Abul Fata v. Russomoy* (1894), (Anderson, 2008:96-97; Schacht, 1982; Banday, 2013); and the usurpation of *waqfs* in Zanzibar among other British colonies (Fair, 2001:69-82). Accordingly, the lack of disclosure of the volume of *waqfs* through survey stemmed the need to make the state agency inclusive. This is because disclosure could have probably demanded the inclusion of Muslims with diverse backgrounds, knowledge, and interests in the state body, making control of the institution challenging on the part of the colonial government.

The Act also empowered the Commission to take over the administration of privately administered *waqfs* (both family and public) in varying circumstances. Section 12, sub-sections 1 (a) and (b) provide:

Commissioners may take over administration of *waqfs* which are being conducted in an improper or unauthorized manner in any case in which it appears to the Commissioners that (a) there is no properly constituted trustee of a *waqf*; or (b) any trustee is acting in an improper or unauthorized manner ... in the case of *waqf khairi* of their own motion, and in the case of *waqf ahli* on the motion of the majority of the beneficiaries, hold an inquiry.

Thus the Commission could bring *waqfs* under its direct management whenever the state felt that they were not properly administered. One such instance involved the Wakilifi *masjid* at *mji wa kale* (Old town) in Mombasa in 1957. Upon inquiry as required by law it was established that the

endower, Ali bin Muhammad bin Juma, had not established a precise formula for filling in the vacant position of the *mutawalli*.²² After the demise of the first two he had personally appointed – Abdulrahman bin Nasib bin Ali and Ali bin Khamis, Naaman bin Ali imposed himself as *mutawalli* and also served as a *mu^cadhdhin* (*adhan* crier).²³ WCK, therefore, took over the *waqf* allegedly for lack of a legal *mutawalli* and improper management. Naaman bin Ali was, nonetheless, employed as the caretaker by the WCK.²⁴

3.2.2 Colonial Policies on Land and Immovable Properties that Impacted on *Waqfs*

The place of land as a factor of production both in the capitalist economy advocated by the British colonial government and in the institution of *waqf* cannot be gainsaid. However, capitalist economy perceived land ownership from a private view point different from the communal ownership as practiced in the Protectorate. Since then, acquisition and ownership of land in the region was marked by possession of a land title deed upon survey and demarcation. Consequently, from 1908, through the Land Titles Ordinance, huge tracts of land in the Protectorate changed ownership from community or ‘native reserves’ to Crown Lands despite widespread protests and claims of historical tenure from the locals (Hailey, 1979:106-107).²⁵

The Ordinance further empowered the Governor “to grant lease or otherwise alienate in Her Majesty’s behalf any Crown lands for any purpose and on any terms and conditions as he may think fit” (Anderson, 2008:91). This part of the Ordinance was particularly backed by the 1894 Land Acquisition Act of India introduced in the Protectorate (later East African Land Regulations of 1897) that gave the British colonial government the right to seize ‘native land’ supposedly for public purposes (Pouwels, 1987; Carmichael, 1997; Ndzovu, 2014b). The net

²² Section 12(2) requires that the WCK issues notices of inquiry to interested parties to appear and give evidence before the WCK. Notices were issued in local dailies in both English and Kiswahili and displayed in public places and the mosques. See Government of Kenya, *Waqf Commissioners Act*, Cap 109; *Mombasa Times*, November 3, 1957 and November 5, 1957. WCK records indicate that Abdulrahman bin Nasib bin Ali and Ali bin Khamis had died by June 1957, WCK archive, Mombasa.

²³ Correspondence between WCK’s Advocate and Naam bin Ali inquiring if indeed the former was the legally constituted *mutawalli*, June, 1957, WCK archive, Mombasa.

²⁴ Minute 50/94 of November, 1994; letter of appointment, October, 1994, WCK archive, Mombasa.

²⁵ The Crown Lands Ordinance (1951) defines Crown land as “[...] all public lands in the colony which are for the time being subject to the control of Her Majesty by virtue of any treaty, convention, or agreement, or by virtue of Her Majesty’s protectorate, and all lands which shall have been acquired by Her Majesty for the public service or otherwise howsoever, and includes all lands occupied by the African tribes of the colony and all lands reserved for the use of members of any African tribe, save only the lands declared to be native lands by the Native Lands Trust Ordinance.” See Hailey, W. (1979). *Native Administration in the British African Territories*. London: His Majesty’s Stationery Office, pp.106-107; Anderson, J. (2008). *Islamic Law in Africa*, op. cit. pp.90-91; Syagga, P. (2010). Public Land, Historical Land Injustices and the New Constitution. *Society for International Development* (S.I.D), Nairobi: Constitution Working Paper Series no. 9, 6. Retrieved from www.sidint.net/docs/WP9.pdf. (Accessed April, 2016).

effect of these Ordinances was to abrogate locals' ownership of some of their customary lands and reduce them to squatters, majority of who were incidentally Muslims, thereby interfering with their socio-economic welfare.

By virtue of such Ordinances, the British colonial government also appropriated lands endowed as *waqfs* some of which were not compensated as required by law. A case in point was a cemetery land that was acquired for the construction of a railway line at Changamwe, Mombasa (Carmichael, 1997). According to the Shari'ah, *waqfs* acquired through compulsory acquisition by the state are to be paid for so that replacements could be established in line with the initial consecrations. The lack of compensation upon acquisition of *waqf* lands by the British colonial authorities meant that no substitute *waqfs* were established to carry on the aims of the previous ones as required by the Shari'ah. Undoubtedly, this had a ripple effect on the socio-economic and cultural wellbeing of the chain of beneficiaries of those *waqfs*.

This is not, nevertheless, to deny several other *waqfs* acquired by the colonial government under similar circumstances, but compensated during the period 1950 to 1960. They include the *waqf* land of *shaykh* Mbaruk bin Rashid bin Salim el-Kehlany in Mombasa in 1954 that was meant for the benefit of his two *masjids* in Mombasa and Gazi. Understandably, the WCK had bargained for a replacement land of equal value, but the colonial government paid in cash in compensation for the *waqf* land after allegedly failing to acquire "suitable land at the coast which could be the subject of an exchange."²⁶ Other *waqfs* acquired by the state include those whose usufructs were meant for *masjid* Mandhry and *masjid* Mwana Iki bint Suleiman in Mombasa. In both instances, the government also paid in cash.

While the WCK records indicate that compensation for the *waqf* of bint Suleiman was divided between the two holy *masjids* – Mecca and Medina as well as *masjid* Kikeshi as designated by the endower, that of *masjid* Mandhry was claimed to have been "added to other amounts from similar *waqfs* for the purchase of other properties."²⁷ However, by the period of study, no

²⁶ It would have been quiet contrary to British colonial principles of capitalist economy to replace the land *waqf* with yet another piece of land. Here, the government paid seventy two thousand eight hundred and thirty three Kenya shillings. See letter of response by the Government Collector to WCK, April, 1955; Government award notice of compensation, March, 1955; WCK's letter of response to notice of acquisition, December, 1954, WCK archive, Mombasa.

²⁷ The colonial government paid nine thousand six hundred and sixty Kenya shillings for the *waqf* of Mandhry and seven hundred and seventy three Kenya shillings for the *waqf* of Mwanaiki. Interview with Muhammad Shalli, Mombasa, December, 2014. See also minute 2068 of April, 1957, WCK archive, Mombasa.

replacement *waqfs* had been established in place of the land *waqfs* of *shaykh* Mbaruk. It was also not possible to ascertain whether the compensation funds remained in the WCK accounts and if indeed were immune to fluctuation since 1950s. Paradoxically, the WCK Act did not contemplate for compulsory acquisition of *waqfs* by the government. The Act, therefore, does not provide for the same.

Moreover, no land transaction could be legally binding without first being confirmed as rightfully owned and sanctioned by the government as provided in Section 19 of the Ordinance:

No rights or title to the possession of land within [...] the dominion of the Sultan of Zanzibar, claimed under and in accordance with Muhammadan law, shall be recognized as against the Crown or Government, unless the person claiming such right or title shall not only establish in himself such right or title but prove [...] that he or some predecessor in title was in possession [...] prior to 14th December, 1895 (as quoted in Anderson, 2008:91).

Such Ordinances particularly dealt a blow to claims of ownership by the locals in the Protectorate on the basis of lack of titles that were to present to the Land Registration Court to prove their ownership (Berg-Schlosser, 1984; Syagga, 2010). In other instances, *mutawallis* could also not develop some *waqfs* for lack of titles of ownership as demanded by the Crown Lands Ordinance. This is true of some *waqf* lands and wells in Malindi region where the WCK failed to develop them due to lack of title deeds from 1911 to 1912 (Carmichael, 1997). This clearly illustrates that, the shift in the perception of land ownership did not only impact on the already established *waqfs* from being developed but also hindered the establishment of land-based *waqfs* due to lack of ‘legal ownership’.²⁸

While the statute did not contemplate for compulsory acquisition, it however, empowered Commissioners to dispose of *waqfs* in selected instances. Sections 16 (2) and 17 provides:

If it appears to the *Waqf* Commissioners that in respect of any *waqf* the intentions of the maker cannot reasonably be carried into effect and that it is accordingly expedient that the property the subject of the *waqf* or any part thereof should be sold, the *Waqf* Commissioners may cause that property or part thereof to be sold, and shall apply the proceeds [...] in such manner as the *Waqf* Commissioners think fit for the benefit of the beneficiaries of the *waqf*.

²⁸ At one instance around 2005-2006 before I embarked on the current project, I was involved in plans to establish a community integrated school at Marigiza village, Msambweni county, Kenya. *Mzee* Ali Athuman Mwachausa had offered a piece of land as *waqf* but due to lack of title of ownership, the project could not be registered with the local Education and Social and Cultural offices. This led to the abandonment of the project.

Apart from Commissioners having the liberty to decide what is most suitable to the beneficiaries, albeit without necessarily consulting them, the Act does not place time span within which such use should be made with a view to maintaining utility of the sale proceeds. This could partly explain the delay by the Commission to acquire replacement *waqfs* in place of those dismembered through compulsory acquisition as it is not compelled by law to take fluctuation in to consideration.

Further, some regulations on immovable properties impeded the development of *waqfs* by logically prohibiting their being endowed as such during the colonial era. This could be discerned from the African Property Preservation Ordinance (1916) that established:

No building, standing coconut palm, standing fruit tree, or other standing tree situated in an area to which this Ordinance has been applied shall be sold, leased, hypothecated, mortgaged or pledged by any means whatsoever to any person who is not a member of an African tribe inhabiting such area and residing therein (as quoted in Anderson, 2008:91).

By prohibiting any form of pledge – including *waqfs*, this piece of legislation undoubtedly impeded the establishment of new *waqfs* after its enactment. This is because it does not take cognizance of the fact that Islamic charity and *qurba* on which *waqf* is founded is not limited by race, ethnicity, or even locality.

There are several *waqfs* that were consecrated by non-African Muslims, particularly Asian immigrants, who also maintained social and spiritual attachments with their ancestral homes as expressed in their *waqf* deeds. These include the *waqf dhurri* of Gulamhussein Adamji whose, though primary beneficiaries are the endower's descendants in Mombasa, residual beneficiaries are the pilgrims of Karbala in Iraq;²⁹ the *waqf dhurri* of Haji Ismael Haji Adam whose primary beneficiaries are Muslims of Asian descent of the Memon ethnic community while residual beneficiaries are poor and beggars at the two holy *masjids* in Mecca and Medina as well as Baghdad;³⁰ and several other *waqfs* whose primary and residual beneficiaries are non-Africans.³¹ Indeed, within the context of the WCK Act, not all Asians were recognized as Muslims and

²⁹ The *waqf* of Gulamhussein Adamji consisted of several parcels of land (*shambas*) and houses in Tudor, Mombasa. See *waqf* deeds of Gulamhussein Adamji, fols. 38/9, plots no. 3806/1 & 2519, WCK archive, Mombasa.

³⁰ See *waqf* deeds of Hajji Ismael Hajji Adam, fols. 51- 52; on plot no. 5158; Hajji Ebrahim Adam, on plot no. 8173/5, fol. 67, WCK archive, Mombasa.

³¹ See *waqf* deeds of Moosaji Issaji, fol. 120; Hajji Ismael Hajji Adam (above) for *waqf al- Haramayn* (Mecca and Medina); Minute 2039 of 17/2/1956 on the compulsory acquisition of *waqf* of Mwanaiki bint Suleiman whose compensation was distributed between the *masjids* of Mecca, Medina, and Kikeshi, WCK archive, Mombasa.

could not, therefore, consecrate legal *waqfs*.³² As such, the African Property Preservation Ordinance further inhibited them from establishing new *waqfs* considering the limitations on the choice of beneficiaries on their part. It is no wonder that there are very few *waqfs* by non-African Muslims in the WCK registry despite Asian Muslims forming a sizeable group in the community. It is possible to argue that they either did not register their *waqfs* as required or resorted to other charitable institutions besides *waqfs*, both of which remain possible as discussed in chapter five.

What is evident in the above cases, therefore, is the appropriation of legislative instruments as political power and symbolic violence by the colonial government to control and negotiate the cultural and economic fields of the Protectorate even where it disregarded religious feelings of the community. As witnessed in some instances, either the government took away *waqfs* without compensation or used its powers within the WCK to see that the compensation did not realize its utility in acquiring substitute properties. Accordingly, colonial policies were not only a blow to practices of *waqf* in the region, but also set in motion the economic, social, and cultural subordination of the Muslim community.

3.3 Contradicting Legislations and Civil Judgments against the Shari^ca on *Waqf* Petitions in Colonial Kenya

As argued in the previous section, control of the judiciary and legislative fields by the British colonial state also influenced the judicial processes in the Protectorate as judgments were delivered in accordance with the British understanding of the Shari^ca, i.e. ‘Anglo-Mohammedan jurisprudence’. Among such decisions concerned *waqfs* and had serious ramifications on the future of the institution in the community. A case in point involves a High Court ruling in 1952 on the validity of *waqf dhurri* where Fatuma binti Mohamed bin Salim had designated her progeny and upon their extinction, the agnates. Three other *masjids* were also designated as residual beneficiaries of the *waqf*.

³² Section 2 of the WCK Act (1900) defines a Muslim as “[...] an Arab, a member of the Twelve tribes [*Thenashara Taifa*, i.e. Swahili Muslims confederation], a Baluchi, a Somali, a Comoro Islander, a Malagasy or a native of Africa of the Muslim faith.” See Government of Kenya, *Waqf Commissioners Act*, Cap 109.

The High Court invalidated the *waqf* based on the principle of precedence in Common law. Two legal precedents specifically influenced the decision of the High Court in this suit: that of a Privy Council judgment on *Abul Fata v. Russomoy* (1894); and the decision by the East African Court of Appeal on *Said bin Muhammad bin Kassim, etc. vs. the Waqf Commissioners, Zanzibar* (1946). Both judgments were allegedly informed by the Hanafi law that requires the inclusion of a charitable cause as ultimate beneficiary for the validity of a *waqf*. Accordingly, the *waqfs* were invalidated because of long chains of beneficiaries that made the perceived charitable causes so remote and almost non-existent (Anderson, 2008:96-97; Schacht, 1982; Qureishi, 1990; Banday, 2013).

The invalidation of the *waqf dhurri* of Fatuma binti Mohamed bin Salim in 1952 was, nonetheless, against both the preponderant view about Shari^ca (see chapter two) and the WCK Act of 1951 on the validity of *waqfs*. Sections 4 (1b, i and ii) of the Act provides:

Every *waqf* heretofore or hereafter made by any Muslim which is made, either wholly or partly, for any of the following purposes [...] the maker of the *waqf* is an Ibadhi or Hanifa Mohammedan, for his own behalf during his lifetime, is declared to be a valid *waqf* if – (i) it is in every other respect made in accordance with Muslim law, and (ii) the ultimate benefit in the property the subject of the *waqf* is expressly, or, in any case in which the personal law of the person making the *waqf* so permits, impliedly, reserved for the poor or for any purpose recognized by Muslim law as a religious, pious or charitable purpose of a permanent character.

Like the Act as indicated above, the majority opinion in Sunni Islam would have, nonetheless, validated the contested *waqf* on the mere dedication of the same being charity on its own merit (Kozlowski, 1998). All other Sunni *madhhabs* do not peg the validity of *waqfs* on the number of beneficiaries or residual charitable causes. Therefore, the court decisions that established the legal precedents were a clear case of misinterpretation of the jurisprudential positions in the Shari^ca.

As a matter of fact, the Privy Council decision is also claimed to have been reversed in India by the Mussalman *Waqf* Validating Act of 1913 (Schacht, 1982; Kozlowski, 1998; Anderson, 2008). Further evidence was also adduced to prove the contradictions of the court decision in Zanzibar over the Shari^ca as well as the Zanzibar *Waqf* Validating Decree of 1946. Clearly, these legal arguments rendered the basis of the High Court ruling on the case of Fatuma binti

Mohamed bin Salim as untenable (Anderson, 2008, 1951; Schacht, 1982). By relying on the doctrine of precedence applied in English Common law which does not exist in Shari'a (Anderson, 2008), the judgment established grounds for the contestation and invalidation of similar *waqfs* in the postcolonial era (see chapter four). This emphasizes that miscarriage of justice was not only to the economic and socio-cultural detriment of beneficiaries, but also with a view to putting into disrepute the institution of *waqf* altogether on the basis of non-Islamic jurisprudential practices.

In another incident, the Supreme Court declared null and void some sections of the charitable *waqf* of Mohammed bin Rashid bin Badai in 1942. The corpus of the *waqf* consisted of two farms at Kisauni and Miritini and a residential plot in Mombasa Island for the benefit of his soul; those of his deceased parents and siblings; Ghazali *madrassa*; *da'wa* (propagation); and other charitable activities as deemed fit by the WCK as designated *mutawallis*.³³ The court upheld the validity of the section of the *waqf* on the residential plot but nullified the other section on agricultural lands. This was paradoxical in the sense that there are no two ways in *waqf* according to the majority opinion in Sunni Islam. A *waqf* is either valid or not at all but cannot be split with some sections held as valid and others as invalid. Again, in 1949 the same court nullified the *waqf* of Mohammed bin Soud consisting of a piece of farm at Kisauni, Mombasa. Consequently, four heirs of the endower – Ahmad, Soud, Khadija and Salima – divided the properties in accordance with the law of *mirath*.³⁴

A landmark judgment involving another land *waqf* also delivered in a Mombasa court in 1949 would suffice to explain the reasons for the invalidation of the previous two *waqfs*. In *Said bin Abdalla and Sabahu binti Ali vs. the Waqf Commissioners and the Registrar of Titles*, the court held that the creation of a land-based *waqf* was either a 'transfer of land' or 'dealing in land' under the terms and regulations of the Registration of Titles Ordinance (1901).³⁵ In this context, the *waqf* was nullified for contravening the regulations regarding transfer of land (Anderson, 2008:98). This is because the Registration of Titles Ordinance barred the Registrar of Lands not to recognize any dealings that contradicted the provisions:

³³ See testamentary *waqf* of Mohammed bin Rashid Badai dated September 12th 1935 (English translation), the WCK, Mombasa.

³⁴ WCK archive, Mombasa.

³⁵ Civil Case no. 40 of 1949, High Court of Kenya, Mombasa, WCK archive, Mombasa. See also Anderson, J. (2008). *Islamic Law in Africa*, op. cit. p.98.

A registrar must not register any instrument purporting to transfer or otherwise deal with [...] land [...] except in the manner herein provided nor unless such instrument be in accordance with the provisions hereof, but any instrument in substance in conformity with the forms annexed hereto shall be sufficient (as quoted in Anderson, 2008:98).³⁶

Precisely, *waqfs* were considered real estate properties whose contracts were guided by English Common law and procedures. Accordingly, the Registration of Titles Ordinance did not recognize *waqf* deeds as valid documents in the establishment and transfer of *waqf* lands because the charters do not identify legal persons to whom the properties are transferred. Transfer of ownership of real estate, in view of the Ordinance, required that *waqf* lands be transferred to *mutawallis* or institutions as legal beneficiaries, but not to indeterminate entities like the poor and needy. Clearly, by not recognizing *waqf* deeds as binding documents in the transfer of *waqf* lands to *mutawallis* and beneficiaries, the statute technically invalidated land *waqfs*. Above all, since the Shari'a places ownership of *waqfs* to God, who is in this case not a legal entity, the requirement by the Registration of Titles Ordinance was a case of a misapplied piece of legislation.

There is no doubt that the British experience regarding *waqf* lands in Zanzibar influenced the dynamics of the legislations and court decisions regarding land in the Protectorate. It has been argued before in the study that though land formed a significant factor of production, it was perceived differently by the Muslim community and the British colonial government. The British viewed land in terms of capitalist economy that should be put into 'productive use' but not to be pawned or inhabited by a chain of dependants as largesse (Fair, 2001). It would be recalled that during the 1900s in Zanzibar, *mutawallis* of huge tracks of *waqf* lands were forced to charge monthly rents to the occupants in a view to instilling capitalist economic ideals. The British colonial government, nonetheless, faced insurmountable challenges in convincing *mutawallis* to change their perceptions on *waqf* lands and occupants from mere acts of generosity to income generating ventures through house rents and land taxes (Fair, 2001:200-210; Oberauer, 2008).

Unlike in Zanzibar, however, where some beneficiaries were manumitted slaves who looked up to their former masters for dependence, majority of beneficiaries of land *waqfs* in the

³⁶ A similar legislation – the Land Transfer Ordinance of 1920 - existed in Jerusalem during the British mandate where it became impossible to register *waqfs* in the *kadhi's* court without the consent of the land registry department. See Reiter, Y. (1996). *Islamic Endowments in Jerusalem under British Mandate*. London: Frank Cass & Co. Ltd., pp.37-38.

Protectorate were either descendants of the endowers or public causes. Therefore, nullification of land *waqfs* in Kenya could be interpreted as attempts by the British colonial government to stem a repeat of the Zanzibar crisis where *mutawallis* resisted embracing capitalist ideals advocated by the colonial government. Revocation of the *waqfs*, in essence, put the farms in the direct ownership of individual heirs who could then be swayed to adopt capitalism rather than allowing their shares to be used as charities by the community. This helped the British colonial government to achieve its “self imposed mission of civilization, progress, equity, and good government” at the expense of a religious tradition of charity and *qurba* in form of *waqfs* (Hashim, 2010:223).

In summary, the various secular policies and civil institutions instituted by the colonial government to control resources also influenced the institution of *waqf*. As discussed, the colonial government controlled the juridical and legislative processes from where authorities could invoke contradictory legislations and judgments against the Shari‘a demonstrating the application of ‘Anglo-Mohammedan jurisprudence’ in the region. On the other hand, the selective appointment of *waqf* Commissioners who worked under strict guidelines and supervision ensured that the state would have a leeway in implementing its policies in the Protectorate. Clearly, this was a case of appropriation of political power and symbolic violence for the control of resources in a colonized territory.

Conclusion

This chapter has documented the contours in the conflicts, negotiations, and control of economic, political, and social resources among different actors and fields in the British East Africa Protectorate. Starting with the negotiation for political and economic power from the Bu Sa‘idi sultanate upon the coming of the British, we have established that subsequent control of the political field by the later accorded it the legitimacy to influence the juridical and legislative spheres. This enabled the British colonial government to establish laws and civil institutions that restructured and limited the jurisdiction of the *kadhi*’s courts as well as influencing the civil judgments emanating there from. From the inclusive understanding of Muslim personal status law, the colonial authorities also re-defined it to the exclusion of *waqfs*. Ultimately, this placed control of the economic mainstay of the interlocutors of Islamic knowledge and authority - the

kadhis and *‘ulama* – as well as the *mutawallis* and diverse groups of beneficiaries in the hands of the colonial government.

To strengthen economic and political hegemony, the colonial government only conscripted Muslims perceived as ‘sympathetic’ with the ability to propagate state policies and according them religious legitimacy. This partly explains the formulation of the *Waqf* Commissioners Ordinance 1900 (later Act of 1951) to accord the state an upper hand in the appointment of Commissioners who worked under British colonial officers seconded to the state agency. Moreover, the colonial authorities exploited existing ethnic rivalry between Muslims as evident in the appointment of Commissioners to represent competing and conflicting Muslim groups in the region (see Appendix 3). Ultimately, the general policies in managing *waqfs* as established by the colonial government provided fertile grounds for the negotiations for control of socio-cultural and political spheres in the Muslim community along ethnic and regional boundaries expounded in chapters four and six as internal *umiji-wamiji* (locale identity and belonging) dynamics.

Chapter Four

Managing *Waqfs* in Postcolonial Kenya: Perpetuating State Control

4.0 Introduction

... I find the excuse that Malindi had no representation in the Commission rather wanting. How many other districts are not represented? Why do we want the Waqf Commission to look like a coastal affair that does not concern other Muslims in the country? (Shaykh Ibrahim Lithome, April, 2010).

Such are the sentiments that the position of a *Waqf* Commissioner arose during the postcolonial period as the WCK Act remains unchanged. With the active involvement of secular state in the control of *waqfs*, what informed the appointment of a Commissioner as a state *mutawalli* during the postcolonial period? Of what influence were secular policies on the development of *waqfs* in the postcolonial times? And how did Muslims negotiate the secular milieu in the practices of *waqfs* during the postcolonial era? The answers to these questions and the internal dynamics that inform the affairs of the state agency are the main focus of this section of the study, hence development of the chapter around the *Waqf* Commissioners of Kenya Act (1951) that established the state agency and the secular policies instituted since the colonial times. From the appointment of *Waqf* Commissioners to imposed compulsory registration; nullification of *waqfs*, allegedly, inconsistent both with the Shari^ca and the Common law; dismemberment of *waqfs* through executive decrees and adverse possession to the takeover of *waqf* administration by the state agency for lack of established *mutawallis*, the discussion unravels the influence of secular state policies and Common law judgments on the institution and how Muslims negotiated these developments during the postcolonial period.

4.1 Appointment of *Waqf* Commissioners: Ethnic Affiliations and Loyalty to State Policies

The normative precept that the position of a *mutawalli* is honorary with no fixed remuneration (*Sahih al-Bukhari*, 3:507, 895) changed with the establishment of the WCK as a supervisory body. Since then, *waqf* Commissioners were appointed and remunerated by the state compounding the dynamics in the position, particularly during the postcolonial period, when filling it demanded varied and salient albeit unwritten considerations. In constituting the WCK as

state *mutawallis*, Section 6 (1) of the WCK Act provides that the agency shall be made of eight persons of whom:

(a) One shall be the Provincial Commissioner of the Coast province, who shall be ex officio a member; (b) one shall be the Chief *Kadhi*, who shall be ex officio a member; (c) one shall be a Muslim appointed by the Minister on the recommendation of the Provincial Commissioner of the Coast province; and (d) five shall be Muslims appointed by the Minister from a panel of names submitted by the Provincial Commissioner of the Coast province after taking into consideration Muslim opinion in relation thereto.

As provided, the Act does not specify the qualifications for appointment of Commissioners. Considering that the statute significantly remains unchanged, the colonial precedent for appointing Commissioners - socio-ethnic affiliations and perceived loyalty to state policies could, therefore, be assumed to be effective in the postcolonial period. State officers – the PC and the Chief *Kadhi* – are also incorporated as ex-officio members.¹ Within this context, appointments to the state agency during the postcolonial period were laden with socio-political and symbolic undertones that turned them to raw contests between the state and Muslims on one hand, and amongst socio-ethnic and political Muslim groups on the other.

During field work, I was particularly intrigued by the stipulation that five members of the state agency were appointed from a panel of names that took ‘Muslim opinion’ into consideration. Despite being a Muslim and brought up in the coast region, I have not heard of Muslims’ opinion being solicited in appointing *Waqf* Commissioners. Neither is there a democratically elected Muslim body that could claim to speak for the majority of the Muslims in the country, let alone the coast province from whose position the nomination of Commissioners could be paramount owing to the legal limitation of the Act.² So, how was Muslims’ opinion with regard to

¹ According to the history of Provincial administration, there have been about two Muslim PCs in the coast province in independent Kenya – Ismael Chelang’a and Yussuf Hajj. Except for special cases when the Commission meetings were held in their offices, non-Muslim PCs sent Muslim representatives to the WCK meetings. Interviews with Mohammed Shalli, Mombasa, November, 2014; Zubeir Hussein Noor, Mombasa, November, 2014.

² Section 1 of the WCK Act (1900) read in conjunction with legal notice no. 604 of 1963 restricts the legal jurisdiction of the Act to coast province. According to Hassan Ndzovu, establishment of the Supreme Council of Kenya Muslims (SUPKEM) in 1973 was meant to attain social control of the Muslim community by the state at the expense of political, economic, and theological development. This suggests that the board did not entirely represent Muslims’ interests. Therefore, several organizations were formed to offer alternative voices including the Council of *Imams* and Preachers of Kenya (CIPK); the National Muslim Leaders Forum (NAMLEF); National Union of Kenya Muslims (NUKEM); and *Jam’at Ta’lam al-Quran* (community for the Teachings of the Quran, JTQ) among others. However, none of these bodies could claim the legitimacy of being Muslims’ mouth piece. See Ndzovu, H. (2014b). *Muslims in Kenyan Politics, Political Involvement, Marginalization, and Minority Status*. Evanston: North Western University Press, pp. 79-105.

appointment of the Commissioners sought? Or what actually constituted Muslims' opinion in as far as appointing the state *mutawallis* was concerned?

Suffice to say that the positions and responsibilities of some state officers in the statute including the Governor, Civil Secretary, and the *liwali* acquired new names as Minister for legal and constitutional affairs or the Attorney General (AG); the Chief *Kadhi*; and the PC respectively during the postcolonial period.³ Even with these amendments, nonetheless, the government retained the power to appoint Commissioners. In this regard, as confided by some informants, Muslims' opinion in the spirit of the amendments entailed the Chief *Kadhi* as the legal state advisor on Islamic issues. From logical deduction, it implies that the Chief *Kadhi* sanctioned recommendations made by the PC or he submitted the five names to the PC for approval by the AG.⁴ In simple terms, the state consults within its institutions and decides who to appoint as Commissioner on the basis of socio-ethnic affiliations and perceived loyalty to its policies. And how does the government identify from the diverse ethnic groups Muslims perceived as sympathetic to state policies in the postcolonial era? The answer to this question echoes the concepts of social and cultural capital as advanced by Pierre Bourdieu.

Bourdieu (1986:248-249) conceives of social capital as “the aggregate of the actual or potential resources which are linked to possession of a durable network of more or less institutionalized relationships of mutual acquaintance and recognition or in other words, to membership in a group.” Summarized differently, social capital is all about lasting social relationships, connections, and networks of family, friends, workplace, and neighbors based on trust and corporation to ensure common norms, social control, and most times, mutual benefits. These social networks are meant to provide a chance to the members within the group to “enjoy certain privileges they have not necessarily earned” (Svendsen and Svendsen, 2003:623; Bourdieu, 1986; Rey 2007). According to Bourdieu (1986:249), the relationships and networks are socially instituted to imply obligations and could be manifested “by the application of a common name, (the name of a family, a class, or a tribe or of a school, a party, etc.) and a whole set of constituting acts designed simultaneously to form and inform those who undergo them [thus] enacted and so maintained and reinforced.”

³ Legal Notice 604 of 1963 on sections 1, 6, 24 and 26 of the WCK Act.

⁴ Interviews with Muhammad Shalli, Mombasa, November, 2014; Zubeir Hussein Noor, Mombasa, November, 2014.

On the other hand, Bourdieu (1986:243-248) espouses cultural capital in the form of long-lasting dispositions of the mind and body (*embodied* state, i.e. culture and cultural competence, cultivation, incorporation, socialization, and assimilation); in the form of cultural goods (*objectified* state, i.e. material objects and media including but not limited to writings, paintings, and instruments); and in the form of objectification (*institutionalized* state, i.e. academic qualifications and or certificates of cultural competence acquired through training in a socially recognizable institution) (emphasis in original; see also Svendsen and Svendsen, 2003). In this sense cultural capital “denotes knowledge of or competence with aesthetic culture or specific distinctive cultural traits, tastes, and styles of individuals who share a common sense of honor based upon and reinforced by shared conventions” (Di Maggio, 1982, as quoted in Lareau and Weininger, 2003:574). In the wider context, cultural capital could be perceived in terms of instruments, both technical and social, for the appropriation of symbolic wealth (i.e. cultural heritage of the society) worthy of being sought and possessed (Di Maggio, 1982, cited in Lareau and Weininger, 2003).

Based on the foregoing, appointment of *Waqf* Commissioners in the postcolonial era could be summarized by four important considerations: social capital, symbolic capital, cultural capital, and more importantly, regional (read the former Protectorate) balancing. The Chief *Kadhi* recommends five people within his social network who possess the requisite cultural competence that in the opinion of the PC, also based on his National Security Intelligence Services (NSIS) reports are ‘loyal to state policies’. It goes without saying that this arrangement gives the Chief *Kadhi* the audacity to recommend, hence, literally appoint his allies and avoid his distracters with ease.⁵ A critical look at the appointed Commissioners over time confirms this view. The list includes renowned politicians and business men as opinion makers and symbolic figureheads from respective socio-ethnic groups being reappointed several times on recommendation of the Chief *Kadhi* (see appendix 3).⁶ This practice maintained the status quo not only in *waqf*

⁵ This also opened the door for potential candidates or socio-ethnic and political groups to lobby with the Chief *Kadhi* or the PC for appointment as *Waqf* Commissioners. See correspondence between Coast Peoples’ Party (CPP) and the WCK, March, 1961; correspondence between O.K.T. Kashero of Harambee *masjid* and the WCK, July, 1970; correspondence between Malik Said Basheik and the PC, February, 1975, WCK archive, Mombasa. Interview with Zubeir Hussein Noor, Mombasa, November, 2014.

⁶ Correspondence between Chief *Kadhi* and the PC on the re-appointment of *Waqf* Commissioners, Ref 3/4/86; 16/9/81; 3/5/82; 11/6/86; January, 1962; March, 1986; Gazette Notices no. 1943, July, 1982; 2050, May, 1986. It was also customary for the WCK to request serving commissioners to be re-appointed or their potential replacements debated and agreed upon in Commission sittings. See correspondence between the WCK and Commissioners, January, 1962; minute 2176 of January, 1961; letter to Hon. Abdallah Ndovu Mwidau, February, 1962; the WCK’s letter to PC seconding the appointment of *shaykh* Said

administration but also in the internal socio-ethnic equilibrium of Muslim groups, particularly, in the former Protectorate. Borrowing from Mwakimako's (2010) terminologies, this brings us to the notion of *umiji* (locale) and *wamiji* (townspeople) in the institution of *waqf*.

4.2 Competing for Supremacy: Muslims' Internal Rivalry and Ethnic Dynamics in Constituting the *Waqf* State Agency

There existed a number of autonomous but symbiotic cosmopolitan city-states along the Eastern coast of Africa including Mombasa, Gedi, Pate, Lamu, Malindi, Zanzibar, and Kilwa from as early as the eighth century attracting visitors from across the globe.⁷ The Mazrui became *liwalis* and representatives of the Ya^crubi dynasty in many of these city-states after overthrow of the Portuguese in 1698 (Said-Ruete, 1929; Berg, 1973; Al-Mazru'i 1995).⁸ When the Bu Sa^cidi replaced the Ya^crubi dynasty in 1749 A.D., the Mazrui shifted their allegiance to the former. However, protracted succession disputes that pre-occupied the Bu Sa^cidi in Oman enabled many of the governorates under Mazrui *liwalis* to exist as autonomous and rival city-states for over a century until 1837 (Spear, 1988; Freeman-Grenville, 1988; McIntosh, 2009).

Over time, the city-states grew into important towns distinguishing themselves in a binary contrast – with Malindi and Mombasa as political nerves of the region while Lamu and Takaungu (Kilifi) developed into legendary centers of Islamic knowledge and authority.⁹ This suggests that old aged negotiations and conflict for supremacy in the economic, political, social, and cultural fields as witnessed in the close to two centuries' autonomous life of the centers only mutated but did not end at least from the viewpoint of *waqfs*. This is true considering the fact that the British colonial authorities, through in-direct rule policy, upheld the socio-ethnic

Mohammed Mandhry, August, 1965; the WCK's letters to Hon. Mohammed Jahazi and Ahmed Ali Omar, June, 1968, WCK archive, Mombasa.

⁷ Fair, L. (2001). *Pastimes and Politics: Culture, Community, and Identity in Post-Abolition Urban Zanzibar, 1890-1945*, Oxford: Ohio University Press, pp.10-12; East African City-States. Retrieved from: <http://www.blackpast.org/gah/east-african-city-states>. (Accessed April, 2016); East Africa's Swahili Coast. Retrieved from <http://www.africanworldheritagesites.org/cultural-places/swahili-coast.html>. (Accessed April, 2016); Kilwa and the Swahili Coastal Trading States. Retrieved from: <http://www.vhinkle.com/africa/kilwa.html>. (Accessed April, 2016).

⁸On the emigration of the Mazrui to the East African coast see Al-Mazrui, A. (1995). *The History of the Mazru'i Dynasty of Mombasa*. Oxford: Oxford University Press, pp.21-22; Fair, L. (2001). *Pastimes and Politics*, op.cit; Nicolini, B. (2014). Notes on Asian Presence along the Swahili Coast during the Nineteenth Century. *Quaderni Asiatici* 107, (September), 61-86.

⁹ See Sperling, D. (1988). *The Growth of Islam among the Mijikenda of the Kenya Coast, 1826-1933* London: University of London, School of African and Oriental Studies; Seesemann, R. (2006). African Islam or Islam in Africa? Evidence from Kenya. In R. Loimeier and R. Seesemann (Eds.), *The Global worlds of the Swahili: Interfaces of Islam, Identity and Space in 19th and 20th Century* (pp. 229-250). Berlin: Lit.

hierarchy according Arab Muslims preferential treatment over African Muslims and recognized the former as legitimate leaders of the coastal communities (Ndzovu, 2014b). With the *waqf* Act un-changed, post-British regimes continued to ape this hierarchy as evident in the appointment of the Chief *Kadhi* (Mwakimako, 2010), and the *waqf* Commissioners.

Postcolonial state policies, therefore, aped the colonial ones giving impetus to Muslims' socio-ethnic negotiations in the society. This could be explained better in Mombasa as a microcosm. According to Mwakimako, Mombasa's socio-political sphere has been traditionally decorated by tribal alliances and rivalry pitting the Mazrui on the one side and the *Tisa Taifa* and *Thelatha Taifa* (i.e. *Thenashara Taifa*, twelve ethnicities) Swahili Muslim groups on the other.¹⁰ The relations between the two Swahili Muslims' federation and the Mazrui were determined by changing needs and circumstances for the mutual benefits of either side. For instance, despite their antipathy, issues of shared concern, like the appointment of the Chief *Kadhi*, could easily unite the *Thelatha Taifa* and *Tisa Taifa* against the Mazrui. This is due to the fact that "Muslims recognized the authority of *ʿulama* on the basis of their influence within the boundaries of *miji* (sing. *mji*, locales), racial, and ethnic groups" (2010:110). Therefore, appointment of the Chief *Kadhi* who also influences the nomination of Commissioners and the affairs of the *waqf* state agency has ever been a socio-ethnic and regional contest between the Swahili Muslims' confederation and Mazrui in Mombasa on one hand, and Mombasa vis-à-vis her neighboring former city-states, especially Lamu, on the other since the position was established.¹¹

Etymologically, the term *umuji* (pl. *umiji*) is derived from a Swahili noun *mji* (pl. *miji*) meaning town. The verb *umuji* (i.e. of belonging to a town) and the compound noun *wamiji* (towns' people) were primarily used as socio-ethnic tags in relation to the ambiguous spatial boundaries between the two groups in the Mombasa milieu. The Mazrui family inhabited the present Old

¹⁰ The *Thenashara Taifa* represents a federation of Swahili Muslim groups consisting of Wakilindini, Tangana and Changamwe, (also called *Thelatha Taifa*) on one hand, and Mvita, Jomvu, Mtwapa, Kilifi, Pate, Faza, Shaka, Gunya and Katwa, (the *Tisa Taifa*) on the other. According to Hassan Ndzovu, the socio-ethnic formations were critical in the negotiations for inclusion and exclusion in the British political landscape facilitating the formation of political associations to advocate for ethnic temporal interests that could be felt in the present times. See Al-Mazru'i, A. (1995). *The History of the Mazru'i Dynasty of Mombasa*, op.cit; Mwakimako, H. (2010). Conflicts and Tensions in the Appointment of Chief *Kadhi* in Colonial Kenya 1898-1960s. In S. Jeppie, M. Moosa & R. Roberts. (Eds.), *Muslim Family Law in Sub-Saharan Africa: Colonial Legacies and Post-Colonial Challenges*, (pp.109-134). Amsterdam: Amsterdam University Press; Ndzovu, H. (2014b). *Muslims in Kenyan Politics*, op. cit.

¹¹ There have been ten Chief *Kadhis* since establishment of the position in Kenya. Mombasa has produced five, four from the ethnic Mazrui Arabs while Lamu has produced 4. The only non-Kenyan Chief *Kadhi* was *shaykh* Abdallah Salih Farsy (1912-1982). See Seesemann, R. (2006). African Islam or Islam in Africa? op. cit., pp.229-250; Mwakimako, H. (2010). Conflicts and Tensions in the Appointment of Chief *Kadhi*, op. cit., pp.109-134.

town and areas neighboring Fort Jesus from where they established their political base after the expulsion of the Portuguese. In the classical sense, therefore, typical Swahili Muslims would refer to the Old town as *mjini* (town) from where Mombasa city-state was administered in contrast to the *shamba* (farm land) peripheral neighborhoods where the Swahili Muslims were associated with.¹² Thus, appointment of Commissioners to the state *waqf* agency always sought to have representatives (*wamiji*) from these two locales (i.e. urban and peri-urban) and the surrounding former city-states (also *miji*) to safeguard the intricate socio-ethnic and political dynamics of the Mazrui–Swahili Muslims’ confederation divide, and that of Mombasa vis-à-vis her rival neighbors.

Informing this perception was a critical analysis of the list of serving and former Commissioners. Mombasa normally got three or more (out of the six ordinary) seats while the rest were shared among neighboring towns – Takaungu, Malindi, Lamu, and rarely, Kwale.¹³ It was on the context of these considerations that the appointment of *shaykh* Ibrahim Lithome in 2009 caused uproar from the coastal *miji* that had been overlooked in the appointment cycle.¹⁴ *Shaykh* Lithome was a legal advisor to the Supreme Council of Kenya Muslims (SUPKEM) and an expert in the Shari‘a. Based on these attributes, he possessed the requisite cultural, symbolic, and even social capital to merit his appointment as Commissioner of the state agency. However, despite being an invaluable resource to the Muslim community, his nomination was strongly contested by Lamu and Malindi on the claims that he was an ‘outsider’ from the coast region.

It is a fact that section 1 of the WCK Act read in conjunction with Legal Notice No. 604 of 1963 restricts the jurisdiction of the state agency to the coast province. However, this does not prohibit the appointing of Commissioners from outside the region. Precisely, section 6(1) on the

¹² This view is further emphasized by the location of present administrative offices including the PC’s, High Court, Central Bank, Mombasa town hall, and most importantly, the State house and the historical Fort Jesus within the precincts of Old town. The socio-ethnic tags could also relate to the fluid ‘*uungwana*’ (civilized) and ‘*ushenzi*’ (un-civilized) boundaries of the Arab, African, and Swahili Muslims. Interview with Muhammad Shalli, Mombasa, November, 2014. See also Ndlovu, H. (2014b). *Muslims in Kenyan Politics*, op. cit.

¹³ Some informants justified the appointment policy based on the amount of *waqfs* available in each town with those having no *waqfs* being left out. However, this view is weak considering that there has never been a survey of *waqfs* to support this position. Further, to demonstrate the close relations between the former governorates in the concept of *umiji*, members of the ‘moon sighting committee’ are only drawn from Mombasa, Malindi and Lamu. See Friday Bulletin Reporter. (*Friday Bulletin*, June 10, 2016, Issue No. 684). Reconstitute Moon Sighting Committee. Nairobi, pp. 1-2. Retrieved from: www.jamiamasjidkenya.org. (Accessed April, 2016). Interviews with Muhammad Shalli, Mombasa, November, 2014; Aboud Hadi, Malindi, October, 2015; *Shaykh* Muhdhari A. S. Hussein, Mombasa, October, 2015.

¹⁴ Letter of complaint by Ahmad Aboud Hadi, Malindi, September, 2009; correspondence between Abdurahman A. Abdurahman, Lamu, and the WCK, June, 2009, WCK archive, Mombasa.

composition of Commissioners is ambiguously silent on the areas of abode of nominees contrary to what was erroneously alleged by the complainants (see section 4.1). Consequently, Muslims across the country have equal chances and rights of being appointed as Commissioners of the WCK. It was further argued by the disgruntled parties that being an ‘outsider’, it would be difficult for *shaykh* Lithome to be available for Commission assignments given the long distance to Mombasa, (the headquarters of the WCK), from Nairobi, where he resided.¹⁵ Clearly, Lithome’s cultural, symbolic, as well as social capital was deemed irrelevant in as far as the internal socio-ethnic and political dynamics of the *wamiji* (Mazrui–Swahili Muslims’ confederation) and neighboring coastal *miji*’s Muslim groups were concerned. For this reason, his appointment was revoked and was replaced by a Commissioner from Malindi.¹⁶ Therefore, in the context of *umiji-wamiji* and *waqfs* in particular, individual identity and ‘Muslimness’ is contingent to socio-ethnic affiliation and locale (or regional) belonging with some perceived to be more inclined than others.

In conclusion, though serving the state agency as a Commissioner was a prestige that every Muslim wished to attain, it tended to be a preserve of some powerful cartel of Muslim elites from the coastal towns. In other words, “*waqfu una wenyewe*” (i.e. WCK [and *waqf*] has its owners).¹⁷ The appointment of other Muslims outside the *umiji-wamiji* continuum, their cultural competencies and symbolic resources notwithstanding, is not guaranteed as evident in the case of *shaykh* Lithome. This view was subtly compounded by an incident that occurred around May 2013 involving two Swahili women as narrated by an informant. The women had visited the WCK office to protest rent increment on *waqf* houses they were occupying. Despite incessantly explaining their dissatisfaction, the Commission Secretary remained adamant that the status quo would stand in reflection of *ijar al-mithal* for the interest of the *waqfs*. The women were infuriated by this reply and ranted against the Secretary saying, “*hizi [nyumba za] waqfu ni zetu sisi. Ziliwekwa na mababu zetu wa Mandhry, siyo zenu nyie Wabajuni*” (the *waqf* houses belong to us [while thumping their bosoms]. They were consecrated for us by our Mandhry fore-fathers;

¹⁵ Conservative estimates put the distance between Mombasa and Nairobi at five hundred kilometers, taking about 8 hours to cover by bus or 50 minutes by charter plane.

¹⁶ Gazette Notice no. 1260 of February, 2010 on the revocation of the appointment of *shaykh* Ibrahim Lithome (Nairobi) and his replacement, Prof. Abdallah Nadji Said (Malindi). Lamu has had no commissioner since 2009. This makes the claim that *Waqf* Commissioners were appointed on the basis of amount of *waqfs* in a town to be superfluous. Group interviews with *Mwalimu* Hussein Said, Hamid Abdurahman and Abdallah Swaleh, Lamu, December, 2015; Muhammad Shalli, Mombasa, November, 2014. See also minutes 17/2010, WCK archive, Mombasa.

¹⁷ Interview with Rashid Mwando, the WCK, Mombasa, October–December, 2014, (translation is mine).

they are not for the Bajunis [i.e. ethnic-Muslims from Lamu to which, incidentally, the Secretary belongs]).¹⁸ This incident was twin fold: it illustrated a preponderant perception among the *wamiji* that *waqfs* are their exclusive right and should be left for them to manage and use as they deem appropriate, and the deeply entrenched antipathy among Muslims in the region along socio-ethnic and locale affiliations.

4.2.1 Levels and Influence of *umiji-wamiji* Dynamics in *Waqfs*

Departing from the appointment of Commissioners to the state agency, we discern two levels of *umiji* - national and regional - that influenced the institution of *waqf* in the postcolonial period. At the national level, socio-ethnic and political negotiations for control of *waqfs* between locales with considerable Muslim populations was seemingly sanctioned and perpetuated by the WCK statute that limits the jurisdiction of the state agency to coast province. In effect, Muslims outside the coast region could not establish *waqfs* in the spirit of the Act, except for *non-labeled waqfs* like private trusts, *zakat*, and *sadaqa* as part of Islamic charity. This legal limitation partly accounts for the inability by the state agency to administer consecrations beyond the coastal area or even resolve reported claims of misappropriation of *waqfs* in Kisumu (Nyanza region) in the 1980s and Narumoru (Central province) around 2010.¹⁹

On the other hand, although the WCK Act does not bar the appointment of a Muslim outside coast province as a Commissioner, the furor that followed the nomination of *shaykh* Lithome and his subsequent nullification suffices to understand the negotiations for the control of *waqfs* between Muslims and the state, and amongst Muslims themselves along *umiji-wamiji* perspective. Among issues that Lithome observed upon nullification of his appointment was the tendency to make the WCK, and *waqf* in general, exclusively a coastal affair.²⁰ Lithome's

¹⁸ Interview with Muhammad Shalli, Mombasa, November, 2014, (translation is mine).

¹⁹ Muslims in Nyanza had raised concerns to the District Officer (DO) over mismanagement of *waqfs* in Kisumu town. The Commissioner of Lands (not the WCK), later appointed the Kisumu Muslim Association (KMA) as trustees of the contested *waqfs*. Similar claims were lodged by Muslims in Narumoru (Central Kenya) who petitioned the Kenya National Commission on Human Rights (KNCHR). The KNCHR referred the matter to the WCK who replied of being tied by law to handle the case. See correspondence between the KMA, the WCK, *kadhi*, Nyanza region and the DC Nyanza, August, 1981- January, 1982; Narumoru Medina mosque committee, KNCHR, and the WCK, November, 2011- February, 2012, WCK archive, Mombasa.

²⁰ In the letter questioning revocation of his appointment, *shaykh* Ibrahim Lithome wondered; "[...] I find the excuse that Malindi had no representation in the *Waqf* Commission rather wanting. How many other districts are not represented? Why do we want the *Waqf* Commission to look like a coastal affair that does not concern other Muslims in the country?" See correspondence between *shaykh* Lithome and the WCK through the Chief *Kadhi*, April, 2010, WCK archive, Mombasa.

appointment was questioned and nullified on the basis of not being a coastal Muslim, the legal area to which the WCK Act defines national *umiji*. In essence, therefore, national *umiji* perpetuates negotiations of disconnect between Muslims and the state, and amongst Muslims along geographical boundaries in as far as *waqfs* are concerned.

Below national *umiji* is the regional (town locales) that encompasses only a few coastal *miji* where the WCK Act is actualized. Here, it departs from two levels of struggle for control of *waqfs* as an economic capital for the negotiation of social and political fields – Mombasa as a microcosm and the neighboring towns' locales. Within Mombasa town and its environs as explained before, the socio-political negotiations for *waqfs* were ever a contest pitting two sections representing the fluid spatial boundaries between the Swahili Muslim federation and their allies on the one side, and the Mazrui and their sympathizers on the other. These were, undoubtedly, deep rooted struggles that endowers had imbibed and were constantly aware of even as they consecrated *waqfs*, and largely informed the choice of Commissioners with a view to maintaining the internal equilibrium of the Mombasa Muslim protagonists.

Outside Mombasa, *umiji* regards the historical relations between the town and her neighbors that informed considerations on the appointment of *waqf* Commissioners. Some respondents argued that Commissioners were appointed from among “*waqf* producing regions only.”²¹ However, since the WCK Act does not provide for survey, it was impossible to ascertain the volume and distribution of *waqfs* to support this assertion. WCK only manages registered *waqfs* that could not be held as representative of the total volume of *waqfs* in the coast province, let alone the entire country. Precisely, the twin incidents of Narumoru and Kisumu confirm the hundreds of *waqfs* dotting the country that because of one reason or the other remained unregistered or are registered under various institutions besides the WCK. The probable justification in the criteria of appointing Commissioners, therefore, lied in the urge to have people representing and safeguarding the socio-ethnic, political, and cultural interests of individual locales and city-states that existed in the coast region during the Bu Sa^cidi sultanate.

²¹ Interviews with Mohammed Shalli, Mombasa, November 2014; Ahmed Aboud Hadi, Malindi, October, 2015; *Shaykh* Muhdhar A.S. Hussein, Mombasa, October, 2015. See also correspondence between the WCK and Abad B. Muyongo, August-September, 2006, WCK archive, Mombasa.

The conspicuous disregard of areas within the coast province, but outside the former Protectorate like Tana River and Taita-Taveta in the *waqf* negotiations further corroborates the foregoing opinion. The Protectorate extended inland only ten nautical miles from the coast line (Hailey, 1979; Eliot, 1996; Ndzovu, 2014). This makes the two hinterland regions of Taita-Taveta and Tana River not being part of the former Protectorate despite being in the coast province and commanding considerable population of Muslims, and by extension, *waqfs*. Consequently, *waqfs* from these areas have been overlooked and no Commissioner has been appointed since the establishment of the state agency. Thus, establishment of *waqfs* within the Protectorate was constantly informed by these historical incidents as endowers sought to advance and safeguard temporal locales' interests as evidenced in various *waqf* deeds (see chapter six).

As socio-political and ethnic interests of the *wamiji* and *umiji* took precedence in appointing Commissioners, beneficiaries, *waqifs*, *mutawallis*, merit, gender, and other considerations were disregarded.²² The result was the entrenchment of inefficiency and complacency within the WCK causing widespread dissatisfaction and apathy among majority Muslims who felt exploited and marginalized in successive appointment cycles and administration of *waqfs* by the state. Disgruntled Muslims also accused the state agency of gross failure and nepotism, particularly, in the award of lease and rent contracts of *waqfs* and how the body generally transacted business. This could not have been articulated better than in the lament by the beneficiaries of the *waqf* of Bamkele in Mombasa town.

The *waqf* of Bamkele has a vast corpus base composed of a total of forty four parcels of land and other properties within and outside Mombasa town. Of these, plot no. 84/XLI was contested because it was a prime premises comprising three commercial sites in the heart of the town leased to a local entrepreneur for 99 years from 1988 at a *salf* of sixty thousand Kenya shillings with two thousand six hundred shillings as monthly rent.²³ According to the beneficiaries, the lease contract was not in good faith for the economic interest of the *waqf* but to the benefit of the

²² By 2010, there was no female *Waqf* Commissioner in the WCK. The WCK Act does not, however, bar a female Muslim from being appointed as a member of the Commission. Their being overlooked from appointment could be attributed to male chauvinism prevalent in the local Muslim community who also legitimize the same through religious prohibitions that restrict free mixing of the genders. Interviews with Mohammed Shalli, Mombasa, November, 2014; Zubeir Hussein Noor, Mombasa, November, 2014.

²³ Letter by Zubeda bint Salim bin Iddi Bamkele to the WCK, July, 1999, cc. the Chief *Kadhi*, the PC coast Province, and tenants of the contested plot along Biashara Street, Mombasa. See also communication to the WCK by the complainant, July, 1988, WCK archive, Mombasa.

entrepreneur. They argued that apart from the contract being concluded without their involvement, the price was below *ijar al-mithal*. Accordingly, they concluded that economic, social, and symbolic capital were the possible considerations in the award of the lease.²⁴

The above incident serves to highlight Muslims' dissent against the WCK compounded by the lack of transparency and representation in the state agency. Unlike in Kenya, the Indian law of *waqf* is particular on the election (not appointment) of members of *waqf* boards in a system of proportional representation that brings together Muslim politicians, *mutawallis*, Muslim organizations, members of various *madhhabs*, and experts in the Shari'ah among others.²⁵ The specificity of the Indian statute also rules out possible scenarios of socio-ethnic and political favoritism in the election of Commissioners that bedevils the WCK. As such, it instills confidence in the hearts of Muslims in the community as well as efficiency in the board.

Therefore, the apparent lack of specific qualifications for the appointment of Commissioners in the statute was possibly meant to render the appointees easy to manipulate for the economic and political conveniences of the British colonial government. However, this was inadvertently inherited and perpetuated in the postcolonial Kenya, albeit for similar ends as was consequently hijacked by certain individuals and cartels along the *umiji-wamiji* considerations. However, as the state-WCK relationship took an ambivalent turn from the recent past, the void in the specific qualifications when appointing Commissioners accorded the historical *umiji-wamiji* negotiations for control of economic and socio-cultural spheres among ethnic-Muslim groups, particularly in the former Protectorate, an invaluable platform for its reenactment.

4.3 Compulsory Registration: Challenges and Protests against State Control vis-à-vis Revival of *Waqfs*

Compulsory registration of *waqfs* remained an important requirement even during the postcolonial period. However, the inability to enforce the rule, political interference, and weak penalties on non-compliance made state supervision and control of *waqfs* a challenging task during this era. Unlike the British colonial period where the state employed a hands-on approach

²⁴ Group interviews with Ali Salim Bamkele, Abdurahman Bamkele, Ahmed Bahaidar Bamkele and Hamid Salim Bamkele, Mombasa, November, 2015. See also internal memo by the Secretary, WCK, to Commissioners, July, 2010, WCK archive, Mombasa.

²⁵ See the *Waqf* Act of India of 1995, sections (9) and (14); *Waqf* (Amendment) Act of India of 2013.

to ensure control of resources, the *‘ulama*, and various groups of beneficiaries for political hegemony, the postcolonial regimes developed an ambivalent attitude towards hands-on control of the institution.

As a matter of fact, registration of *waqfs* declined sharply from the 1940s as shown in Table 1. Only 7 (6.7 per cent) *waqfs* were registered between 1940 and 1960, i.e. two decades before independence. The scenario worsened in the postcolonial period as the central registry realized 13 (12.5 per cent) *waqfs* from 1970s to 2000s. This scenario begs for answers as to why compulsory registration started to decline during the colonial period despite hands-on approach by the colonial government. By neither means does this decline suggest that Muslims stopped establishing *waqfs*; nor is it a pointer that *waqfs* stopped being the economic, social, and symbolic means worthy the negotiations witnessed then and for a long period in the postcolonial era manifested in protracted court battles involving *waqfs* and the internal intrigues that characterized appointment of Commissioners. Clearly, registration of *waqfs* declined in expression of Muslims’ dissatisfaction with centralized administration and control of the institution.

Precisely, state control of *waqfs* was resented because major actors – endowers, diverse groups of beneficiaries, *‘ulama*, and Muslim socio-cultural institutions – gradually lost independence and control of the institution. Consequently, this weakened the sectors catered for by *waqfs*; rendered the traditional positions obsolete; and eroded the privileges and influence of the actors in the society in sharp contrast to the steady socio-political ascendance of the British colonial government. In other words, control of resources by the colonial government, and *waqfs* in particular, had accorded it the economic and political power to dictate the level and nature of negotiations on the relationship between them and the Muslim community on the one side, and amongst Muslims themselves on the other. This caused apathy in a cross section of Muslims who responded through non-compliance with the requirement for compulsory registration of *waqfs*.

The situation was no different during the postcolonial period as successive regimes failed to undo the colonial state policies and legislations in relation to *waqfs*. These include lack of reforms in the WCK statute; continued appointment of Commissioners along socio-ethnic and locale backgrounds; political interference on *waqfs*; as well as dismemberment and invalidation

of *waqfs* through secular policies and institutions (see sections 4.5.1 to 4.5.3). To retain control of resources and fulfill the religious requirement on charity and *qurba*, a cross section of Muslims established *non-labeled waqfs* that they registered with other state bodies like the prisons, military, ministries of education and health (see also Mwakimako, 2007a), or private trusts and Non-Governmental Organizations (NGOs) as discussed in chapter five.

Significantly, compulsory registration became impossible to enforce in the postcolonial period as the state body also lost the vigor to pursue non-complying *mutawallis*. This is mainly due to the minimal fine imposed on defaulters that in essence even when imposed upon offenders it does not benefit the state agency (WCK Act, section 10, 4). This, evidently, placed the state agency in an awkward situation with so many *waqfs* out of its control while at the same time battling with inherited battered image.²⁶ The Act further bestowed upon the agency the audacity to disregard endowers' wishes as contained in various *waqf* deeds, and by extension, the Shari^ca on *waqfs* whenever they deemed fit. This created discontent in the Muslim community. Section 16(2) of the WCK Act provides:

In any case where in the opinion of the Waqf Commissioners the intentions of the maker of a *waqf* are unlawful or unascertainable or are incapable of being carried out, or where any surplus revenue remains after fulfilling the intentions of the maker of the *waqf*, the *Waqf* Commissioners shall [...] apply the property or surplus property or revenue in such manner as the *Waqf* Commissioners think fit for the beneficiaries of the *waqf*.

As expressed in the clause, the Act thus granted the *Waqf* Commissioners the authority to disregard the *shurut al-waqif* and spend *waqf* revenues against designated causes provided that it found the execution of the endower's stipulations unlawful or unascertainable. Included among these are recitation of the Qur'an at the endower's grave yard, salaries for Qur'an teachers, and organizing religious rites like *hajj*, *mawlid*, *khitma*, and *iftar*. This occasionally led to dissents and protests by the diverse groups of beneficiaries and progeny of endowers.²⁷

²⁶ Group interviews with Ali Salim Bamkele, Abdurahman Bamkele, Ahmed Bahaidar Bamkele and Hamid Salim Bamkele, Mombasa, November, 2015; Mohammed Abdallah, Ali bin Khamis, Rahman Abdallah and Rashid Khamis, Mombasa, November, 2015; Said *Sharif* Abdallah, Malindi, November, 2015.

²⁷ Most of the rites were disregarded allegedly for lack of funds. Once in a while, however, the WCK claimed to give some usufruct of the *waqfs* to *madrasas*, mosques, and other public institutions in fulfillment of endowers' wishes. Interviews with Muhammad Shalli, Mombasa, November, 2014; Mohammed Abdallah, Rahma Abdallah, and Ali bin Khamis, Mombasa October, 2015; Said *sharif* Abdallah, Malindi, October, 2015.

More so, by providing that the WCK could use the property of *waqf* or its surplus revenue in such manner as the Commissioners think fit, the Act subtly enshrined impunity to commit or omit important decisions without consulting the concerned parties. Ostensibly, this was on the belief that decisions made by the state agency would be to the best interests of the diverse groups of beneficiaries and *waqifs*. On the contrary, this was not always the case as established by the study crystallized by the lament by the Bamkeles above and, the apparent failure by the WCK to re-invest compensation funds from some compulsory acquired *waqfs* as was evident in chapter three. Disenfranchised beneficiaries of these and many other *waqfs* were at logger heads with the state agency questioning its decisions to lease them out to private investors allegedly at minimal rates and without consulting them. Consequently, some of the beneficiaries sued the Commission.²⁸ This demonstrates that not all decisions made by the state agency on behalf of the beneficiaries and *waqifs* as empowered by the Act were popular, causing dissatisfaction and apathy among a cross-section of the Muslim community, hence the non-conformity with the compulsory registration rules.

In interpreting the socio-economic and political subordination of traditional actors of *waqfs* that caused resentment and subsequently, non-compliance with imposed registration rule, we draw from Bourdieu's concept of symbolic violence – “the violence exercised upon a social agent with his or her complicity” (Bourdieu and Wacquant, 2003:272; Bourdieu, 1990, 2000). In the case of *waqfs*, it is clear that the state policies established an environment of symbolic domination against traditional actors in the Muslim community since the colonial period. The victims – *waqifs*, *mutawallis*, *‘ulama* and the general community of beneficiaries - as social agents understood and recognized the violence wielded precisely against them (i.e. being subordinate in the economic, social, and symbolic fields and capital). However, due to the political power of the colonial authorities and subsequent postcolonial government, particularly in the 1960s to 1970s, they ‘feigned’ not to perceive it as such, thereby constructing their relationship with the state from the stand-point of their being subordinate as *natural* (Bourdieu and Wacquant, 2003).

²⁸ The Bamkeles have had protracted legal battles against the WCK among them challenging alleged usurpation of administration of their private *waqfs* and leases to Shigog investments limited believed to be owned by a renowned businessman in the town. Group interview with Ali Salim Bamkele, Hamid Salim Bamkele, Abdurahman Bamkele and Ahmed Bahaidar Bamkele, Mombasa, November, 2015. See also Civil Suit no.165 of 1926 in the High Court of Kenya at Mombasa; correspondence between Shigog, the WCK, and the Attorney General, 2010-May, 2012, WCK archive, Mombasa.

Conversely, this perception also instilled apathy and resentment among Muslims manifested in the low figures captured in the central registry of the state agency.

In the last decades of the twentieth century, however, the opening up of the democratic space in the country also meant slackening of conspicuous presence by the state in the supervision and control of *waqfs*. Direct interference by the government through the provincial administration as was the case of Malindi *waqfs* (see chapter three) and the *waqf* of Salim bin Mbaruk bin Dahman at Kanamai (see section 4.5.3) was relatively relaxed. As a matter of fact, the relationship between the state agency and its benefactor in the twenty-first century could aptly be described as ambivalent. According to a pre-independence agreement that incorporated the former Protectorate to the Kenya colony, the state was bound to protect Muslims' historical claims to land and religious institutions (see chapter five).

Despite this historical and constitutional obligation, nonetheless, the postcolonial government faced a dilemma. It could not risk conspicuous involvement in the development of Muslims' religious institutions (like the WCK and *kadhi's* courts) and their supervision without drawing the anger of the majority Christian population for alleged bias as evidenced during the review of the constitution. Within this context, the state resorted to controlling the WCK from the periphery. It engaged the WCK in-directly on need basis so as to maintain control of the institution for more or less the same reasons that led to its establishment without drawing the wrath of either religious community. Accordingly, this accorded the WCK and Muslims in general an ambiguous degree of hands-off in the control of *waqfs*.

Around the same time, the judiciary also demonstrated some independence from the political elites by delivering land mark rulings including the revocation of legislations that earlier nullified some *waqfs* like the case of Mazrui lands (see section 4.5.2 below). This further eased the apathy among some Muslims against the state agency. More imperatively, there was a new development in the institution across the Muslim world in the last decades of the twentieth century – the renewed zeal to resuscitate *waqfs*. In their study, Siraj and Hilary (2006) and Mohamad and Cizakca (2013) observe that several countries with significant Muslim majority like Sudan, Kuwait, Malaysia, and Qatar established legal and legislative reforms to recover,

preserve, and develop *waqfs* to help finance socio-economic and cultural development (see also Kahf, 2003; Nabaa, 2016).

It could not be conclusively established to what extent the renewed zeal influenced the establishment of new *waqfs* amongst Kenyan Muslims. However, as established by the study, there were new *waqfs* registered with the WCK. This could appropriately account for the rise in the registration figures to 11 (10.6 per cent) during the first decade of the twenty-first century as shown in Table 1. This suggests a gradual change of heart lessening the apathy among a cross-section of Muslims who had earlier refused to register their *waqfs* in protest to centralized administration. Clearly, this is a significant pointer towards revival of the institution as observed earlier by Kahf, Siraj and Hilary, and Dafterdar and Cizakca that could be difficult to ignore.²⁹

4.4 State Control of *Waqfs* and Jostling for Power and Privileges by Interest Groups

The normative obligation of the *kadhi* taking over the management of *waqf* in the absence of a *mutawalli* with a view to protecting the interests of the endower and the diverse groups of beneficiaries was transferred to the state agency. Accordingly, the state agency continued to take over management of private *waqfs* allegedly for lack of precise *mutawallis* during the postcolonial period. As provided by section 11(b) of the WCK Act, nonetheless, state takeover, particularly of *waqf dhurri* where the process is initiated by the majority, negates the interests of the minority beneficiaries. This is demonstrated in an incident narrated by Mohammed Shalli. According to Shalli, a beneficiary sought intervention of the state agency for allegedly being denied of his share of usufruct of *waqf ahli* by his germane siblings but the WCK became legally barred from helping him since he was the minority in that circumstance.³⁰ Within this context, the statute could be seen as condoning violation of the rights of some beneficiaries fanning family feuds.

Another incident where the state agency took over the management of *waqfs* merits brief comments. This involved *masjid* Msalani at Bondeni, Mombasa in 1976. Upon inquiry as

²⁹ In Kenya, efforts to resuscitate *waqfs* begun in February 2016 with the government establishing a task force to review the *Waqf Commissioners Act*. See Friday Bulletin Reporter. (*Friday Bulletin*, March 4, 2016, Issue No. 670). Calls for Views as *Waqf Commission Act Review Starts*; Friday Bulletin Reporter. (*Friday Bulletin*, March 18, 2016, Issue No. 672). *Waqf Review Commission to Hold Public Hearings*. Retrieved from: www.jamiamasjidkenya.org. (Accessed April, 2016).

³⁰ Interview with Mohammed Shalli, Mombasa, November, 2014.

required by law, it was established that the first *mutawalli* – Mohammed bin Rashid Basami – had died leaving a vacuum in the custody of the *waqf* since it was unclear if the endower had provided for the succession to the position. In the absence of a precise *mutawalli*, *mwalimu* Said bin Ahmed who was also the *imam* (prayer leader) usurped the position on self appointed basis exposing the *masjid* to frequent quarrels for control. The WCK, therefore, took over management of the *masjid* for lack of a legitimate *mutawalli*. For a long time upon the demise of *mwalimu* Ahmed, Khamis Omar Shaibo became the de facto *imam*. In the year 2000, WCK confirmed Shaibo as *mutawalli* and *imam* but was opposed by a self imposed ‘executive committee’ that went ahead to establish a ‘trust of the mosque of Msalani.’³¹

Apparently, a *mu^cadhdhin* or *imam* of a mosque is not only an honorific spiritual title in a Muslim community. Apart from demanding that the holder of these titles exhibits the requisite cultural capital – basic knowledge of Islamic *fiqh* (jurisprudence) - the position is also laden with privileges and influence akin to what Bourdieu describes as symbolic and social capital that place the holder in a level above ordinary *ratibs* (worshippers), especially in well endowed *masjids*. In the context of *waqfs*, social capital could as well be institutionalized in socially constructed titles like *mu^cadhdhin*, *liwali*, *imam*, *kadhi*, *ma^clim*, *shaykh*, or ‘member of an executive committee of a *masjid*’ among others. Holding any of such honorific titles, therefore, places the holder in a vantage position to acquire and manage economic resources like donations and other charities made in the *masjid*. Since economic capital has the highest convertibility rate (Bourdieu, 1986:252-255), it is obvious that holders of such titles are better placed to exchange it into various other capitals when the need arises, i.e. social, cultural, and at times, even political.

It is against this background that the conflicts witnessed at Msalani *masjid* upon confirmation of the *imam* by the state agency should be understood as contestation for the control of social, economic, and symbolic privileges.³² Informing this perception is the remuneration (i.e. economic capital) of the *mu^cadhdhin* and *imam* as well as catering for utility bills including water and electricity by the WCK upon takeover of the *masjid*. Around 2011 the state agency also applied for and acquired title of ownership (i.e. symbolic capital) for the *waqf* cementing the

³¹ Khamis Omar Khamis (Shaibo) had usurped the role of *imam* since the demise of *mwalimu* Said bin Ahmed causing contestation from the ‘executive committee’ of the mosque, led by Salim Awadh. See copy of inquiry, March, 1976; Shaibo’s correspondence to the WCK, March, 2000; WCK’s letter of appointment to Shaibo, July, 2000; Awadh’s correspondence with the WCK, May-July, 2001; the WCK’s correspondence to the Registrar of Titles, January, 2003, WCK archive, Mombasa.

³² Records of inquiry in to the mosque of Msalani, October, 1957, WCK archive, Mombasa.

takeover.³³ During the course of this research, the *waqf* was declared a historical monument (i.e. symbolic capital) and had attracted a renovation grant of about thirty five million Kenya shillings from a private donor (i.e. economic capital).³⁴ Drawing from the above narrative, events in the Msalani *waqf* clearly corroborate our view of contestation for economic, social, and symbol capital. Majority, if not all *masjids* under the state agency have their *imams*, *mu^cadhdhin*, and some times, cleaners drawing salaries from the Commission. Even those not under the state agency are catered for by independent committees and sponsors. This demonstrates that attaining any of the positions in a *masjid* guarantees the holder of some economic mainstay directed to such institutions through *waqfs* or ordinary donations, charities, and other related privileges.

Above all, entry of the NMK through declarations of *waqfs* as national monuments as evidenced in the cases of *masjids* Msalani, Wakilindini, as well as the Mazrui cemetery (see chapter three) among others, occasionally transforms the contestation to intra-state agencies' conflict. In the circumstances, the WCK had to contend with the interests of the diverse groups of beneficiaries and *ratibs* apart from its state counterpart – the NMK. At stake is probable economic and symbolic capital encapsulated in donations to renovate *waqfs* as witnessed in *masjid* Msalani that could also draw the interests of local politicians and contractors. These struggles and lack of consensus by various actors often stall the reconstruction processes leaving the *waqfs* in structurally condemned state. More so, because of being non-revenue generating properties, some *waqfs*, like *masjid* Msalani, rely on others through *tasrif* as well as donations from well wishers to support them, thereby, periodically inflaming the contestation.³⁵

4.5 Invalidation of *Waqfs*: The Effects of Secular Legislations and Judicial Rulings on *Waqfs* in Postcolonial Kenya

The Shari^ca holds *waqfs* established contrary to basic principles including those that favor one gender; or contradict the law of *mirath*; or bear other inconsistencies with guidelines on *waqf* in view of the majority opinion as null and void. Moreover, the preponderant view holds that *waqfs* could neither be alienated on the basis of adverse possession nor opened up for inheritance. However, in a legal plurality society, particularly where the Shari^ca comes second to English

³³ Correspondence from Lands Registrar, December, 2011, WCK archive, Mombasa.

³⁴ Communication between the WCK and donor, June, 2012, WCK archive, Mombasa; interview with Mohammed Shalli, Mombasa, November, 2014.

³⁵ Interview with Mohammed Shalli, Mombasa, November, 2014.

Common law, this may not necessarily be the case. Besides, the limitation of the jurisdiction of the *kadhi's* courts to a narrowly defined Muslims' personal status law and the lack of Appellate Court of the *kadhis* in postcolonial Kenya meant that matters arising from *waqf* could only be adjudicated in the civil courts where presiding judges are not bound by the Shari'ah. Consequently, some *waqfs* that could have otherwise been upheld as valid in the Shari'ah milieu were invalidated as expounded in the following scenarios:

4.5.1 Invalidation of *Waqfs*: Conflicts between the Shari'ah and the Common Law

The influence of the doctrine of precedence in Common law on court decisions continued to be felt in the postcolonial era causing legal conflicts with the Shari'ah regarding the validity of *waqfs*. Even so, the WCK Act pre-empted the Islamic jurisprudential conflicts that informed the legal precedents in Common Law by holding *waqfs* consecrated according to varying *madhhab* as valid (see chapter three). Nonetheless, questions were raised in the civil courts with a view to invalidating some *waqfs* in the postcolonial period. This was evident in Civil Suit no. 55 of 2011 in the High Court in the matter of the *waqf* of Said bin Rashid al-Mandhry.

In this litigation, one of the alleged administrators, Ali Said Mohammed, sued to have the *waqf* invalidated for inconsistencies with laid down procedures. The petitioner avowed that the “*waqf* lacks an expression to the effect that the ultimate benefit in the property the subject of the *waqf* is reserved for the poor or for any other purpose recognized by Muslim law as religious, pious, and charitable purpose of a permanent nature.”³⁶ He also argued that the *waqf* had become uneconomical to maintain as it realized little revenue, thereby requesting that it be dissolved to enable inheritance of the properties according to the Shari'ah guidelines of *mirath*. However, one fundamental flaw that the court established in the petition was that the applicant failed to enjoin the WCK as respondents despite the *waqf* having been registered by the state body. On the basis of this technical default, the matter was differed to grant WCK the right of reply.³⁷

The petitioner in the above litigation raised concerns that warrant brief comments. Both issues raised by the complainant are based on the jurisprudential differences that characterized the legal

³⁶ Amended originating summons, ground 2, Civil Suit no. 55 of 2011 in the High Court of Kenya, WCK archive, Mombasa.

³⁷ Order of the High Court, Civil Suit no. 55 of 2011, September, 2011, WCK archive, Mombasa. The matter was, however, still pending during research.

debate in the formative period of the institution of *waqf*. On the issue of formula, preponderant view on the Shariʿa would uphold the validity of the *waqf* on its own merit as Islamic charity established for the purpose of attaining *qurba*. This position is subtly held by the WCK Act for it does not confine the validity of *waqfs* to a specific theological dispensation. More so, the contested *waqf* was presumably established under Shafiʿi legal code to which the majority of Kenyan Muslims ascribe (Freeman-Grenville, 1988; Horton, 2001; Stockreiter, 2015). Except for Hanafi law, the overriding opinion, including Shafiʿi theology, do not insist on the inclusion of a charitable cause as ultimate beneficiary for the validity of *waqfs* rendering the applicant’s claims of inconsistency with the Shariʿa, at least as held by the majority of renowned Sunni theologians, superfluous.

The second concern regarded the economic viability of the *waqf*. As alleged by the complainant, the *waqf* had become ‘uneconomical’ to maintain, though not in ruins. As provided by the appellant, the question of continued viability could appropriately be explained under the principle of (ir-)revocability of *waqfs*. Except for *imam* Malik, the majority position on this context holds that the property could be exchanged, leased, or even sold and its revenue invested in another *waqf* (see chapter two). Yet, a quick perusal of the endowment deed revealed that the corpus included 8.92 acres of prime residential land in Tudor estate, Mombasa, valued at four hundred and forty six million Kenya shillings from fifty million shillings per acre according to *ijar al-mithal*.³⁸ Within this premises, the claims of economic viability of the *waqf* clearly do not hold.

On the other hand, the WCK at some point started to file a ‘no objection motion’ to suits seeking dissolution of posterity *waqfs* in civil courts that were not under its direct management, the current one included.³⁹ This implied that the right of reply accorded to the state agency on the petition could not necessarily impede the applicant. Therefore, on the basis of the doctrine of precedence in Common Law, the petitioner sought to capitalize on the jurisprudential disparities in Sunni Islam to have the *waqf* invalidated for economic expedience. This explains his appeal

³⁸ Interviews with Mohammed Shalli, Mombasa, November, 2014; Zubeir Noor, Mombasa, November, 2014.

³⁹ The WCK’s reply to Advocate regarding Civil Suit no. 55 of 2011 in the High Court, January, 2012. See also WCK’s reply to summons against Miscellaneous Cause no. 10 of 2012 in the High Court, May, 2013; Miscellaneous Application no. 4 of 2013 in the High Court (Family Division); communication between the WCK and beneficiaries of the *waqf* of Omar Mohammad Bakar of Lamu on dissolution, February, 2008; the WCK’s reply to the request by beneficiaries of the *waqf* of Yabu bint Saburi on dissolution, April, 2011; Miscellaneous Cause no. 14 of 2015 in the High Court, (still pending), WCK archive, Mombasa.

that the consecration be dissolved to allow inheriting of the property rather than disposing it and using the proceeds to establish a substitute *waqf* as required under the Shari^ca.

Moreover, the failure to review the judicial framework in relation to the jurisdiction of the *kadhi* courts in the postcolonial period also meant a continued application of the ‘Anglo-Mohammedan jurisprudence’ (Schacht, 1982). Since *kadhi* courts lacked Appellate powers, Muslims dissatisfied with decisions of the ‘subordinate court’ could appeal at the High Court where adjudication is not bound by the Shari^ca, a scenario that occasioned legal clashes between the *kadhi*’s and civil courts in relation to *waqfs* as aptly illustrated in two cases: The first involved Civil Appeal No. 17 of 2014 at the High Court lodged against a decision by the *kadhi*’s court on Succession Petition No. 103 (A) of 2004 in the matter of family *waqf* of Athman bin Kombo bin Hassan.

It was alleged that in establishing the above *waqf*, the endower denied his daughter, Fatuma Hassan Momo, and wife, Skotchi Shame Mwidau, of their Qur’anic rights of inheritance by not including them among beneficiaries of the *waqf*. The applicant, Hassan Kadi Omar, also claimed that the respondents, Bakari Kombo and Hassan Kombo, denied him of his share of the usufruct despite being a legal heir of a descendant of the endower born after consecration of the *waqf* and covered by the *waqf* deed as provided.⁴⁰ Upon careful review of the submitted *waqf* deed, the *kadhi*’s court declared the *waqf* invalid on the basis of inconsistency with the Qur’an guidelines on *mirath*.⁴¹

In the Civil Appeal at the High Court, the disgruntled respondents in the Succession Petition challenged the *kadhi*’s decision on the annulment of the *waqf*. The appellants argued that the respondent was not heir of the endower as claimed, but a descendant of the *mutawalli* of the *waqf* who was incidentally a brother of the endower. In this regard, the *mutawalli* was not a joint endower of the *waqf* and the respondent could not, therefore, challenge its legality. It turned out that Hassan Kadi Omari was an agnate relative who could not claim usufruct of the *waqf* in the existence of cognate descendants of the endower. However, though the relationship between the complainants in the appeal case and the female relatives in the inheritance petition was not put

⁴⁰ The endower had provided for his ‘children yet to be borne’ as part of the beneficiaries. See *waqf* deed of Athman bin Kombo bin Hassan, folio No. 97, WCK archive, Mombasa.

⁴¹ See Court Order, May, 2010, Succession Petition no. 103 (A) of 2014 at the *kadhi*’s court, WCK archive, Mombasa.

into doubt, the High Court set aside the decree of the *kadhi's* court and reinstated the *waqf* effectively denying the latter of their right to inheritance as outline in Quran 4:11-12.⁴²

According to the argument by the applicants of the Succession Petition corroborated with the *waqf* deed produced before the *kadhi's* court, one would argue that the family *waqf* was void in accordance to the Shari'a for denying legal heirs of their right to *mirath*. As discussed in chapter two, the preponderant view gives precedence to Qur'an guidelines and right to inheritance over the right to *waqfs*. However, the High Court was not bound by the Shari'a or even applied it as understood since the colonial period. It is, therefore, possible to relate that the decision by the High Court did not take cognizance of the normative principles on the validity of *waqfs* overruling the 'subordinate court' to uphold an invalid *waqf* that was inconsistent with the Shari'a. This was a mistake that the *kadhi's* court sought to correct in its decision on the Succession Petition, an apparent miscarriage of justice that could have possibly been rectified in an Appeal Court of the *Kadhis* that is lacking in the present circumstances.

The second case in this scenario involved application of the Common law on adverse possession to invalidate a *waqf*. As provided both by the Shari'a and the *Waqf* Commissioners Act, however, the law of adverse possession – where one becomes entitled to property owing to a prescribed period of uncontested occupation or squatting – does not apply to *waqfs*.⁴³ A departure from this legal exception could, nonetheless, be noted from Civil Suit no. 60 of 2006 at the High Court that resulted in the dismemberment of *waqf*. In this suit, Hamzaali petitioned the court to recognize him as proprietor of the corpus of the *waqf* of Adam Abdulhussein based on the law of adverse possession.

According to the plaintiff, the last surviving beneficiary of the posterity *waqf* who was also his aunt and a widow of the endower, Rukiyabhai, appointed him through bequest as sole beneficiary of the estate before her demise in 1986. Therefore, Hamzaali requested the court to grant him right of possession for having been in “continuous and uninterrupted possession for a

⁴² See Decree of the High Court, Civil Appeal no. 17 of 2014, September, 2014, WCK archive, Mombasa.

⁴³ Section 15 of the WCK Act provides; “[...] notwithstanding anything contrary in any Act or law for the time being in force, no title to any property the subject of a *waqf* shall, after the commencement of this Act, be acquired by any person by reason of that person having been in adverse possession thereof or by reason of any law of prescription.”

period of twenty years.”⁴⁴ Significantly, the WCK was not enjoined in the case though the court raised a genuine question on “whether or not the Limitation of Actions Act will apply to land held in trust by the *waqf*?”⁴⁵ However, while delivering his ruling, the judge made reference to section 569 of Halbury’s laws of England regarding trespass in possession of charity land and ruled in favor of the petitioner.⁴⁶

Three issues in the above petition are of major concern: First, the *waqf* deed was not produced in court making it difficult to ascertain the residual beneficiaries of the *waqf*. It is, nonetheless, safe according to the Shari’c to hypothesize that some charitable cause, and not the petitioner, could have been designated or assumed as ultimate beneficiary. In this regard, the alleged *wasiyya* appointing the petitioner as beneficiary of the estate becomes irrelevant. Secondly, as a corporate body in charge of *waqfs*, the WCK was denied its right of reply to the petition. Consequently, the court relied on evidence from one party. Finally, although the court raised a fundamental question on the relevance of the law of limitation of actions, it was oblivious of the differences between *waqfs* and trusts thereby using the latter as a benchmark to the former leading to the miscarriage of justice.⁴⁷

4.5.2 Invalidation of *Waqfs* through Parliamentary Acts

The Mazrui land trust commonly known as the Takaungu land at Kilifi district comprised of 2,716 acres consecrated as *waqf ahli* of the Mazrui Shak’si followers of Salim bin Khamis. This land trust was established by the British colonial government through the Mazrui Lands Trust Act of 1914 for private ownership of the Mazrui family in clear illustration of the colonial policies that accorded some ethnic Muslims preferential treatment over others.⁴⁸ In 1989,

⁴⁴ Order of the High Court, Civil Suit no. 60 of 2006 in the matter of MSA/XLII/13, p.2, WCK archive, Mombasa.

⁴⁵ Order of the High Court, Civil Suit no. 60 of 2006 in the matter of MSA/XLII/13, p.3, WCK archive, Mombasa.

⁴⁶ Vol. 24 article 569 of the Halbury’s Laws of England on trespass in possession of charity land as quoted in the judgment provides; “[...] if the trespasser, or a person who claims independently of the right of the charity, gets into possession of charity land, time will run against the title of the charity just as it would against any *cestui que trust* entitled under a trust, if the trustee were out of possession and the property was held by a stranger.” See Order of the High Court, Civil Suit no. 60 of 2006 in the matter of MSA/XLII/13, p.3, WCK archive, Mombasa.

⁴⁷ Trusts differ from *waqfs* as religious institutions in that the later are guided by a law believed to be divine and could not be alienated though they could be exchanged or sold and their proceeds used to establish replacement *waqfs* to be managed according to the *shurut al-waqif*. See Qureshi, M. (1990). *Waqfs in India: A Study of Legislative and Administrative Control*. New Delhi: Gian Publishing House; Kozlowski, G. (2008). *Muslim Endowments and Society in British India*. Cambridge: Cambridge University Press; Khan, A. (2008). *Commentary on the Law of Waqf in India (The Waqf Act, 1995)*. Hyderabad, Saraswathi Printers.

⁴⁸ The land was registered as private under certificate of ownership number 409, of April, 1914, issued under the Land Titles Act (Cap 282) Laws of Kenya to *shaykh* Ali b. Salim. See Kenya National Archives – KNA/PC/Coast/1/11/41.

however, the postcolonial parliament established the Mazrui Lands Trust (Repealed) Act revoking the private ownership of the land, hence the *waqf*.⁴⁹

In debating the Repeal Act, it was argued that the initial Act that established private land ownership for the Mazrui family disregarded ancestral land rights of the Mijikenda inhabiting the area. The Repeal Act, therefore, invalidated the *waqf* ostensibly to enable settling of other deserving landless Kenyans. Nevertheless, this was without compensation to the beneficiaries of the *waqf* contrary to the Shari^ca and the Land Acquisition Act (1983).⁵⁰ The repeal infuriated the Mazrui for the loss of their private property, and by extension, a cross section of Muslims for the invalidation of the *waqf*. This scenario was occasionally reenacted in public forums to epitomize perceived historical injustices in relation to land ownership, marginalization, and economic exploitation of the Muslim community in the region (al-Mazrui, 2004:7).

In a Civil Suit no. 185 of 1991 in the High Court in the matter of Mazrui Lands Trust (Repeal) Act and the Constitution of Kenya, the aggrieved beneficiaries petitioned the court against acquisition of the *waqf* land without compensation. The applicants argued that the Repeal Act violated their constitutional right to property and desecrated the *waqf ahli* protected by the Shari^ca, thereby asking that the Act be nullified to restore the land *waqf*.⁵¹ In its ruling, more than two decades later, the court granted the request of the applicants and ordered for the compensation of the complainants.⁵² In its two decades seizure of the *waqf* land without compensation, however, the state had made it impossible for an alternative *waqf* to be established as required by the Shari^ca. Therefore, although the *waqf* land was restored, its development lagged behind for more than twenty years.

⁴⁹ The *waqf* was administered by a lands board of trustees composed of C.W Hobley (PC, Mombasa), *shaykh* Rashid b. Salim (head of Mazrui), *shaykh* Mohammad b. Soud (*liwali*, Takaungu), *shaykh* Khalfan b. Abdallah (*kadhi*, Takaungu), *shaykh* Muhammad b. Juma (*mudir*, Roka) and Riziki b. Mohammad. See the Mazrui Lands Trust Act (1914), section 3; KNA/PC/Coast/1/11/41; judgment on Civil Suit no. 185 of 1991 in the High Court in the matter of Mazrui Lands Trust (Repeal) Act and in the matter of the Constitution of Kenya between the Mazruis and the Attorney General, 2-3, WCK archive, Mombasa.

⁵⁰ The Land Acquisition Act (1983), Section 5 on compensation provides; “[...] as soon as practicable after entry has been made, the Commissioner shall make good or pay full compensation for any damage resulting from the entry.” See also Section 75(1), Constitution of Kenya (1963) and Article 40(3), Constitution of Kenya (2010).

⁵¹ Article 40(3) of the Constitution of Kenya (2010) prohibits the state against depriving a person of his property or interest over a property without compensation. See also applicants’ requests 1-6 as contained in the High Court judgment, Civil Case no.185 of 1991, Mombasa, July, 2012, WCK archive, Mombasa.

⁵² Judgment of July, 2012 by the High Court on Civil Suit No. 185 of 1991, WCK archive, Mombasa. See also section 8, Land Acquisition Act, Cap 295 Laws of Kenya.

4.5.3 Dismemberment of *Waqfs* through Executive Decrees

The *waqf* of Salim Mbaruk bin Dahman was established in 1933 on 9.74 acres of beach farm at Kanamai, (Takaungu) Kilifi district as *waqf khayri* “for the benefit of his soul and of the local Muslims.”⁵³ Around January 1953, the *waqf* land was leased to Hassanali Hussein Suleiman Virjee for a period of 99 years, but transferred it to Goolshan eight years later upon consent from the WCK.⁵⁴ Again, one year later, the *waqf* changed hands when Goolshan sold his lease-hold rights to the Christian Council of Kenya (renamed National Council of Churches of Kenya, NCCCK).⁵⁵ Before sanctioning the transfer of lease, however, the WCK sought to establish the NCCCK’s use of the *waqf* land. When the NCCCK confirmed that they wished to erect a Church, the WCK objected to the transfer explaining that “it would be contrary to the principles of the Shari^ca for the property to be used for the purposes indicated.”⁵⁶

In reply to the withheld consent, the NCCCK dispelled the WCK’s fears by assuring that the premises would be a retreat center for all people without regard to ethnic or religious affiliations though the WCK was not moved.⁵⁷ To secure the land, the NCCCK gave in to the imposed conditions and signed the lease contract. However, the NCCCK violated the agreement by refusing to pay ground rent; fell down coconut trees without the consent of the WCK; and constructed a Church. It turned out that the NCCCK contravened the contract on the auspices of the provincial administration that coerced the Chief *Kadhi* to use his authority to repeal restricting clauses in the lease agreement despite opposition from the WCK.⁵⁸

All the while, refusal by the NCCCK to pay rent also inhibited execution of *shurut al-waqif* that included maintenance of an orphanage and *madrassa* at Takaungu. This was contested by the beneficiaries forcing the WCK to seek the intervention of the Registrar General to compel the NCCCK to honor the agreement and enable it to execute the *waqf*’s mandate.⁵⁹ Despite this intervention and several meetings between the NCCCK and the WCK at the behest of the PC, the

⁵³ Letter by the WCK Secretary, K. S. Riyami to the PC coast province, October, 1972, WCK archive, Mombasa.

⁵⁴ Transfer of lease from Hassanali H. S. Virjee to Goolshan Ladies Wear Ltd, March, 1961. See also lease agreement between Virjee and the WCK, January, 1953, WCK archive, Mombasa.

⁵⁵ Transfer of lease from Goolshan Ladies Wear Ltd to the NCCCK, July, 1962, WCK archive, Mombasa.

⁵⁶ Correspondence between the WCK and the NCCCK’s Advocate, August, 1962, WCK archive, Mombasa.

⁵⁷ Correspondence between the WCK and the NCCCK’s Advocate, September - November, 1962, WCK archive, Mombasa.

⁵⁸ Correspondences between the PC coast province, the Chief *Kadhi* and the WCK, May, 1967. See also Al- Mazrui H. (2004). Memorandum to the Commission of Inquiry, op.cit, pp.10-11, WCK archive, Mombasa.

⁵⁹ Correspondence between the Registrar General, the WCK and the NCCCK, May - October, 1971, WCK archive, Mombasa.

NCCK refused to pay. As a matter of fact, the NCCK changed the argument claiming to have acquired the premises as ‘freehold’ without rent requirements and that the WCK should consider selling the *waqf* altogether to end the standoff.⁶⁰ While launching the center in October 1971, the NCCK used the occasion to petition the President (*Mzee* Jomo Kenyatta) to have the WCK terminate further encumbrances to the *waqf* land. Subsequently, the WCK succumbed to a forced *istibdal* of three-bedroom Swahili house offered by the NCCK in waiver of claims to the beach farm. As observed by al-Mazrui (2004:11-13), the WCK accepted the substitute property “with a view of not embarrassing the President to remove the relationship existing between the WCK as landlords and the NCCK as lessees.”⁶¹ It is clear from these events that pressure from political elites led to the dismemberment of the *waqf*.

Examined from a broader perspective, the foregoing events that culminated in the establishment of a ‘Christian resort center’ in the heart of a ‘Muslim region’ arguably pass for a religio-political contestation. This is because, prior to independence, two of the predominantly Muslim regions in Kenya – the Protectorate and the North Eastern Frontier District (NFD, later Northeastern province) agitated for secession. While those in the Protectorate wanted to join Zanzibar so as to remain under the rule of the Shari‘a, the NFD wanted to secede and join Somalia for similar reasons (McIntosh, 2009; Ndlovu, 2014b). Significantly, the two regions had grown suspicious of the Christian up-country Kenya given their historical (dis-)engagement with the British colonial authorities that left the former economically and socio-culturally neglected and marginalized.⁶² Therefore, Muslims feared that under a unitary system of government, they would be economically, politically, and religiously subordinate to their majority Christian compatriots who were also well endowed in cultural and economic prowess. These fears were, even so, allayed in a pre-independence agreement that undertook to respect and preserve Muslim institutions and registered freehold titles to land among other efforts to integrate the Muslim community (al-Mazrui, 2004; Mwakimako, 2007b; Chesworth, 2010).

⁶⁰ Minutes of the WCK meeting held in the PC’s office, September, 1970; minutes of the meeting of January, 1972; correspondences between the WCK, the NCCK, Commissioner of Lands, and the PC coast Province, October - September, 1972.

⁶¹ See also minutes of the WCK meeting held in the PC’s office at Mombasa, December, 1973; minute 143 of special meeting of the WCK and the NCCK, July, 1974; minute 26/76(1) of WCK meeting, July, 1976; the NCCK’s correspondence to the PC coast province, September, 1972; PC’s correspondence to the WCK, October, 1973; correspondence between the NCCK and the WCK, January – July, 1974; correspondence between the NCCK and the WCK, July - August, 1974; WCK archive, Mombasa.

⁶² See also Adow, M. (2013). Not yet Kenyan. (Documentary). Retrieved from: <http://www.aljazeera.com/programmes/aljazeeracorrespondent/2013/10/not-yet-kenyan-2013102885818441218.html>. (Accessed April, 2016).

However, considering the frequently enacted historical injustices narrative against the two Muslim regions,⁶³ the deliberate attempts to nullify land *waqfs* through legislations (e.g. the Mazrui Lands Repeal Act, 1989); and the impunity with which the NCKK negotiated the leasehold agreement with the WCK, it suggests that a complex configuration of interests were at play in the contestation for religio-political and economic spaces in the region that manifested in the *waqf* incident. The NCKK violated the lease agreement with support from political elites and state administration epitomized by the President during the inauguration of the center whose presence could not have merely been coincidental.⁶⁴ Precisely, the President's alleged executive order to the WCK (read Muslims) to terminate their claims of ownership of the *waqf* land was laden with political power and symbolic violence meant to intimidate the minority Muslims to recognize the prevailing officialdom (read Christian) after the fall of the sultanate. Consequently, "keeping in mind the political realities of that time", writes al-Mazrui (2004:12), "when none could safely be seen to resist or opposed presidential directives", dismemberment of the *waqf* passes for a political duel between Muslims and the Christian political elites.

On the other hand, erecting a Church and a Christian resort center on a *waqf* land in the midst of the perceived heartland of Islam in the country was, arguably, a move in the NCKK's stake for negotiation and control of the religious field. By appropriating political power, the NCKK was determined to test and question the dominance of Islam in the coast region by establishing a Christian center with a view to fight for a share of adherents. These negotiations resonate so well with the Church's spirited opposition witnessed three decades later during the constitutional debate that frustrated Muslims' efforts to expand the legal jurisdiction of the *kadhi's* courts to include the adjudication of *waqfs* (see chapter five). It is within this context that the establishment of the Christian center at the predominantly Muslim region, and importantly, on *waqf* land, stands appropriately as contestation for the religious field between Muslims and their Christian compatriots. Needless to emphasize the economic gain that the NCKK eyed in the

⁶³ On historical injustices against the Muslim regions, see Africa Center for Open Governance (AFICOG). (2009). Mission Impossible: Implementing the Ndung'u Report. Nairobi. Retrieved from: http://www.africog.org/reports/mission_impossible_ndungu_report.pdf. (Accessed April, 2016); Al-Mazrui. (2004). Memorandum to the Commission of Inquiry, op. cit. pp.1-15, WCK archive, Mombasa; O'Brien, E. (2011). Irregular and Illegal Land Acquisition by Kenya's Elites: Trends, Processes and Impacts of Kenya's Land Grabbing Phenomenon. Nairobi. Retrieved from: <http://www.kenyalandalliance.or.ke/wp-content/uploads/2015/03/KLA-commercial-pressure.pdf>. (Accessed April, 2016).

⁶⁴ The NCKK was then under the chairmanship of Rev. Thomas Kalume who was also a Member of Parliament (MP) for Malindi North constituency from 1969. See also correspondences between the PC, coast province, the Chief *Kadhi*, and the WCK, May, 1967; Al-Mazrui. (2004). Memorandum to the Commission of Inquiry, op. cit, WCK archive, Mombasa.

establishment of the resort center on the beach farm in contrast to the Swahili house offered to the WCK as substitute *waqf*.

4.5.4 Invalidation of *Waqfs* through Precedents on Muslims' Popular Practices

Dissolution of family *waqfs* is not a new phenomenon in the history of the institution. It is alleged that predominant Muslim societies like Turkey, Egypt, and Syria not only opened existing *waqf ahli* for inheritance but, also banned the establishment of new ones owing to their susceptibility to abuse the Shari'a guidelines of inheritance and perpetuation of discriminative gender based cultural practices (Schacht, 1982; Pearl and Menski, 1998; Kozlowski, 1998, 2008). The ban subtly implied that until proved to contradict divine injunctions, the majority opinion on the validity of *waqf ahli* remains. As it turned out, however, annulment of *waqf ahli* in the cited Muslim lands established historical precedents that could be an affront to the preponderant view about Shari'a as evident in the Succession Petition no. 29 of 2014 at the *kadhi's* court.

In the mentioned petition, Mwarabu bint Mohammad bin Abdallah Zeheniyah had established *waqf dhurri* in favor of Amina bint Adam Dadrahman el-Balushiya failure whom her descendants, with *masjid* Mazrui as the residual beneficiary.⁶⁵ Owing to family feuds, a section of third generation beneficiaries applied to have the *waqf* administered by the WCK in 2012. Then another section of disgruntled beneficiaries sued the WCK two years later for usurping the administration of the *waqf* despite the existence of Amina's progeny. However, the complainants also requested that due to the large number of beneficiaries involved, (thirty, including males and females), the *waqf* be revoked and the property inherited as it had become un-economical to maintain.⁶⁶

In its order of July 2014, the *kadhi's* court granted the first appeal of the complainants and removed the *waqf* from the WCK's administration, but refused to invalidate the *waqf* on the claims of continued economic viability. Arguably, the decision by the *kadhi's* court not to invalidate the *waqf* was informed by the majority opinion on the principle of *ta'abbid* (see

⁶⁵ Mwarabu bint Muhammad bin Abdullah Zeheniyah had no children, so Amina could have been the closest relative. There is no mention of a husband or other descendants in the *waqf* deed where she appointed *shaykh* Khamis bin Masoud Zeheniyah to execute her will. See *waqf* deed of Mwarabu bint Abdallah dated June, 1946 (unmarked), WCK archive, Mombasa.

⁶⁶ Clause 9, Succession Petition no. 29 of 2014, Chief *Kadhi's* Court, WCK archive, Mombasa.

chapter two). Yet, upon review of the judgment by the Chief *Kadhi* in January 2015, the order of the lower court was quashed and the *waqf* was dissolved. Commenting on this review, the Chief *Kadhi* asserted that “family *waqfs* could also be dissolved and property inherited by heirs as is the case in *other Arab lands*,”⁶⁷ (emphasis added). Accordingly, this suggests that the basis of the Chief *Kadhi*’s order is the popular historical precedent in the Muslim societies mentioned before where similar *waqfs* were invalidated rather than legal merit of the present case. By disregarding the historical and cultural contexts in which the *waqfs* were invalidated in those Muslim societies, this was, arguably, a veiled attempt to introduce the doctrine of precedent despite the Shari’^ca remaining uncoded. In the mentioned Muslim societies where *waqf ahli* were invalidated, the failure probably rested on the judiciary and the ^c*ulama* to create awareness and reform the perceived rigid operational and institutional law of *waqfs* (Kuran, 2001), rather than ban a section of the practice altogether. Therefore, the preponderant view is that only *waqfs* that are inconsistent with the Shari’^ca are void. Clearly, this does not apply to all *waqf ahli*.

As established by the study, claims of disputes and diminutive shares of usufruct of *waqf ahli* owing to large numbers of beneficiaries warranting dissolution of the consecrations should not be blamed on the consecrations. Rather, the blame could be apportioned to the inability by beneficiaries and *mutawallis* to rise above the perceived rigidity to invest and expand the corpus as provided by the principles of ^c*ana*, *hikr* and *istibdal* (see chapters one and six). Therefore, claims to dissolve *waqfs* citing diminutive shares could further be mere ploys to dismember the consecrations for economic (read capitalism) and symbolic expedience as was evident in the case of *waqf* of Said bin Rashid al-Mandhry (see section 4.5.1). Such petitions to dissolve family *waqfs* notwithstanding, the institution demonstrated the potentiality to guarantee not only the socio-economic stability of its beneficiaries, but also the wider community without regard to religious and social affiliations.

4.6 Other Civil Policies Influencing *Waqfs* in Contemporary Kenya: The Land Acquisition and National Museums and Heritage Acts

Waqfs in Kenya do not subsist in isolation but within a conflagration of civil procedures and agencies outside the Shari’^ca that their establishment and management have to negotiate to

⁶⁷ Interview with *shaykh* Muhdhar A. S. Hussein, Mombasa, October, 2015, WCK archive, Mombasa.

survive. First among such statutes is the Land Acquisition Act, Cap 295 (1983) that accords the state unlimited access to land for public interest and development. Precisely, section 6(1a) provides:

Where the Minister is satisfied that any land is required for the purposes of a public body, and that the acquisition of the land is necessary in the interests of defense, public safety, public order, public morality, public health, town and country planning or the development or utilization of any property in such manner as to promote the public benefit; and so certifies in writing to the Commissioner, he may in writing direct the Commissioner to acquire the land compulsorily under this part.

Going by the statute, immovable *waqf* properties like land and buildings are not immune to compulsory acquisition. This eventuality is, nonetheless, provided for by the Shari^ca through the principle of *istibdal* where ruined or depleted consecrations could be sold or exchanged to acquire replacement corpuses that would be managed according to the aspirations of the endower. On the basis of the Act as provided above, some *waqfs* were acquired by the government during the postcolonial times as evident in a number of cases:

The first regards the *waqf dhurri* of Mwinyifaki bin Matano at Jomvu Chaka Reli, Mombasa, which was acquired in 1972 but was, nonetheless, not compensated allegedly because of missing records at the lands registry.⁶⁸ The second involved the *waqf khayri* of Duweiky at Malindi acquired in 1974 and compensated in cash.⁶⁹ By the time of research, however, like similar cases during the colonial era, the WCK had not established replacement *waqf* for Duweiky.⁷⁰ The inability to acquire replacement *waqfs* from compensations dating back to the colonial period weighs heavily against the state custodian. Owing to market fluctuations, it could be difficult to acquire replacement *waqfs* after some years or even commit the funds to non-designated expenses. More so, the delay does not help in achieving the requisite rule on perpetuity of *waqfs*, hence disadvantaging endowers in their spiritual aspirations as well as causing untold suffering to the diverse groups of beneficiaries.

⁶⁸ Kenya Gazette Notice no. 799/800, March, 1972. The details of the three acre plot were formerly given as MN/V/135R, WCK archive, Mombasa. Interviews with Muhammad Shalli, Mombasa, November, 2014; Zubeir Hussein Noor, Mombasa, November, 2014.

⁶⁹ The government offered One million forty thousand eight hundred and forty two Kenya shillings as compensation. See notice of compulsory acquisition, plots 1147 & 1148, October, 1974; payment notice, October, 2002; payment voucher, November, 2002; Gazette notice no. 3490 & 3492, July, 1998, WCK archive, Mombasa.

⁷⁰ Minutes 3/2003(9); 116/2008(25), WCK archive, Mombasa.

The second statute is the National Museums and Heritage Act (1910). The NMK was established to “identify, protect, conserve, and transmit the cultural and natural heritage and promote cultural resources” in the country (NMK Act, section 4). The agency is empowered to purchase or exchange, take on lease, or acquire by gift properties of scientific and cultural significance. Alongside acquisition, it could also declare a place or immovable structure to be of historical and cultural interest worthy protecting.⁷¹ In this context, the Act accorded the state agency unlimited access to properties some of which were *waqfs*. Among these are the Mazrui cemetery and the ruined Wakilindini *jamia masjid* that were declared as protected sites between 1954 and 1955 (see chapter three). Others include Rodha *masjid* in Lamu (since 1980); a ruined *masjid* at Kikambala; plus a host of other *waqfs* in Mombasa’s Old town like *masjids* Mandhry and Basheikh, and the Kongo *masjid* in Diani, Kwale district.

Although acquisition of properties of cultural interest by the state body precludes areas of religious significance like *masjids* and cemeteries, the Act allows the NMK to enter into partnership with owners or custodians of such sites, thereby placing the NMK as co-trustees with the WCK on some *waqfs*.⁷² In this regard, consulting the NMK in relation to renovation of *waqfs* becomes compulsory failure of which it is punishable by law (Section 41, 2).⁷³ This partly explains the conspicuous presence of the NMK in some *waqfs* as consultant engineers since renovations must conform to specified standards. As a matter of fact, there were instances when the WCK only sanctioned reconstruction of *waqfs* but delegated the work to the NMK from the issuing of tenders until hand over of the property to the WCK.⁷⁴

The regional office of the state agency at Mombasa allegedly offers free consultation and architectural designs on *waqfs* under its co-trusteeship as part of its social responsibility. Most probably, it is due to the fact that the resident officers are indigenous Muslims who feel obliged

⁷¹ See also Lamu Old town as UNESCO world heritage site. Retrieved from: <http://whe.unesco.org/en/list/1055>. (Accessed April, 2016).

⁷² Section 42(a) of the National Museums and Heritage Act provides; “[...] if the Minister considers that a monument is in danger of being destroyed, injured or allowed to fall into decay, he may acquire the monument by way of compulsory purchase under the provisions of the Land Acquisition Act (Cap. 295) but that power shall not be exercised in the case of a monument which, or any part of which, is periodically used for religious observances.”

⁷³ Section (2) of the National Museums and Heritage Act provides; “[...] the owner or occupier of a monument which is the subject of any such [guardianship] instrument or agreement intends to build or to do any other act or thing in contravention of the terms of the instrument or agreement, the High Court may grant an injunction to restrain that building or other act or thing.”

⁷⁴ The NMK was involved in the renovation of several mosques including Ibadhi and Mandhry in Mombasa as well as Rodha and Msikiti wa Pwani in Lamu. Interviews with Muhammad Shalli, Mombasa, December, 2014; Kalandar Khan and Abu Swamad A. Ali, National Museums of Kenya (NMK), Mombasa, September, 2015.

to give back to the society. Whether or not this social responsibility would be continued when the indigenous Muslims are replaced with non-indigenous, or even non-Muslims, remains to be seen. On the other hand, the NMK does not finance the reconstruction of these *waqfs* yet it collects substantial foreign exchange from them since they are part of tourist attraction sites. Neither does it remit portions of the proceeds to its co-trustee (the WCK) nor beneficiaries of the *waqfs*. This lack of monetary remittances from the NMK partly impedes some beneficiaries from maintaining their *waqfs*. Moreover, since reconstruction has to conform to structural designs approved by the state body, it is also impossible for the beneficiaries to dispose the *waqfs* to private developers most of whom have expressed the desire to put up high rise residential and commercial buildings contrary to regulations by the NMK.⁷⁵ Consequently, majority of *waqfs* under the co-trusteeship of the NMK and the WCK are in disrepair.

A closer analysis of the relationship between the NMK and the WCK on *waqfs* reveals a scenario akin to the use of political power and symbolic violence in negotiating and shaping the economic and socio-cultural fields with the beneficiaries of the *waqfs*, and by extension, the Muslim community. The state, through the NMK Act, dictates on how the *waqfs* should be maintained with regard to structural designs but does not finance their maintenance, yet it is the largest beneficiary of their output through tourism. On the other hand, beneficiaries of the *waqfs* survive in a state of symbolic domination deprived of their economic, social, and cultural privileges.

Conclusion

Attainment of independence in Kenya did not necessarily herald new beginning, particularly with regard to *waqfs*, as secular policies and civil institutions established by the British colonial government remain effective. Except for amending the WCK Act to re-align it with the restructured provincial administration, the statute, therefore, puts the institution of *waqf* into extended control by the state. Accordingly, compulsory registration; takeover of *waqfs* allegedly for improper management; and delays in the establishment of replacement *waqfs* dismembered through compulsory acquisition continue unabated. In constituting the state agency, only

⁷⁵ Interviews with Muhammad Shalli, Mombasa, December, 2014; Zubeir Hussein Noor, Mombasa, November, 2014. Kalandar Khan and Abu Swamad A. Ali, National Museums of Kenya (NMK), Mombasa, September, 2015; Mohammed Abdallah, Rahma Abdallah, and Ali bin Khamis, Mombasa October, 2015.

Muslims perceived as loyal to state policies are appointed as Commissioners at the expense of *waqifs*, *mutawallis*, and beneficiaries.

Significantly, appointing Commissioners on the basis of socio-ethnic affiliations and perceived loyalty to state policies rekindled negotiations for cultural, social, and economic supremacy and control along *umiji-wamiji* dispositions akin to life during the period of city-states. It was within this context that some Muslims perceived appointment to the *waqf* state agency or positions of the *mutawalli* and *imam* as an opportunity not only to protect temporal socio-ethnic and economic interests of certain groups but also to acquire individual social, symbolic, and even economic capital. This was the preponderant view, particularly in the alleged traditional *waqf*-rich zones that turned the appointments into constant negotiations and a delicate balance with those left out crying foul.

More so, owing to limited jurisdiction of the *kadhi*'s courts, there abounds miscarriage of justice as adjudication of matters of *waqfs* in the civil courts is not in accordance with the Shari'a causing dismemberment of *waqfs*. With this perpetuation of state control of the institution, the subsequent chapter would, therefore, seek to understand how the Muslim community responded or even adapted to the situation in practicing *waqfs*.

Chapter Five

Muslims' Response to State Control and Adaptation to Internal Dynamics of *Waqfs*

5.0 Introduction

Secular state policies and civil constructs that herald supervision and control of *waqfs* caused a paradigm shift in the socio-cultural life of the institution and the community as a whole. They cast aside the Shari'ah normative precepts on *waqf* practices; sidelined traditional actors in the affairs of the institution; disrupted the social fabric of the community as *waqf* resources were used contrary to designated causes; and threatened the institution since the Shari'ah was applied as understood by the colonial government. This chapter, therefore, seeks to analyze how Muslims responded to this scenario in the practices of *waqfs*. The use of James C. Scott's concept of symbolic resistance is critical in understanding the silent but spontaneous and effective efforts by the subordinate community not only to reverse the control of resources without attracting the wrath of the secular government, but also to uphold the religious obligation of practicing charity. Significantly, Muslims' switching to the uncontrolled charitable institutions and *non-labeled waqfs* was a ready alternative provided by the Shari'ah under the expansive concept of charity. As illustrated in the discussion, *waqfs* adopted wide range of local customs and traditions at different times since its inception making it to be lived and mediated variedly across the *umma*. Use of the different alternatives, therefore, reflects a stage in the evolution of the institution calling for the understanding of the response in the perspective of a continuous process of adaptation to internal and external dynamics in *waqfs*.

5.1 Symbolic Resistance: Muslims' Response to State Control of *Waqfs*

The establishment of the WCK in the British East Africa Protectorate in 1899 fits the scenario where both Muslim and invading colonial governments controlled *waqfs* to stem the influence of the *'ulama* and the diverse groups of beneficiaries for political hegemony (see chapter two). Accordingly, on the strength of civil legislations and the judiciary that was not bound by the Shari'ah, the colonial government appropriated political and symbolic capital as well as symbolic violence to enforce what it regarded as 'legitimate' versions of the social world. Using Muslims perceived as sympathetic to state policies to serve as Commissioners under the supervision of

European officers, the state controlled the economic mainstay and the socio-cultural sphere of the diverse groups of beneficiaries and actors of *waqfs* in the community.

However, as established by the study, use of symbolic violence by the British colonial government to whip Muslims into ‘Islamic officialdom’ (Hyden, 1985) in light of British lenses in as far as *waqfs* were concerned, was short-lived. The fallout begun immediately it became apparent that the community was under immense symbolic, economic, socio-political, and cultural subordination. Consequently, the community unwittingly ‘exited’ from the state sponsored Islamic officialdom in a way aptly described by James C. Scott as symbolic (ideological) resistance. In his writings on peasant societies, Scott (2009:34) espouses symbolic resistance as “the ordinary means of class struggle [and] techniques of first-resort in the common historical circumstances in which open defiance was impossible and entailed mortal danger.”

Symbolic resistance offers a framework to understand the behavior and actions of subordinate groups in power relations when the powerful may have an interest in over-dramatizing their reputation and mastery (Scott, 1990:xii; Martin, 2000). The main purpose of symbolic resistance is to avoid notice and detection that could result into direct confrontation with the authorities. This involves “no overt protest and requires little or no organization or planning” (Scott, 1987:417). While engaging in symbolic resistance, subordinate groups would, therefore, employ a wide range of ‘*infrapolitics*’, i.e. actions practiced outside the visible spectrum of what usually pass for political activity. These include sabotage, desertion, withdrawal, feigned ignorance, and non-compliance to official demands which are perceived as safe and require neither formal organization nor make headlines (Scott, 1987:419; 1985, 2008). Within this context, therefore, Muslims’ response to state control of *waqfs* in the former Protectorate adequately passes for symbolic resistance as explained below:

5.2 The Rise of a Community of ‘Muslim Peasants’

The economy of the former city-states in the Protectorate was mainly slave labor driven but was first destroyed by the Portuguese when they occupied the coast, before it became vibrant again after their expulsion in the seventeenth century. In the early twentieth century, slave trade was abolished by the British colonial government permanently interfering with the economy of the city-states (Sheriff, 1991; Partridge and Gillard, 1995; McIntosh, 2009; Mwinyihaji, 2014).

Other than seeking to control labor and resources, abolition of slavery was, however, not followed by contingent plans for the former slaves like repatriation or resettlement with the majority having been sourced from the present day Tanzania (McIntosh, 2009:28, 55-58). More so, centuries of slave labor had produced a distinct Muslim Arabo-African culture called Swahili owing to intermarriages between the masters and their slaves. Therefore, without contingency plans upon abolition of slavery, a large indigenous population, manumitted slaves, and the Swahili were rendered jobless, economically insecure, without permanent residence, and condemned to permanent squatting.

In the British colonial project of resource control, land became the central factor of production. Accordingly, the colonial government established various policies that helped them convert large tracts of ‘native land’ into Crown lands in the Protectorate. These policies effectively rendered the local community to be squatters due to lack of title deeds that since then became the evidence of land ownership (see chapter three). Alienation of land exacerbated the worsened socio-economic fortunes in the community owing to the collapse of plantation agriculture and *mikoko* business following abolition of slavery, and compounded by compulsory acquisition of land *waqfs* either without compensation or ambiguous use of their proceeds. These developments put the Muslim community into subordination as the colonial government was on steady ascendancy and firm control of resources. Above all, political, cultural, and economic relations between locals in the Protectorate and the British colonial government took a turn for the worst following the change of base of operation to Nairobi. As a result, the colonial government tended to favor upcountry Christians than Muslims in the Protectorate who endured long periods of neglect and disengagement (McIntosh, 2009; Ndzovu, 2014).

With resources, particularly *waqfs*, strictly under control of the British colonial government, the largest impact was arguably felt in the sector of Muslim education. Ordinarily, Muslim educational institutions – *madrasas* and *duksis* (elementary Quranic schools) were attached to mosques and the *‘ulama* who attended to those institutions were expected to be full time servants of the community in imparting knowledge being maintained through *waqfs*. Orphanages were also among major beneficiaries of *waqfs*.¹ State control of *waqfs*, therefore, adversely affected

¹ Among *waqfs* designated for Muslim education include those of Latifa bint Saleh bin Awadh, fols. 100-101; Rehema bint Ali, fol. 254; Ali bin Salim, fols. 94-95; Amria bint Ali bin Khamis, fol. 36; Seif bin Salim bin Khalfan el-Bu Sai’di, fols. 20-21, WCK archive, Mombasa. Main expenses were salaries of teachers, auxiliary staff, students’ stipends, and books.

this sector through loss of its major source of support as resources could be utilized in non-designated causes throwing it into disarray.

As a substitute, Christian missionaries introduced formal education with the support of the colonial government that many Muslims viewed with suspicion. Their apathy was premised on the fact that missionaries were using education as a disguise for evangelization since baptism became a prerequisite to admission into mission schools (Mwakimako, 2007b; Loimeier, 2007).² With few racial-based and ill-equipped formal schools that developed much later, the baptism requirement impeded the majority of Muslim children from accessing formal education. Consequently, this created resentment informing the urge among Muslims to secede in the eve of independence fearing further subordination by their upcountry Christian compatriots (see chapter four).

The inadequate levels of formal education disadvantaged Muslims from competing favorably with their Christian counterparts in economic development, political negotiations, job placements, and civil service appointments creating the minority-marginalization narrative in the region (Ndzovu, 2014a:1-23; McIntosh, 2009). Clearly, British colonial policies on land and control of resources were favorable recipe for the gradual growth of a community of ‘Muslim peasants’ in the Protectorate. However, owing to the imperial power of the colonial government, Muslims could not openly question the policies that put them under subordination. Rather, they resorted to symbolic resistance appropriately manifested in the institution of *waqf* as a microcosm.

5.3 Trends and Patterns of Symbolic Resistance against State Control of *Waqfs* in the Protectorate since Colonial Period

The change from the Shari^ca normative of *waqf* practices started with the establishment of the WCK where centralized supervision and control through compulsory registration was imposed. However, as Scott (1985:xvi; 2012:xx) observed, one does not necessarily need to “risk an open land invasion” while squatting would secure access to land; or “openly petition for rights to wood, fish, and game” where poaching would accord the same goods and services. Accordingly, since the spiritual, socio-economic and cultural purposes of *waqfs* could as well be accomplished

² See also Kresse, K. and Mwakimako, H. (2016). *Guidance (Uwongozi)*, Shaykh al-Amin bin Mazrui: *Selected Essays from the First Swahili Islamic Newspaper* (here *sahifa* no.3, 7th *Jamad’ Thani* 1349 A.H./29th October 1930), Leiden: Brill.

through several alternative charitable activities including *sadaqa*, *zakat*, community associations, and private trusts as provided by the Shariʿa, Muslims turned to them as a means to protest the imposed state control.

According to the figures captured in Table 1, registration of *waqfs* experienced a decline from the colonial period (see chapter three). Only 7 (6.7 per cent) *waqfs* were registered from 1940 to 1960, two decades before the end of colonial rule. Compared to 74 (71.2 per cent) *waqfs* registered from 1910 to 1930 upon establishment of the state agency, this represents 54.8 per cent decline over an equal length of time. This suggests that a cross section among Muslims did not register their *waqfs* when it was dangerous to question imperial policies. Yet, as depicted in the figures, non-compliance with compulsory registration of *waqfs* was not a coordinated response in the Muslim community, neither was it openly declared in the conventional sense of a resistance movement. Rather, it was a kind of ‘everyday form of resistance’ (Scott, 2009) and a means by which the socially, economically, culturally, and politically subordinate Muslim community manifested their dissent against centralized management of *waqfs* by the state.

During the postcolonial period, the land problem in the former Protectorate was not addressed but was rather exacerbated. Apart from invalidating *waqf* lands, political elites in subsequent regimes grabbed Crown and community lands. From the 1970s to 1990s particularly, land in the region was used to reward political loyalty apart from resettling of non-locals commonly referred in an essentialist term as *wabara* (upcountry folk) at the expense of the *wapwani* (indigenous coastal dwellers). This became (and remains) a recurrent emotive and sensitive issue that occasionally flares into bloody clashes between the *wabara* and *wapwani* over control and ownership of land (McIntosh, 2009; Ndlovu, 2014b). Neither did postcolonial regimes establish policies to help the region catch up with the rest of the upcountry areas in development. As illustrated in the National Housing and Population Census (2009), predominant Muslim regions lag behind in development and provision of social welfare including education, electricity, water, and employment opportunities (see appendices 1 and 2). As a result, locals in the former Protectorate are disenfranchised owing to prolonged periods of political marginalization, economic exclusion, and exploitation. In the words of Cooper (1980:293), this makes them “less independent, less secure, and more exposed to the vagaries of markets and politics... [where]

food shortages have become chronic... [and] wage labor is more often a necessity..." (as quoted in McIntosh, 2009:29).

Drawing from figures illustrated in Table 1, Muslims' disenfranchisement is demonstrated in the continued non-compliance with the compulsory registration rule. Only 13 (12.5 percent) *waqfs* were registered from 1970 to 2000. Apart from non-registration of *waqfs*, a cross section of Muslims also established *non-labeled waqfs* like private trusts and community associations. These are valuable means by which the Muslim community symbolically expressed its displeasure against continued government control of *waqfs* and extended socio-economic and cultural subordination in the postcolonial period. This was particularly the norm from the 1990s following expansion of the democratic space in the country as evident in several cases:

The first involves the Mazrui land *waqf* that was revoked through government legislation but later restored by the court (see chapter four). Upon restoration of the *waqf* land in 2012, the beneficiaries established a Mazrui community land trust "for the sake of preservation into perpetuity of the assets and properties comprised in the 2,716 acres of land in Takaungu."³ As contained in the spirit of the trust deed, the Mazrui trust is a *non-labeled waqf*. This is because it provides for the administration of the corpus "according to Islamic Shari'a law [and the] *waqf* land cannot be sold, but the benefit accruing thereof may be enjoyed, leased, transmitted and/or passed on to the next generation."⁴ However, since it was designated as a trust, it technically became independent from the rigors of the WCK and by extension, the political maneuvering and direct control by the government.

The second case involves the 'trust of the mosque of Msalani' established in 2011 by the self-appointed executive committee in defiance of the WCK (see chapter four). As administrators of the *masjid* upon inquiry and takeover allegedly owing to lack of an established *mutawalli*, the WCK appointed a caretaker who was opposed by the 'executive committee' that defiantly established the 'trust of the mosque of Msalani' instead. Save for the land title deed that the WCK used to petition the Registrar of Titles and the Land Registry not to recognize the mosque committee, this would have taken the *waqf* out of the mandate of the WCK.⁵ This is not to forget

³ Clause 3 of the trust deed of the Mazrui Community Land Trust, WCK archive, Mombasa.

⁴ Clause 2(a) of the trust deed of the Mazrui Community Land Trust, WCK archive, Mombasa.

⁵ Trust deed of the Mosque of Msalani, Mombasa, May, 2001; the WCK's correspondence to the Registrar of Titles and the Lands Registry, January, 2003, WCK archive, Mombasa.

the uncountable number of orphanages, *masjids*, integrated schools and *madrasas*, as well as health centers and trusts run by local committees and registered under different bodies (see also Mwakimako, 2007a). Majority, if not all of these social welfare institutions, demonstrate group cohesion and solidarity that capitalized on the principles of *waqf* to harness resources for the wellbeing of the community outside the purview of the state agency.

The Muslim Education and Welfare Association (MEWA) of Mombasa and Tawfiq hospital in Malindi would suffice as illustrations of community associations established through the principles of *waqf*. MEWA was founded in 1985 as a local initiative in response to the appalling standards of formal education of Muslims in the town owing to the systemic neglect of the region by colonial and successive postcolonial regimes. The community pulled resources together to provide bursaries, educational materials, and partial scholarships to advancing students. Since it must align itself to a legal framework, the project was registered as an NGO in 1993. Presently, it also runs a hospital offering health care at subsidized rates apart from offering library facilities, career training, and Ramadan *iftar* to poor Muslims.⁶

Tawfiq hospital in Malindi, a brainchild of two local groups, Tawfiq Muslim Youths and Muslim Education and Development Association of Malindi (MEDA), was established in the 1990s to provide subsidized healthcare in an area that suffered similar neglect by the government. Nowadays, the hospital operates from the support of the local community, volunteers, and a plethora of well wishers, both local and international, including the Islamic Development Bank (IDB); World Assembly of Muslim Youths (WAMY); the International Islamic Relief Organization (IIRO); and the Islamic Foundation (Saudi Arabia).⁷ The hospital also runs Ramadan *iftar* program, *zakat al-fitr*, funerals for the poor, caring for the elderly and orphans, and *da'wa* through a well established *masjid* within the hospital. The hospital's appeal for support as stated in its website - "whatever good you put forward for yourselves you will find it with Allah. Indeed, Allah of what you do is seeing" - is drawn from Qur'an 2:110 in relation to Islamic charity and *qurba* religiously legitimizing giving back to the community.

⁶ Interviews with Mohammed Shalli, Zubeir Noor, Mombasa, November, 2014. See also <https://www.betterplace.org/en/organisations/10087-mewa-muslim-education-and-welfare-association>. (Accessed April, 2016).

⁷ The bulk of help from the renowned international Muslim bodies and individuals come in the name of Islamic charity. Some organizations, like WAMY and the Africa Muslim Agency (AMA) also run Muslim schools and orphanages. Interviews with Ahmed Aboud Hadi, Malindi, November, 2015; Hamdoun, WCK Agent, Malindi, November, 2015.

Clearly, Muslims dissented state control of *waqfs*. Majority of respondents during research also demonstrated lack of confidence in the state agency and cast aspersions on the impartiality of the Commissioners. They perceived the WCK as an agent of internal colonization and subordination calling for its replacement with *miji*-based *waqf* boards.⁸ My interaction with the Muslim public in the course of the study also upholds the hypothesis that despite being an old institution in-charge of a significant socio-cultural heritage, the WCK is unknown beyond the borders of the alleged traditional *waqf* towns of Mombasa, Malindi and Lamu, and more specifically, among the ‘*wenyewe wa waqfu*’ community. While many respondents revealed basic knowledge about *waqfs*, their alleged unawareness on the existence of the state body illustrated some level of feigned ignorance that was difficult to ignore. Conversely, it subtly confirmed the view that the largest majority of Muslims in the country, and the coast province in particular where the WCK is legally confined to, expresses *qurba* and charity in other ways outside the confines of the state agency.

Thus, the proliferation of charitable trusts; preference to un-controlled and decentralized *qurba* initiatives like community associations evidenced in the cases of MEWA and Tawfiq hospitals; feigned ignorance over WCK; and non-compliance with compulsory registration rules, should be understood within the lenses of symbolic resistance against state control of *waqfs* in Kenya. These are valuable, but inconspicuous means of expressing dissatisfaction with state policies on the institution of *waqf* that sought to re-establish control over economic, symbolic, and social capital. As Scott (2012:7-8) posits, “such petty acts of insubordination typically make no headlines. But as just millions of entozoan polyps create, willy-nilly, a coral reef, so do thousands acts of insubordination and evasion creates an economic or political barrier reef of their own.” In the same way, non-registration of *waqfs* with the WCK and ‘exit’ to alternative *qurba* initiatives denied the state the much needed control of the socio-economic and symbolic power espoused by *waqfs*.

⁸ Interviews with Ahmed Aboud Hadi, Malindi, November, 2015; Ali Salim Bamkele, Hamid Salim Bamkele, Abdurahman Bamkele and Ahmed Bahaidar Bamkele, Mombasa, November, 2015.

5.4 Constitutional Negotiations to Free *Waqfs* from State Control in Postcolonial Kenya

The constitutional negotiations to free *waqfs* from state control in postcolonial Kenya were undertaken in the auspices of reforming the *kadhi's* courts during the change of the constitution in 2000s. Like the *kadhi's* courts, the WCK Act was retained in the Independence Constitution courtesy of a tripartite agreement between the Sultan of Zanzibar, the Prime Minister of Kenya, and the British Secretary of State. The charter provided that Islam would be the official creed in the Protectorate and that “all cases and law suits between natives will continue to be decided according to Shari^ca” (Carmichael, 1997:292; Anderson, 2008). In the opinion of al-Mazrui (2004:3), guarantee for the use of the Shari^ca as provided by the charter entailed “freedom of worship and the preservation of religious buildings and institutions like *waqfs*.” Accordingly, these ought to have been collated in the *kadhi's* courts and entrenched in the constitution as part of the postcolonial judicial structure.

However, the Independence Constitution adopted the *kadhi's* courts with the narrowly defined Muslim personal status law (Mwakimako, 2007b, 2010; Chesworth, 2011; Osiro, 2014). Section 66(3) of the Independence Constitution provides:

A *kadhi's* court shall have and exercise the following jurisdiction, namely the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion; but nothing in this section shall limit the jurisdiction of the High court or of any subordinate court in any proceeding which comes before it.⁹

The ambiguous relation between *waqfs* and *kadhi's* courts was thus carried over to the independent period as the Act left out *waqfs*, despite being an integral part of Islamic inheritance, to be managed differently in accordance with the WCK Act. Since then, various amendments were carried out in the Independence Constitution in Kenya at different times until a new one was promulgated in August 2010. However, the *kadhi's* courts statute and the WCK Act were virtually untouched. In the course of review of the Constitution in the 2000s, Muslims' desire to expand and enhance the jurisdiction of the *kadhi's* courts included the determination of commercial and civil disputes arising from *waqfs*. Clearly, this was an attempt to broaden the scope of personal status law and inheritance as understood in the Shari^ca to include *waqfs*,

⁹ See also section 5, *Kadhi's Court Act*, 1967.

wasiyya, and *hiba* (gifts) (Powers, 1990:19-20). This was captured in Article 2000(1) of the Bomas Draft constitution (2004):¹⁰

The jurisdiction of a *kadhi's* court extends to (a) the determination of Muslim law relating to status, marriage, divorce, including matters arising after divorce, and inheritance, and succession in proceedings in which all parties profess Islam; (b) the determination of civil and commercial disputes between parties who are Muslims, in the manner of a small claims courts as by law established, but without prejudice to the rights of parties to go to other courts or tribunals with similar jurisdiction; (c) the settlement of disputes over or arising out of the administration of *waqf* properties.¹¹

It was further proposed that there be established a High Court of the *kadhi's* and a *Kadhi's* Court of Appeal (Bomas Draft, Article 1999, 1). However, dissenting decisions of the proposed *Kadhi's* Court of Appeal, according to the Draft, could as well be appealed against in the Supreme Court (Bomas Draft, Article 1999, 4). The suggestion to grant appellate jurisdiction to *kadhi's* courts stemmed from the urge to accord Muslims dissatisfied with decisions of lower chambers of the *kadhis* to have their cases revisited by a bench of Muslim judiciary who could exercise their joint opinion based on the Shari'a rather than the Common law applied in the existing judicial system. As subordinate courts in the judiciary structure, decisions by the *kadhi's* courts, as established by the current study, have in a number of occasions been overruled by the High Court causing miscarriage of justice (see chapter four).¹²

As proposed in the Bomas Draft Constitution, nonetheless, the enhancement of the *kadhi's* courts did not preclude the right to seek legal redress from civil courts by Muslims, or even in cases pitting Muslims against non-Muslim litigants. The choice of the *kadhi's* courts for the purpose of arbitration remains the private conviction of individual Muslims. However, the proposals were misconstrued as being both spiritual with the view of favoring one religious community over

¹⁰ The proposed draft constitution draws its name from the venue where it was conceived – the Bomas of Kenya –and from where the Constitution of Kenya Review Commission (CKRC) operated. This also differentiates it from parallel drafts, like the Wako and Kilifi that came up later in opposition to the Bomas one. See also Wario, H. (2014). Debates on *Kadhi's* Courts and Christian-Muslim Relations in Isiolo Town: Thematic Issues and Emergent Trends. In J. Chesworth, & F. Kogelmann (Eds.), *Sharia'a in Africa Today: Reactions and Responses*. Vol. 15 (pp.149-176). Leiden: Brill.

¹¹ See also Hassan, I. (2004). Working Document for the Constitution of Kenya Review Commission on the *Kadhi's* Courts, Chief *Kadhi* and *Kadhis*. Retrieved from: <http://www.commonlii.org/ke/other/KECKRC/2002/10.html>. (Accessed April, 2016).

¹² For further discussion on miscarriage of justice in civil courts involving Muslims owing to clash of Regulations between Civil law and the Shari'a, see Hirsch, S. (1994). *Kadhis* Courts as Complex Sites of Resistance: The State, Islam and Gender in Post-Colonial Kenya. In M. Lazrus-Black, (Ed.), *Contested States* (pp.207-230). New York: Routledge; Mwangi, K. (1995). The Application and Development of *Shari'a* in Kenya: 1895-1990. In M. Bakari, & S. Yahya (Eds.), *Islam in Kenya* (pp.252-259). Nairobi: MEWA Publications; Hashim, A. (2006). Unity within Diversity: Unification and Codification of Muslim Law of Personal Status in East Africa. Khartoum: African Universities Congress, pp.328- 349; Anderson, J. (2008). *Islamic Law in Africa*, op. cit., pp.86 – 107; Hashim, A. (2010). Coping with Conflicts, op. cit., pp.221-245.

others as well as legal, aspiring to establish a parallel religious judicial system for Muslims. The proposals were, thus, opposed by an adhoc group of Christians, the ‘Kenya Churches’, (composed mainly of the Pentecostals with support from Methodist and Anglican leaders), a move that did not only raise tension and mistrust between Muslims and Christians in the country, but also temporarily stalled the constitutional review process (Mwakimako, 2007b; Tayob and Wandera, 2011; Wario, 2014).¹³

To understand the opposition by the alliance of ‘Kenya Churches’ to expand the legal jurisdiction of the *kadhi*’s courts we engage the concept of religious field as propounded by Bourdieu. A religious field is characterized by “competition for religious power [which] owes its specificity... to the fact that what is at stake is the *monopoly of the legitimate exercise of the power to modify, in a deep and lasting fashion, the practice and world-view of lay people*, by imposing on and inculcating in them a particular *religious habitus*” (Bourdieu, 1987:126, emphasis in original). Significantly, a religious field has both internal and external stakes as religious groups compete for control over production, consumption of religious capital, and dominance of the religious space. Hence, the positions of power in the religious field results from the confrontation of ‘religious demands’ (i.e. the religious interests of different groups). This is because, “the position of power that a religious formation occupies within the religious field, depends on the power of the social group from which it draws its support in the field” (Mahr, Harker, and Wilkes, 1990:538).

It is an undisputed fact that Islam preceded Christianity in Kenya from as early as the eighth century. Since the coming of the Portuguese in the fifteenth century, however, Islam and Christianity have competed ‘for the soul of Africa’ mission in Kenya’s religious landscape. The competition was compounded in the late nineteenth century with the establishment of British colonial rule that provided conducive environment for Christian missions (Mwakimako, 2007b:290-292; Loimeier, 2007). More so, the negotiations ‘for soul of Africa’ were heightened in the wave of advocacy for the Shari’^ca in some parts of Africa in the early 2000s that culminated in the declaration of the Shari’^ca in several parts of West Africa particularly, in some

¹³ See also Kadhida, J. (*Daily Nation*, May 24, 2010). *Kadhi Courts Illegal, Judges Rule*. Retrieved from: <http://www.nation.co.ke/News/Kadhi%20courts%20illegal%20judges%20rule/-/1056/924614/-/rcndgfz/-/index.html>; Nation Reporter. (*Daily Nation*, July 21, 2010). Clerics Insist on Removal of Clauses. Retrieved from: <http://www.nation.co.ke/Referendum/Clerics%20insist%20on%20removal%20of%20clauses%20/-/926046/962348/-/sw9atdz/-/index.html>. (Accessed April, 2016).

states in Nigeria and Mali (Frederiks, 2010; Chesworth and Kogelmann, 2014). Accordingly, the opposition by the alliance of ‘Kenya Churches’ to improve *kadhi*’s courts in the new constitution should be understood within the historical context of the two faiths contesting over religious legitimacy and control of the religious field. As the constitutional talks in Kenya coincided with the Shari‘a debates among some countries in Africa, the fear of the ‘Kenya Churches’ was probably hinged on the misconception that Islam would gain a formidable constitutional legitimacy in the negotiation for control and dominance of the religious space. In the worst case scenario, it was polemically claimed by the ‘Kenya Churches’ that Muslims were intending to impose the Shari‘a on the majority Christians in the country, thus stocking fear and mistrust between the two religious communities (Mwakimako, 2007b:287-307).

Contrary to the perception by the ‘Kenya Churches’, it was not the intention of Muslims to use constitutional amendments to compete for numbers and control of the religious field. Therefore, to ease the tension and continue with the review of the constitution, it was resolved that *kadhi*’s courts be retained as they appeared in the Independence Constitution – as subordinate courts with the narrowly interpreted and limited jurisdiction to Muslim personal status law among litigants. The failed negotiations to empower *kadhi*’s courts thus effectively dealt a blow to the efforts to free the control of *waqfs* from the state.¹⁴

5.5 Adaptation to Internal Dynamics in *Waqfs*

Muslims’ exit from state controlled *waqfs* should, on the other hand, be understood within the wider context of *waqfs* being a ‘discursive tradition’ (Asad, 2009; see chapter two). The development of the institution of *waqf* assumed different faces at various epochs in response to local customs and needs making it to be lived and mediated variedly across the Muslim world. Accordingly, the various alternatives assumed by Kenyan Muslims during symbolic resistance represent a phase in the internal dynamics of the institution as part of Islamic charity. To demonstrate that *waqf* is a ‘discursive tradition’, we reconstruct its development as follows:

¹⁴ Unlike in Kenya, similar proposals to reform and enhance the efficiency of the *kadhi*’s courts were adopted and ratified in Zanzibar. As contained in the Written Laws (Miscellaneous Amendments) Act 2003, the jurisdiction of the *kadhi*’s court in Zanzibar now includes hearing and determination of matters of *waqf* while an Appellate Court of the *Kadhis* was also established. See Hashim, A. (2005). *Servants of Shari‘a*, op. cit., p.38.

(a) The ‘formative phase’ beginning in the seventh century (first century A.H). During this period, for lack of precise textual legitimacy in the Qur’an, the institution was believed to have been initiated by the Prophet through a number of traditions and the actions of his companions. Thus the main concern during this period was to establish the religious legitimacy and essentials of *waqf*. The growth and development of the institution during this period was also perceived to be progressive and adaptive to various local customs and needs with a view to balancing between theory and practice. *Waqfs* attained stability in the thirteenth century following the formation of the different *madhhabs* (Barnes, 1986; Kozlowski, 1996; Hennigan, 2004);

(b) *Waqfs* entered the ‘classical phase’ in the fourteenth century. This was, arguably, the golden age of *waqfs* as the institution flourished becoming an essential part of the Muslim society and social welfare. Most public institutions and social welfare services including water, education, urban housing, health care, *madrasas* and mosques were either *waqfs* themselves or maintained through *waqf* revenues (Hodgson, 1974:124; Hoexter, 2002);

(c) *Waqfs* entered the ‘transformative stage’ from the first decades of the fifteenth to the seventeenth century. The main debate here was whether or not to adopt cash as a corpus. Cash *waqfs* were dominant throughout the Ottoman Empire in the first half of the sixteenth century but faced opposition in Syria owing to the aspect of *riba* (interest) which is abhorrent in Islam. The debate, however, closed with the adoption of cash *waqfs* as part of the *‘urf* for the public good (*istihsan*) given that its abolition would have dealt a blow to the hundreds of social welfare services that they supported in the community. Other forms of moveables such as ornaments, armor, and animals for their products were also adopted as *waqf* corpuses (Suhrawardy, 1911; Mandaville, 1979; Hoexter, 2002; Gerber, 2002);

(d) From the eighteenth to early nineteenth century, nonetheless, the institution of *waqf* entered the ‘redundancy and stagnation age’. Owing to their immense influence in the social welfare of the society, *waqfs* had established diverse groups of economically secure and independent Muslims that were antithetical to political hegemony. Muslim rulers in the Ottoman Empire, for instance, established the Ministry of Imperial Religious Endowments that put *waqfs* under state supervision, effectively controlling the mainstay of the diverse groups of beneficiaries. Part of the *‘ulama* was also conscripted as *mutwallis* along theological biases to accord the state a religious legitimacy. This coincided with colonial invasion as evident in British India and Egypt;

French Algeria, Syria, and Lebanon; and the Italian colony of Libya where the main concern of the colonial project was resource control. Like Muslim rulers, colonial powers also put *waqfs* under control by establishing departments and ministries with personnel working under strict guidelines and supervision. Consequently, state control, mismanagement, and use of *waqfs* against designated causes paralyzed social welfare in the Muslim society rendering the role of *waqfs* almost obsolete during this period (Barnes, 1986; Kozlowski, 1996; Sanjuan, 2007; Medici, 2011);

(e) Upon the end of colonial rule in the mid nineteenth century, most Muslim states embarked on land reforms that also affected the institution of *waqf*. This could be regarded as the ‘period of botched reforms and extended state control’. Apart from inheriting colonial infrastructure to control the institution, majority of land *waqfs* were either nationalized or redistributed in the ensued reforms that extended to the early twentieth century. In other countries like Egypt, Turkey, Libya, Lebanon, and Syria, *waqf dhurri* were limited to sixty years after the death of the *waqif* or abolished altogether. Accordingly, except in Morocco where *waqfs* are said to have flourished, many of the reforms by new nation states put the institution under extended control and supervision (Schacht, 1982; Kozlowski, 1998, 2008; Kogelmann, 2004, 2005);

(f) From the last decades of the twentieth century, however, the institution of *waqf* entered the ‘disillusionment and new awakening phase’. It was a period of new awakening in the sense that some predominantly Muslim countries including Kuwait, Sudan, Iran, Qatar, and Malaysia embarked on genuine reforms on *waqf* policies and reviewing perceived rigid jurisprudential interpretations with a view to returning the institution to its pristine time. This period was also characterized by the upcoming of the civil societies that were disillusioned by failures in some of the independent states to reform colonial policies and provide social welfare services. Muslim civil society groups, therefore, pushed to free *waqfs* from state control by establishing community based charitable organizations some of which acquired transnational status (Kozlowski, 1998; Kuran, 2001; Hennigan, 2004; Dafterdar and Cizakca, 2013).

The transnational Muslim charitable organizations are using the goodwill of the institution to harness resources in form of *waqf* shares and certificates the usufruct of which is channeled to specific social welfare causes across the Muslim *umma*. Included among others are the International Islamic Relief Organization (IIRO, Saudia); Islamic Relief Organization (IRO,

UK); World Assembly of Muslim Youths (WAMY); Al-Haramayn Islamic Foundation (AHIF); and Africa Muslim Agency (AMA). The IDB also runs a number of subsidiaries that revive *waqfs* across the Muslim world like the *Awqaf* Properties Investment Fund (APIF) and the World *Waqf* Fund (WWF). Included also in the provision of social welfare in the Muslim *umma* are private trusts including the King Faysal Foundation (KFF); Alwaleed bin Talal Foundation; and Shaykh Zayid al-Nahyan (Kuran, 2001; Benthall and Bellion-Jourdan, 2003; Siraj and Hillary, 2006; Dafterdar and Cizacka, 2013).

In summary, therefore, though Muslims dissented state controlled *waqfs* and exited to *non-labeled waqfs*, they remained within the ambit of Islamic charity and *qurba*. Significant, however, were their inconspicuous efforts as subordinate group to decipher the contradictions in the secular state policies and civil institutions of subjugation and re-define the control and excise of social, symbolic, and cultural capital provided by *waqfs*.

Conclusion

Preceding discussions illustrate the significant role of *waqfs* in the socio-cultural and religious life of a Muslim community where life is perceived as one totality. It is not just about resource distribution, but also performing a religious duty and maintaining the social fabric of the community. The secular state (both colonial and postcolonial) policies and civil institutions that governed *waqfs*, therefore, interfered with the life pattern of the Muslim community subjecting it to subordination. In the face of imperial power, however, the community could only turn to the silent but effective means to reverse the control of resources without attracting the wrath of the state. This explains the non-compliance with the imposed compulsory registration rules and use of *sadaqa*, community based organizations, and private trusts.

The discussion in this chapter has also shown that Muslims engaged the state within the constitutional boundaries with a view to manage *waqfs* for their welfare. This was, nonetheless, faced by conflicting religious interests and rendered futile. Significantly, the use of alternative and uncontrolled charitable options does not only demonstrate the urge to control resources, but also exploration of the varied options that the Shari^ca provides under the expansive umbrella of Islamic charity in the face of restrictive socio-cultural and political conditions for the fulfillment of spiritual obligations.

Chapter Six

Distributing Usufruct of *Waqfs* in Kenya: Safeguarding Cultural, Economic, Socio-Ethnic Interests, and Gender Considerations

6.0 Introduction

Islamic charity was a sacred charity, a form of worship, rather than a form of altruism behavior. It would be wrong, nonetheless, to depict Islamic charity, or the charities in other monotheistic religions, as driven only by bad conscience or by an expectation of a divine reward. Complex motives were at work, and the distinctly human trait of altruism and its existence within the system of a sacred charity cannot be denied (Lev, 2005:144).

This observation by Lev (2005) does not depart sharply from Hennigan's (2004) view on the *essence* and *uses* of *waqfs* in Muslim societies, i.e. both agree on the intricate nature of the institution, particularly on the aspect of *waqfs* as gifts *inter vivos*. *Waqf* accords the dedicator the freedom to choose what to endow and whom to include as beneficiary, bringing into fore the fusion of religion, economy, and culture in Muslim societies (Shahin, 1998; Hennigan, 2004; Lev, 2005). It is in this context that the chapter attempts to situate the institution of *waqf* among Muslims in Kenya and understand its place in the socio-cultural negotiations between diverse competing and conflicting groups in the society. Central to the argument in this chapter are the different types of *waqfs* available in Kenya's landscape; the choice of formula - Qur'anic and non-Qur'anic, in the distribution of usufruct in relation to 'domestic' and 'public economy' as well as gender considerations; and the questions of *'ana*, *hikr* and *istibadal* vis-à-vis improvement of the output of revenue generating *waqfs*. The use of relevant case studies and the perception of *umiji-wamiji* propounded in chapter four are pertinent in understanding how the unfolding ethno-social negotiations shaped the development of *waqfs* in the community.

Distribution of usufruct of *waqf* departs from two perspectives – Qur'anic and non-Qur'anic shares. The Qur'anic model is informed by the divine law of *mirath* –“for the male what is equal to the share of two females”- enshrined in Qur'an 4:11-12.¹ Distributing usufruct of *waqf* based on this dogma strictly follows the divine guidelines giving preference to male over female beneficiaries. A cross section of scholars regards this dogma as rigid since disregarding it

¹ For further discussion on Islamic inheritance, see Qur'an 4:176; *Sahih al- Bukhari*, 8:731, 736.

amounts to *kufr* (disbelief) (Barnes, 1986; Reiter, 1996; Powers, 2002; Kozlowski, 2008). The second formula of distributing usufruct of *waqfs* – non-Qur’anic, allegedly draws its legitimacy from Hanafi scholars’ *fatwa* traced to second century A.H. It espouses that if a founder fails to specify the mode of distributing usufruct, it was to be assumed that he had intended to have it equally shared among designated beneficiaries. This opinion is allegedly anchored on a tradition attributed to the Prophet regarding gifts *inter vivos* that advises parents to share them out equally amongst their children and give preference to daughters only when necessary (*Sahih al-Bukhari*, 3:758-760).² Against this backdrop, the various types of *waqfs* in the former Protectorate are contextualized and the impact of the adopted formulas in distributing usufruct to beneficiaries by different endowers analyzed hereunder.

6.1 Safeguarding Family’s ‘Domestic Economy’: The Ambiguous Place of Women in *Waqf Ahli* in Kenya

Family or posterity *waqfs* constituted 63 of the 104 sampled *waqf* charters representing 60.6 per cent of the total *waqfs* registered by the WCK. From these figures, one could discern that majority of endowers were primarily concerned with the welfare of their progeny and the urge to retain the usufruct within the family parameters. This is undoubtedly informed by the nature of *waqf* itself – as *sadaqa* in which case the main beneficiaries are those within the precincts of the endower. Establishing charity for the benefit of one’s family is believed to be a meritorious act in Islam as propounded in a tradition of the Prophet:

...The most excellent dinar is one that a person spends on his family, and the dinar which he spends on his animal in Allah's path, and the dinar he spends on his companions in Allah's path [...] who is the person with greater reward than a person who spends on young members of his family (and thus) preserves (saves them from want) (and by virtue of which) Allah brings profit for them and makes them rich (*Sahih Muslim*, 5:2180).

Several verses of the Qur’an and *hadiths* of the Prophet also emphasize the need to spend on one’s family as a form of *sadaqa* while warning against the lack of it effectively breaking the

² Powers defines gift *inter vivos* (gift between living people) as “a voluntary gratuitous alienation of property by a person to another not made in contemplation of death.” See Powers, D. (1989). Orientalism, Colonialism and Legal History: The Attack on Muslim family Endowments in Algeria and India. *Journal of Comparative Studies in Society and History*, 31(3), 535-571; Reiter, Y. (1996). *Islamic Endowments in Jerusalem under British Mandate*. London: Frank Cass & Co. Ltd, pp.100-101.

social fabric.³ Accordingly, a number of the *waqf* deeds reviewed in this study had elaborate chains of beneficiaries suggesting that the usufruct would be confined within the ‘domestic economy’ (Sanjuan, 2007). Included among these were two *waqfs* of Mwanajumbe bint Ali bin Khamis el-Mandhry. In these *waqfs*, the dedicator designated her nieces, Amina and Mwanamkuu bint Said bin Ali bin Khamis el-Mandhry and their descendants from generation to generation with el-Mandhry *masjid* in Mombasa as the ultimate beneficiary.⁴ Neither of the *waqf* deeds indicated the formula for distributing usufruct assuming equality in share distribution among the first two generations of beneficiaries.

The second case concerns the family *waqf* of Mwanajuma bint Kulo who designated her nephew and niece Abdallah Mwinzagu and Mwanasha Mwenyehija respectively and their descendants as beneficiaries from one generation to the next.⁵ A third example is the *waqf dhurri* of Adam Dadrahman in which he designated his wife, three daughters, “and to those who may hereafter be borne unto me and their children.”⁶ By designating the yet to be borne, Dadrahman, like in several similar cases, was bent to ensure that the usufruct of the *sadaqa* remained within the family circle. Again, as in the earlier two *waqfs*, no precise formula for the distribution of the usufruct was given.

A sharp contrast from the above is the *waqf dhurri* of Haji Ebrahim Haji Adam Naserpuria in which the endower designated her three daughters as equal beneficiaries of the family *waqf* in the exclusion of his two sons.⁷ Moreover, male descendants were sidelined in later generations since usufruct was to trickle down to the daughters’ children from generation to generation. In these and some other cases where the non-Qur’anic model of sharing usufruct was adopted, whether assumed or prescribed, it turns out that women – daughters, wives, and other female cognates, were the most preferred beneficiaries of family *waqfs*.⁸ This could be understood in the context of *waqfs* as gifts *inter vivos* where, in relation to the Prophet’s tradition above, women were accorded priority where gender was the main consideration in the distribution of usufruct. This is in contrast to the Qur’anic formula where shares are predetermined in favor of male

³ See Qur’an 2:264; Qur’an 3:7; *Sahih al-Bukhari*, 3:763-764; 767, 802; 4:11, 20, 22-24; 166, 232; *Sahih Muslim*, 5:2181, 2183.

⁴ *Waqf* deed of Mwanajumbe bint Ali bin Khamis el-Mandhry, fols. 32; 34-35, WCK archive, Mombasa.

⁵ *Waqf* deed of Mwanajumbe bint Kulo, fol. 15, WCK archive, Mombasa.

⁶ *Waqf* deed of Adam Dadrahman, fols. 26-27, WCK archive, Mombasa.

⁷ *Waqf* deed of Haji Ebrahim Haji Adam Naserpuria, fol. 30, WCK archive, Mombasa.

⁸ *Waqf* deeds of Khamis bin Tabibu, fol. 28; Mishi bint Mwalimu, fols. 40-41, WCK archive, Mombasa.

beneficiaries. Taking the *waqf dhurri* of Naserpuria for instance, the three daughters would have shared the usufruct with their two brothers in the ratio one to two (1:2). The same case would have applied to the beneficiaries of usufruct of the family *waqf* of bint Kulo above. Precisely, the Qur'anic principle of distributing usufruct of *waqfs* was adopted in the *waqf dhurri* of Gulamhussein Adamji where four sons and two daughters were designated as beneficiaries.⁹ Two *waqf dhurri* of Mohammed bin Omar bin Aish el-Auf present yet another instance where Qur'an guidelines of inheritance were preferred in distributing usufruct of the *waqf* among three sons.¹⁰ Interestingly, the wife was left out as beneficiary but named as *mutawalli* in both *waqfs* instead. The Qur'anic formula was again used in the *waqf dhurri* of Nassor bin Mohammed el-Nahdy and Haji Kassim Haji Mohammed where male beneficiaries got bigger shares compared to their female counterparts.¹¹

Examining the preference on Qur'anic guidelines of inheritance in sharing the usufruct of *waqf dhurri* by endowers reveals a tendency to protect descendants from competition by agnates as well as retaining portions of the estate within the 'domestic economy' that would have otherwise trickled to the agnates or surrendered to the *bayt al-mal* as required under *mirath* law.¹² This is clearly discernible in the *waqf dhurri* of Mwarabu bint Mohammed bin Abdallah who designated her only daughter, Amina bint Dadrahman el-Balushiya then to her children from one generation to the next with the Mazrui *masjid* as residual beneficiary.¹³ Another case involves one of the *waqf dhurri* of Mohammed bin Said Adnan Bamkele where a daughter, Bukheiti bint Mohammed was designated as the sole beneficiary then her descendants.¹⁴ The tendency was also evident in the *waqf dhurri* of Nanachema bint Athuman al-Famawiya where Aisha bint Manswab bin Abdurahman was designated as the first generation beneficiary and thereafter her descendants from generation to generation.¹⁵

⁹ *Waqf* deed of Gulamhussein Adamji, fols. 38-39, WCK archive, Mombasa.

¹⁰ *Waqf* deeds of Mohammed bin Omar bin Aish el-Auf, fols. 48-9; 56-57, WCK archive, Mombasa.

¹¹ *Waqf* deeds of Nassor bin Mohammed el-Nahdy, fols. 62-63; 64-65; Haji Kassim Haji Mohammed, fols. 69-70, WCK archive, Mombasa.

¹² There is no *bayt al-mal* in Kenya. Properties of Muslims who die without heirs are given to the WCK by the Public Trustee in monetary form to be placed in to a "Surplus Funds Account" and utilized as deemed fit by the state agency. This may not necessarily include investing the funds for the spiritual benefit of the dedicator. See section 18, WCK Act (1951). Interviews with Muhammad Shalli; Zubeir Hussein Noor, Mombasa, November, 2014.

¹³ *Waqf* deed of Mwarabu bint Mohammed bin Abdallah, (unmarked), WCK archive, Mombasa. See also Succession Petition no. 29 Of 2014 at the *Kadhi's* court, Mombasa in relation to plot 406/3 on this *waqf*, WCK archive, Mombasa.

¹⁴ *Waqf* deed of Mohammed bin Said Adnan Bamkele, fol. 130, WCK archive, Mombasa. The endower had several other *waqfs* where different beneficiaries shared the usufruct according to different formulas.

¹⁵ *Waqf* deed of Nanachema bint Athuman al-Famawiya, fol. 160, WCK archive, Mombasa.

According to the Qur'an guidelines of *mirath*, a daughter who survives the deceased as the only heir is entitled to one half of the estate after deductions of other expenses and legacies. Where there are more than two daughters, they share two-thirds of the estate with the remainder going to agnates or the public treasury for the benefit of the general poor and beggars in the community (Qur'an 4:11-12).¹⁶ Therefore, significant portions of the endowers' estate in the mentioned cases above were retained within the 'domestic economy' by use of *waqf* as a means of sharing wealth in the family than it would have been under *mirath* law. This is because as *waqf*, non-designated beneficiaries could not lay claim to the usufruct as they would possibly do under *mirath*.

Another way to ensure that the usufruct of *waqf dhurri* did not go out of the 'domestic economy' was to restrict women's shares of the usufruct, especially wives and daughters, from being inherited by their descendants and relatives regarded as 'outsiders' from the endower's viewpoint. This included placing conditions such as compulsory return of the wives' shares to donor's descendants upon the former's demise, while daughters were entitled to shares only if they remained unmarried.¹⁷ Contrary to *waqfs*, Qur'an guidelines of *mirath* grant the daughter's children (grandchildren of the endower) with their husbands and relatives of the wife some shares of the property upon their demise (Qur'an 4:11-12). Had the endowers allowed female beneficiaries to take their shares to the marital and parental homes respectively, it would have been akin to sanctioning the taking out of the usufruct beyond the confines of the family circle. In both cases however, the conditional entitlement to shares of usufruct as well as locking out what would have been legal heirs suggests denial of the right to inheritance, making the *waqfs* inconsistent with the Qur'an guidelines. Such *waqfs* are often prone to legal challenges by aggrieved beneficiaries in the *kadhi's* court as was established by the study (see chapter four).

It was, nevertheless, not only female beneficiaries who were capped from taking usufruct of the *waqfs* from the endower's cognates as was demonstrated in the *waqf ahli* of Mwanakombo bint

¹⁶ The *bayt al-mal*, according to *imam* Malik, has the right to seize the property of a Muslim who dies without legal heirs or where some portions of wealth remain after legal heirs get their rightful shares. In the principles of *awl* (increase) and *radd* (return), however, remaining portions of inheritance (and *waqfs* distributed according to this formula) may in such circumstances also remain with the cognates. See Bhala, R. (2011). *Understanding Islamic Law (Shari'a)* (here, pp.1089-1163). New Providence: New Jersey; Ghazaleh, P. (2011). Pious Foundations: From Here to Eternity? In G. Pascale (Ed.), *Held in Trust: Waqf in the Islamic World* (pp. 1-22). Cairo: The American University in Cairo Press.

¹⁷ *Waqf* deeds of *shaykh* Said bin Rashid bin Abdullah el-Mandhry, fols. 16-17; Mohammed bin Kaili el-Kilindini, fol. 105; Haji Ismail Haji Adam, fols. 51-52; Alibhai Adamji Dhar, fols. 78-88, WCK archive, Mombasa.

Jaka. In this *waqf*, the dedicator designated her daughter, Mwakazije bint Bwana Amir and her children as beneficiaries in the exclusion of the husband, Beujas bin Amir.¹⁸ As a husband, Beujas was denied of his right to inheritance where he was entitled to one quarter of the usufruct according to the Qur'an guidelines of inheritance. Had he petitioned this *waqf* before the *kadhi's* court, it could have possibly been invalidated on the basis of inconsistency with the Shari'a as held by the majority opinion.

These cases demonstrate the use of *waqf* as *sadaqa* *inter vivos* to protect cognates against competition from agnates. It also helps to retain portions of the usufruct within the confines of the 'domestic economy' that would have otherwise gone to benefit the 'public economy'. Significantly, they subtly illustrate the flexibility of the Shari'a to balance between textual demands and practical realities of life. Nonetheless, it is not possible to determine the circumstances that informed the choice of one method of distributing usufruct of *waqfs* over another. Different endowers adopted different formulas depending on predisposed circumstances that deemed suitable at the time of establishing their endowments. Undeniably, though, as corroborated by the cited cases, the Qur'an guidelines of inheritance were flouted to the detriment of both genders, a misdemeanor that *kadhi's* courts were petitioned to redress.

6.2 *Waqf Khayri* and *Mushtarak Waqfs*: Charitable Endowments and the Concern for 'Public Economy'

Charitable *waqfs* accounted for 37 (35.6 per cent) of the total *waqfs* reviewed during the period of study. In all the registered charitable *waqfs*, endowers clearly expressed the desire to consecrate their wealth purposely for the social welfare of the community and for the spiritual goal of attaining *qurba* with the Creator. In one example, the *waqf* of Naserpuria was consecrated for the benefit of the poor and beggars "as decided by the trustees except among descendants of Haji Adam Fakir Mohammed," and for the annual dinner of the Naserpuria Memon community.¹⁹ Clearly, the endower's urge was to ensure that the *waqf* would benefit majority of the poor in the community than limiting it within his family circle. A number of

¹⁸ *Waqf* deed of Mwanakombo bint Jaka, fol. 118, WCK archive, Mombasa.

¹⁹ *Waqf* deed of Haji Ebrahim Haji Adam Naserpuria, fol. 31, WCK archive, Mombasa.

possibilities could explain the *shurut al-waqif* to single out the descendants of Haji Mohammed as non-deserving beneficiaries:

First, it could be postulated that Haji Mohammed and Haji Adam were close relatives, probably cousins. In this scenario, if the poor descendants of Haji Mohammed were not excluded, they could have laid exclusive claims as the most deserving beneficiaries of the endower by blood relations based on the *fatwa* of *shaykh* Ibn Duhaish (A. H. 1377) (see chapter two). The poor and needy relatives of an endower, according to the *fatwa*, have beneficence priority to *waqfs* established by their relatives than the general poor and beggars in the community. Granted, the poor descendants of Haji Mohammed would have taken back the usufruct of the *waqf* to the ‘domestic economy’. Secondly, as relatives, it could be possible that Haji Adam aimed at restraining them from getting double shares both as beneficiaries of the *waqf* and agnate heirs as is provided for under the Qur’an guidelines of *mirath*.

Another case of charitable endowment involves the *waqf khayri* of Seif bin Salim bin Khalfan el-Busaidi, which was designated for his Liwali Seif Masjid in Lamu. In a typical demonstration of control of property long after demise through *shurut al-waqif*, the dedicator detailed how usufruct should be channeled towards salaries for the *mu^cadhdhin*, Qur’an teacher, and annual *mawlid* feast.²⁰ Salim bin Khalfan bin Amir el-Busaidi also consecrated a piece of land at Kikowani, Mombasa, as cemetery for the benefit of the Memon Muslim community.²¹ Accordingly, as contained in the various *waqf* deeds, establishing *waqf khayri* is not only indicative of endowers seeking *qurba* with God but also enables the usufruct to trickle to the ‘public economy’.

More so, designating religious institutions like *masjids*, *madrasas*, and orphanages, also brings into light the endower’s spiritual attachment with such institutions in the community. Unwittingly though, socio-religious attachments by endowers as exemplified in the choice of such institutions as well as locales gravitate towards safeguarding temporal ethnic and cultural

²⁰ Salaries for *mu^cadhdhin*, Qur’an teachers, water carriers, *mawlid* feasts, Ramadan *iftar*, annual *khitma* recitations, and performance of *hajj* by proxy are some of the recurrent rituals emphasized by endowers for the purpose of reaping spiritual recompense in their afterlife. See the *waqf* deeds of Latifa bint Saleh bin Awadh, fols.100-101; Rehema bint Ali, fol. 254; Ali bin Salim, fols. 94-95; Amria bint Ali bin Khamis, fol. 36; Seif bin Salim bin Khalfan el-Busaidi, fols. 20-21, WCK archive, Mombasa.

²¹ This was an extension of the cemetery earlier consecrated by Haji Mohammed Haji Kassim for the Memon Muslim community. See *waqf* deeds of Salim bin Khalfan bin Amir el-Busaidi, fol. 109; Haji Mohammed Haji Kassim, fol. 110, WCK archive, Mombasa.

interests of select groups of Muslims in the exclusion of others crystallizing the view of *umiji-wamiji* in *waqf* practices among Muslims in the region as argued. The *waqf khayri* of Haji Adam for the poor and annual dinner of the Naserpuria Memon community; the *waqf* of Seif bin Salim for his Liwali Seif Masjid at Lamu; and the exclusive cemetery for the Memon Muslim community as consecrated by bin Amir el-Busaidi in Mombasa aptly corroborate the view on *umiji-wamiji* dynamics vis-à-vis socio-ethnic and political alignments of Muslim groups in the former Protectorate as elaborated elsewhere in this study.

Mushtarak (mixed) *waqfs* were the third type of endowments registered with the WCK and constituted a paltry 4 (3.8 per cent) of the total. As discussed in chapter two, *mushtarak waqfs* concurrently benefit the endower's progeny and other charitable causes in a predetermined proportion as provided in the *waqf* deed. In one example of recently (2006) registered *waqfs*, Mariam Mohammed Mwanjira consecrated a mixed *waqf* for the benefit of her eight agnates (three females and five males) in equal shares alongside a local *masjid* and *madrassa*.²² Another case involves the *waqf* of Mohammed bin Khamis bin Mbwana Kheri el-Bajuni in which usufruct was to be shared between the progeny of the endower and a *masjid* he had established.²³ In a similar case, Aisha bint Abdullah bin Jabir designated reciters of the Qur'an for the benefit of her soul. At the same time, the usufruct was to benefit her granddaughter Aisha bint Khamis, then her children from generation to generation with the Muslim poor and beggars in the community as ultimate beneficiaries.²⁴ Much as endowers were keen on their spiritual afterlife, therefore, they were also not oblivious of their social responsibilities within their extended family chains even in instances when they had no direct descendants.

6.3 Gender and *Waqfs*: Negotiations for Socio-Economic Space between Sexes among Muslims in Kenya

The question of gender remains one of the most contested issues in *waqfs* with regard to the actual endowing and beneficiary trends in Islam. This is because majority of studies (the current partly being no exception) tend to compartmentalize *waqfs* in the perspective of revenue

²² *Waqf* deed of Mariam Mohammed Mwanjira dated June, 2006, WCK archive, Mombasa.

²³ *Waqf* deed of Mohammed bin Khamis bin Mbwana Kheri el-Bajuni, fol. 279, WCK archive, Mombasa.

²⁴ *Waqf* deed of Aisha bint Abdullah bin Jabir, fol. 201, WCK archive, Mombasa.

generating corpuses pitting economic dynamics against gender in relation to property ownership and disposal in Muslim communities. Consequently, establishing *waqfs* is widely conceptualized in terms of negotiations between genders for the control of socio-economic space with its associated benefits that is most times perceived to be skewed in favor of males. Males are particularly claimed to use *waqfs* as a means to retain control of family wealth and protect it against both the alleged fragmentation through *mirath* and to perpetuate customary traditions of patrilineal property ownership in the community (Layish, 1983; Doumani, 1998; Hennigan, 2004; Kozlowski, 2008).

Taking cue from the above narrative, male endowers accounted for 72 (69.2 percent) compared to females' 29 (27.9 per cent) of the total.²⁵ Accordingly, this suggests that Kenya's Muslim community is not an exception in the traditionally held view of the peripheral status of women vis-à-vis property ownership. However, their minimal contribution notwithstanding, women are active actors in the institution both as endowers and protected beneficiaries. As a matter of fact, a significant number of women were designated as first *mutawallis* even in *waqfs* established by men. Of the 29 *waqfs* established by women, 20 (69 per cent) had female *mutawallis*. Added to 8 others consecrated by male endowers in which women were designated as second *mutawallis*, this makes an average of about 26.9 per cent of all *waqfs* under the custody of female Muslims in the former Protectorate. Clearly, women were significant co-partners with their male counterparts in the development of the institution of *waqf*, as far as the Kenyan context is concerned.

The active involvement of women in *waqfs* among Muslims in the former Protectorate is an indictment against the sustained policy of appointing *Waqf* Commissioners as national *mutawallis*. Despite women making up 27.9 per cent and 26.9 per cent of endowers and *mutawallis* respectively, by 2010, no woman was appointed in the state agency as Commissioner. Socio-ethnic and political dynamics of *umiji-wamiji* that tended to inform the appointment of Commissioners had no room for female actors, hence their conspicuous absence from the state body. This is despite the agency dealing with properties whose beneficiaries cut across the gender divide. Apart from constituting a sizeable proportion of endowers and *mutawallis*, women

²⁵ Trusts and *waqfs* established jointly by social groups of both men and women accounted for 3 (2.9 per cent).

were also major beneficiaries as evident in some *waqf* deeds explained elsewhere in the study. Through *waqfs*, endowers protected female relatives including daughters and wives as beneficiaries against competition with the agnates under *mirath* law.

This could further be deduced from the *waqf* of Khamis bin Tabibu el-Kilindini in which his four daughters were the only beneficiaries.²⁶ Were the usufructs of the *waqf* distributed according to the Qur'an guidelines of inheritance, the daughters would have shared two-thirds of the estate with the balance going to agnates or the *bayt al-mal*. Another case concerns the *waqf* of Haji Adam where three daughters were the designated beneficiaries in the exclusion of two sons (see section 6.1). In this *waqf* while females seem to have been outright favored, the sons were made joint *mutawallis* with the position becoming the exclusive right of their descendants upon their demise, just as usufruct was exclusively for the daughters and their descendants.²⁷ This arrangement ensured that only up to one third of the family estate would be controlled by male descendants as wages while the daughters shared the remaining two thirds usufruct of the *waqf*.

In other *waqfs*, however, women were the victims than they would have been were the properties distributed purely as inheritance. Among cases were those successfully appealed against in the *kadhi's* court but eventually rescinded by the High Court (see chapter four). Another instance involves the *waqf dhurri* of Mwanakame bint Juma bin Mwinyingwisa where a sister of the endower, Mwanajuma bint Juma bin Mwinyingwisa, was designated as the sole beneficiary of the first generation before the endower's daughter, Fatuma bint Abu Bakr bin Rashid and her children. The husband of the endower, Abu Bakr bin Rashid, was on the other hand excluded all together. The sister was again the first *mutawalli* to be succeeded by the husband of the endower.²⁸ It could not immediately be established why the endower chose her sister in place of her daughter and husband as first generation beneficiary and *mutawalli* though the *waqf* clearly flouted the Qur'an guidelines of inheritance. The same fate befell the husband in the family *waqf* of bint Jaka (see section 6.1).

²⁶ *Waqf* deed of Khamis bin Tabibu, fol. 28. See also the *waqf* deeds of Mwarabu bint Mohammed bin Abdallah, plot no. 406/3 in the Civil Suit no. 29 of 2014 in the *Kadhi's* court, Mombasa in the matter of estate of Mwarabu bint Abdallah; Mohammed bin Said bin Adnan Bamkele, fol. 130; Nanachema bint Athuman al-Famawiya, fol. 160, WCK archive, Mombasa.

²⁷ WCK, *waqf* deeds of Haji Ebrahim Adam Naserpuria, fols. 30; 31; 66-67; WCK archive, Mombasa.

²⁸ *Waqf* deed of Mwanakame bint Juma bin Mwinyingwisa, (unmarked), WCK archive, Mombasa.

Therefore, the use of *waqfs* as gifts *inter vivos*, at least among Muslims in Kenya as shown in the foregoing cases, could be an affront to the Qur'an guidelines of inheritance despite the varying circumstances informing the decisions. This is an outright inconsistency with the divine law and basic principles of *waqf* as held by the majority opinion that departs from two perspectives: In the first scenario, which incidentally tends to be the most conspicuous, Qur'an guidelines were flouted to retain the usufruct of *waqfs* within the domestic economy and protect female heirs who would have otherwise been exposed to undue competition from agnates. Informing this opinion is the view that it was illogical for an endower to claim to seek *qurba* and *sawab* through *waqf* but turn round to violate the means by which the divine closeness was sought. In other words, majority if not all endowers who flouted the Qur'an guidelines through *waqfs* were probably ignorant of the divine law in the first place. This finds credence in several *waqf* charters written in clear legal jargon with endowers making finger imprints as signatures in the presence of *kadhi's*, Registrar of Titles, and Advocates.²⁹

In this regard, the legal experts, who were probably not adequately informed about the Qur'an guidelines and Shari'a in general, failed to advise endowers leading to the flouting of the divine law. This is likely considering that *kadhis* were mainly Arab Muslims who were not necessarily experts in the Shari'a appointed in consideration of socio-ethnicity and perceived loyalty to state policies. The rest were mostly civil officers and private legal practitioners not adept in Shari'a. In the second scenario, benefits were to the males pointing to the widely held assumption of the urge to retain family wealth in their control and to spearhead cultural practices of male dominance in the community. These two seemingly contradicting aspects present a significant observation that gainsays a widely held assumption premised on the latter scenario as the claimed overall objective underlying the use of family *waqfs* in majority of the Muslim communities.

²⁹ *Waqf* deeds of Clara bint Juma, (unmarked) dated September, 1971; Mwanakame bint Juma bin Mwinyingwisa, (unmarked), dated June, 1933; Mwanajuma bint Kulo (unmarked), dated February 1927, WCK archive, Mombasa.

6.4 Designating *Waqf* Beneficiaries along Socio-ethnic Considerations: A Perpetuation of the *umiji-wamiji* Dynamics

We established that the Mazrui settled in the former city-states as *liwalis* of the Ya^crubi and the Bu Sa^cidi dynasties after the fall of the Portuguese rule and existed as autonomous governorates before the coming of the British in the 1890s. Upon establishment of the Protectorate, Mombasa became a strategic regional hub and administrative center. This economic and political growth of the town did not, however, end the deep rooted socio-cultural and political alignments between the former *liwalis* and the Swahili confederation that remained key considerations in the relations between the two Muslim groups.

To appreciate the ambiguous relations between the Mazrui and the Swahili Muslims' federation, we need to recall the establishment of the post of Chief *Kadhi* (see chapter three); the postcolonial provincial administrative changes that affected the position of the *liwali* in relation to *waqfs*; and how the *liwali*'s replacement in the *Waqf* Commission shaped future development not only in the Islamic judiciary, but also the appointment of Commissioners (see chapter four). Significant also are the considerations that informed the appointment of the occupier of the position of the Chief *Kadhi* during the colonial and postcolonial periods, precipitating endless negotiations between ^c*ulama* from Lamu and Mombasa (*miji*) on the one side, and between the Mazrui and Swahili Muslim federation (*wamiji*) of the Mombasa locale on the other. One does not need to look far to realize how *umiji-wamiji* socio-political dynamics were nurtured under the supervision of the state. The list of occupants of the position of the Chief *Kadhi*, who incidentally have an upper hand in the appointment of *Waqf* Commissioners, would readily corroborate this viewpoint. As appointment to this office oscillated between ^c*ulama* from Lamu and Mombasa, the Mazrui were preferred every time the appointments were made from Mombasa despite lament by other Muslim groups including the Swahili confederation, thereby cementing socio-political animosity between the latter and the former.³⁰

Since the WCK Act does not qualify the selection of Commissioners, it is argued that appointments were undertaken in consideration of socio-political and economic interests of the various ethnic and religious groups within the former Protectorate as evidenced in Mombasa as a

³⁰ See Mwakimako, H. (2010). Conflicts and Tensions in the Appointment of Chief *Kadhi* in Colonial Kenya, 1898-1960s. In S. Jeppie, E. Moosa & R. Roberts (Eds.), *Muslim Family Law in Sub-Saharan Africa: Colonial Legacies and Post-Colonial Challenges* (pp.109-134). Amsterdam: Amsterdam University Press.

microcosm. Consecration behaviors captured in a cross section of the *waqf* deeds as shown in Table 2 appropriately suggest that historical negotiations were imbibed by endowers and accounted for the choice of beneficiaries along socio-ethnic affiliations. This is because *shurut al-waqif* forms one of the canons of *waqf* in Islam and its disregard is only an exception but not a rule. When an endower, therefore, stipulates in the *waqf* charter that primary or residual usufruct of his consecration shall “pass over to poor beggars of the Naserpuria Memon community of Mombasa;”³¹ or “to el-Mandhry *masjid* in Mombasa;”³² or to “the poor of the Arab and Swahili communities of Mombasa,”³³ the *mutawalli* has to effect this to the latter not only in fulfillment of the aspirations of the endower but also in perpetuation of the *umiji-wamiji* dynamics.³⁴

This view is further crystallized by the existence of other *waqfs* consecrated by the same endowers but dedicated to the social welfare of the poor and beggars of the Muslim community without regard to socio-ethnic affiliations. A case in point regards the *waqf* of Haji Adam designating a *madrassa* established by his late father and other charitable institutions for the benefit of the widows and poor as decided by the trustees.³⁵ This particular *waqf* contrasts with the one above established by the same endower in which he designated the Naserpuria Memon community of Mombasa as residual beneficiaries. In another *waqf*, Haji Mohammed established a cemetery and *madrassa* for the exclusive benefit of the same socio-ethnic group (Memon Muslim community) that was later extended through the *waqf* of bin Amir el-Busaidi.³⁶ This partly explains the occasional appointment of Muslims of Asian descent as *Waqf* Commissioners as well with a view to representing such minority groups in the Muslim community.³⁷

³¹ *Waqf* deeds of Haji Ebrahim Haji Adam Naserpuria, fols. 30-31; 66-67; Haji Ismail Haji Adam Mohammed, fols. 51-52; Salim bin Khalfan bin Amir el-Busaidi, fol. 109, WCK archive, Mombasa.

³² *Waqf* deeds of Mwanajumbe bint Ali bin Khamis el-Mandhry, fols. 32; 34-35; Kassim bin Rashid bin Abdallah el-Mandhry, fol. 23; WCK archive, Mombasa.

³³ *Waqf* deeds of Mohammed bin Abdurahman Basheikh, fols. 4-5; Nassor bin Mohammed el-Nahdy, fols. 62-65; 75-76, WCK archive, Mombasa.

³⁴ Around 2008-2009, some Muslim activists in Mombasa allegedly went on air in local media blaming the WCK for corruption, inefficiency and failure to use *waqfs* to help fight poverty among Muslims in the region. This prompted media personalities to visit the WCK to seek clarification the following day. In response, the Secretariat refuted the allegations on the strength of availed *waqf* deeds that tied usufruct to specific beneficiaries and families. Interview with Muhammad Shalli, Mombasa, October - December, 2014.

³⁵ The trustees of this *waqf* were incidentally the endower and his sons (jointly). Based on socio-ethnic trends, it was, however, likely that the poor and beggars of the Memon Muslim community would be accorded preference over non-Memon Muslims who may consider approaching the trustees for assistance based on the *waqf* deed. See *waqf* deed of Haji Ebrahim Haji Adam, fol. 67, WCK archive, Mombasa.

³⁶ *Waqf* deed of Haji Mohammed Haji Kassim, fols. 110; 172, WCK archive, Mombasa.

³⁷ See the list of *Waqf* Commissioners, appendix 3.

Therefore, designating one particular socio-ethnic group as exclusive primary or residual beneficiaries of *waqfs* in the Muslim community in a given geographical locality within the former Protectorate, particularly in Mombasa, echoes the view of *wamiji* espoused in the study. Muslims negotiated the socio-cultural and religious fields within the premises of group identity, and in the case of Mombasa locale, it was in relation to the Mazrui–Swahili Muslims’ federation continuum. Since relations in the socio-cultural sphere and religio-political landscape in the Mombasa locale were determined by alliances and rivalry, it made group identity (read social capital) of significance in making members relevant in the respective negotiations.

There are various groups of migrant ethnic Asian and Arab Muslims, including the Baloch (Swa. Baluchi), the Basheikhs, Hadhramis, and the Mandhrys, caught in the socio-ethnic negotiations of the main protagonists – the Mazrui and Swahili Muslims in the Mombasa locale. Historical sources reveal how these migrant communities, especially from the Indian sub-continent and the Persian Gulf, settled along the East African coast from as early as the eighth century as traders, guards, or religio-political refugees (Fair, 2001; McIntosh, 2009; Lodhi, 2013; Nicolini, 2014). Drawing from the socio-ethnic narrative of the Mombasa locale, it is clear that migrant Muslims also became aware not only of their foreign identity but also their place in the socio-political and religious negotiations in the host community.

Therefore, to remain relevant, migrant groups adapted the negotiations in the locale to maintain their respective socio-ethnic interests and identities. Consequently, they consecrated *waqfs* for the benefit of their socio-ethnicities including cemeteries, *masjids*, and *madrasas*, in the range of 2.9 per cent (Mandhrys), 3.8 per cent (Basheikhs), and 7.7 per cent (Memons) as shown in Table 2.³⁸ As an established migrant community, Hadhramis also consecrated *waqfs* for their socio-cultural wellbeing as evidenced in the *waqf khayri* of *sharif* Muhammad Abdallah Riday whose usufruct was meant for the “general welfare of the al-Hadhrami *masjid*” in Mombasa.³⁹ *Masjid* Mbaruk (also Baluchi *masjid*) in Mombasa was on the other hand established by Mbaruk bin Rashid bin Salim el-Kehlany but mainly patronized and managed by the migrant Baloch Muslims.

³⁸ See the *waqf* deeds of Haji Ismail Adam, fols.51- 52 for the benefit of Memon Muslim *madrasas*; Salim bin Khalfan bin Amir el-Busaidi fol. 109 and Haji Mohammed Haji Kassim, fol. 110 for the cemetery of the Memon Muslim community; Kassim bin Rashid bin Abdallah el-Mandhry fol. 23; Mwanajumbe bint Ali bin Khamis el-Mandhry, fols. 32; 34-35, and Amria bint Ali bin Khamis, fol. 36 for the benefit of the Mandhry mosque, WCK archive, Mombasa.

³⁹ *Waqf* deed of *sharif* Muhammad Abdallah Riday, dated September, 2005, WCK archive, Mombasa.

| Socio-ethnic group | No. of <i>waqfs</i> | Percentage |
|-------------------------|---------------------|------------|
| Mazrui | 5 | 4.8% |
| Mandhrys | 3 | 2.9% |
| Basheikhs | 4 | 3.8% |
| Naserpuria Memon | 8 | 7.7% |
| <i>Thenashara Taifa</i> | 11 | 10.6% |

Table 2. *Waqfs* with specified beneficiaries in relation to *umiji-wamiji* dynamics in Mombasa.

(Source: WCK, 2015).

As former *liwalis*, the Mazrui cultivated wider social, political, and symbolic clout above the Swahili confederation and the rest of the immigrant Muslim communities in the locale. However, as shown in Table 2, the Mazrui commanded a paltry 4.8 per cent compared to 10.6 per cent of the Swahili Muslim federation of the overall 29.8 per cent of registered *waqfs* designated for the primary and residual benefits of socio-ethnic enclaves. This suggests that social and symbolic capital was the ripple effect of the political clout among the Mazrui that partly accounted for their influence in the state agency compared to other Muslim groups. This again emphasizes the significance of the position of the Chief *Kadhi*, as was held in ‘hereditary’ by the ethnic Mazrui, both in *waqfs* as well as socio-ethnic negotiations of the *wamiji*.

At stake in the socio-ethnic negotiations of the *wamiji* in relation to *waqfs* was the protection and advancement of temporal socio-economic and symbolic interests in the Mombasa locale manifested in the control of a wide range of endowments from real estate to *madrasas*; orphanages to *masjids*; and cemeteries. Within this context, control and management of *waqfs* became a constant negotiation between the various socio-ethnic groups as well as individual beneficiaries against the WCK. Several scenarios would attest to this observation including negotiations pitting the state agency against the *waqf* of the Mazrui (cemetery, see chapter three); the Bamkele (see chapter four); and the *masharifu* cemetery.

Taking cue from the Mazrui cemetery, inter-state agency negotiations placed it under the co-management of the WCK and the NMK with the title of ownership being in the former.⁴⁰ Besides, the cemetery was used in the past for the burial of combatants of different nationalities

⁴⁰ Order of the Civil case no. 36 of 1909 at the High Court of East Africa by acting Principal Judge in the matter of the Mazrui cemetery between the *Waqf* Commissioners of Kenya and others (applicants) and Adam bin Suleiman Mohammed bin Ali and others (respondents), WCK archive, Mombasa.

who fell in the wars first between the Portuguese and the Mazrui, then between Mazrui and Sayyid Said bin Sultan of the Bu Sa'idi dynasty in Zanzibar (Freeman-Grenville, 1988; Spear, 1988). In view of this, the cemetery is a public *waqf*. Owing to its proximity to Fort Jesus from where the Mazrui ruled Mombasa, however, political power was clearly core to its usurpation hence the name Mazrui cemetery. Accordingly, since it is a public *waqf*, the Mazrui's ceremonial association with it could not qualify their claim on adverse possession. Nonetheless, this did not stop different forums of the Mazrui since the 1980s from persistently pushing to have un-official exclusivity over the cemetery confirmed by the WCK.⁴¹

Another case concerns the *waqf* of *shaykh* Mvita commonly referred to as the '*masharifu* cemetery.'⁴² Endowed in the 1930s primarily for the burial of the *Tisa Taifa* group of Swahili Muslims, the *waqf* fell in the management of the WCK upon the death of the first *mutawalli*, Abdallah bin Ridhwan.⁴³ Along the way, however, the WCK relaxed its control over the *waqf* and some descendants of the endower seized the opportunity to run it as a 'clan' cemetery. By 1998, the cemetery had a caretaker committee under hereditary leadership of the *sharif* Shatry family. While managing the *waqf*, the Shatrys also rented some sections that realized considerable revenue to enable maintenance of the graveyard.⁴⁴ Citing old age, however, the chair of the Shatrys at one time invited the WCK to establish a management board and take active role in the affairs of the cemetery, an idea that the WCK agreed to implement though they left it largely in the hands of the Shatrys.⁴⁵ From 2013 to 2014, the Shatrys insistently petitioned the WCK to terminate its claim over the cemetery for their private use though the state agency turned down the appeals.⁴⁶ Around the same time, the WCK secretariat had to intervene to allow

⁴¹ Correspondence between the WCK and 'Women of the Mazrui Community,' May, 1981- April, 1983; correspondence between the WCK and 'Mazrui Cultural and Welfare Society,' January, 2006 - November, 2013, WCK archive, Mombasa.

⁴² The honorific title *sharif* (pl. *ashraf*, Eng. *sharifs*) denotes that the bearer claims genealogy from the Prophet, i.e. has a social and spiritual class above ordinary believers. *Sharifs* are also believed to possess and capable of transmitting *baraka* (blessings) from God. The cemetery acquired this name after falling in to the control of the *sharif* Shatry family. The name *mashaykh* is also interchangeably used in reference to this cemetery.

⁴³ Correspondence between the WCK and *mutawalli*'s heir, Mohammed bin Ridhwan, who had usurped management upon the demise of his father, November, 1934; Order of Court on Civil case no. 4 of 1935 in accordance with section 12 of the WCK Act; correspondence between the WCK and Register of Titles, February 20th, 1935; correspondence between the WCK and Town Clerk, May, 1935, WCK archive, Mombasa.

⁴⁴ The WCK records indicate that the cemetery had a positive balance of thirty three thousand seven hundred and twenty nine Kenya shillings and ten cents as at December, 1998 which rose to forty five thousand shillings by December 2005, WCK archive, Mombasa.

⁴⁵ Correspondence between *sharif* A. Shatry and the WCK, July - August, 1998; the WCK minute 41/98, WCK archive, Mombasa.

⁴⁶ Correspondence between the WCK and Shatrys, February, 2013 – April, 2014; the WCK minute 24/2014. See also list of cemetery board members of 1998 and 2014 dominated by the Shatrys and consisting of the Mandhrys and the Mazrui, WCK archive, Mombasa.

a *non-sharif* to be interred in the cemetery after some members of the committee had objected.⁴⁷ This illustrates that the *sharifs* had ‘privatized’ the cemetery.

This is not to deny that the Shari^ca allows private cemeteries. On the contrary, there are hundreds of private graveyards endowed specifically as such but the two cases were not exclusive. More so, private graveyards could also become public on the strength of the principle of ‘*waqf* by user’ as long as their owners do not object to the burial of a non-family member.⁴⁸ In this regard, the interment of non-Mazrui soldiers and *non-sharifs* in the Mazrui and *masharifu* graveyards respectively disqualifies claims of exclusivity by both groups. Accordingly, the fight for exclusivity of the cemeteries by the two groups was informed by the internal socio-ethnic dynamics of the *wamiji* in the Mombasa locale. While the Mazrui banked on their established political clout, the *sharifs* sought to capitalize on ‘nobility’ (read social capital) with their genealogy supposedly traceable to the Prophet. This echoes the pre-colonial socio-ethnic hierarchy that was upheld during the British colonial era and by subsequent postcolonial regimes as explained before. And since both cemeteries are strategically located and attracted monetary benefits from merchants, the economic aspect in the negotiations needs not to be overemphasized.

6.4.1 *Waqf* as a Tool for Regional Socio-Cultural Identity and Political Control

The growth in economic and political strength of Mombasa since the British colonial times, undeniably, overshadowed the rest of the neighboring former city-states. However, the eclipsed towns did not sink into oblivion. Rather, they reinvented themselves as distinguished centers of Islamic culture, knowledge, and authority. It is this cultural capital base that gave these towns the much needed clout for the continued negotiations with their nemesis. Within this context, negotiations between the former city-states departed from the premise of contrast and complimentary binary. As evidenced in the various *waqf* deeds, endowers designated social and religious institutions or communities in specific locales as primary and residual beneficiaries for the purpose of advancing temporal socio-religious interests.

⁴⁷ There are also several public cemeteries in Mombasa including Manyimbo and Kikowani. However, trends point to the use of the cemeteries along socio-ethnic affiliations of the Mombasa locale. Interview with Muhammad Shalli, Mombasa, October-December, 2014.

⁴⁸ For further discussion on *waqf* by user, see Qureshi, M. (1990). *Waqfs in India: A Study of Legislative and Administrative Control*. New Delhi: Gian Publishing House; Banday, B. (2013). *Administration of Waqfs: Law and Practice in Kashmir*. New Delhi: Dilpreet Publishing House.

The *waqf khayri* of bin Khalfan el-Busaidi whose usufruct was designated for his Liwali Seif Masjid in Lamu aptly fits this description.⁴⁹ This is particularly because part of the corpus of the *waqf* was in Mombasa but its usufruct was meant to benefit Lamu. It beats logic, despite freedom of choice of beneficiaries guaranteed by the law of *waqf*, to bypass similar deserving religious institutions within the vicinity of the corpus to benefit a far flung institution. Clearly, this does not only demonstrate spiritual attachment with the religious institution at Lamu but helped to strengthen the position of the town in the continued negotiations for *umiji* supremacy. Contrasted to this are the *waqf khayri* of bin Dahman at Takaungu designated for the local Muslims; and the family *waqfs* of Nassor bin Mohammed el-Nahdy whose residual beneficiaries were “the poor and beggars of Mohammedan Sunni of Mombasa.”⁵⁰

Administered from Mombasa, *waqfs* in neighboring towns became central to the struggle for control of socio-cultural and political space of *umiji*. As emphasized before, nomination and appointment of *Waqf* Commissioners was allegedly made in consideration of *waqf*-producing zones with Mombasa taking the pole position owing to its perceived large contribution to the *waqf* economy (see chapter four). Therefore, Takaungu, Malindi, and Lamu locales had their shares of representation determined by the whims of appointing authorities on the basis of perceived loyalty with a view to maintaining the political and cultural relationship between the coastal *miji* but disguised on their contribution to the *waqf* economy. This partly explains the public outcry which led to the nullification of the appointment of *shaykh* Lithome in 2009 and his position awarded to Malindi. Paradoxically, Lamu has had no representative in the state agency since 2009 despite insistent laments by locals, making the claims of representation based on amount of *waqfs* per region superfluous.⁵¹ This also subtly illustrates the fading significance of Lamu while at the same time emphasizing the pole position of her rival, Mombasa, in the negotiations for *umiji* supremacy.

Commissioners are only policy makers, yet the actual management of *waqfs* is bestowed upon a skeletal secretariat in Mombasa. To help the secretariat discharge its mandate in Malindi and Lamu, the WCK engages agents. This emphasizes the relationship between these *miji* vis-à-vis other *miji* within the coast but outside the former Protectorate and away from the *umiji-wamiji*

⁴⁹ *Waqf* deed of *liwali* Seif bin Salim bin Khalfan, fols. 20-21, WCK archive, Mombasa.

⁵⁰ *Waqf* deeds of Nassor bin Mohammed el-Nahdy, fols. 62-65; 75-76, WCK archive, Mombasa.

⁵¹ Group interview with Mwalimu Hussein Said, Hamid Abdurahman and Abdallah Swaleh, Lamu, December, 2015.

internal dynamics. Further, the long distance between the former city-states, especially with Lamu where communication and road network was erratic, meant that important decisions affecting *waqfs* outside Mombasa were delayed. This occasionally resulted in disenfranchisement among beneficiaries as decisions were at times not forthcoming since the WCK board did not meet regularly.⁵² Dissatisfied by the WCK's improper attention on far flung *waqfs*, some beneficiaries, with the support from their Commissioners, often demanded that the WCK terminate management of the *waqfs* and return them to respective heirs and beneficiaries, or establish *miji*-based *waqf* boards.⁵³

Disenfranchisement by beneficiaries and Commissioners from the various towns against the WCK in Mombasa is reminiscent of old age negotiations between the former city-states with feelings of domination and marginalization evident. The conflict and struggle for control of *masjid* Rhoda in Lamu between the WCK and the descendants of the endower with the support of local Commissioners makes a suitable reference. Abu Bakr Manswab Seyyid Hassan and *sharif* Abdallah Salim, the heirs of Shee Batte who consecrated the said *waqf*, insistently petitioned the WCK to hand over its management to them citing alleged embezzlement and lack of proper maintenance by the state agency.⁵⁴ For a long time, this conflict inhibited development of the *waqf* as parties engaged in protracted war of words.⁵⁵ At one point a retired Commissioner, *sharif* Abdallah Salim, rallied his lawyer and allies in the WCK to support the bid that had degenerated into a contest between Lamu and Mombasa over the management of the *waqf*.⁵⁶ The WCK did not, however, relent on its hold over the *waqf*.

By 2013, *masjid* Rhoda had attracted sponsorship for refurbishment from outside Kenya and like other *waqfs*, the WCK tasked the NMK to undertake the structural designing and award of tender for its renovation.⁵⁷ This was in line with the NMK requirements since the *waqf* sits in a section

⁵² There were no *Waqf* Commissioners from 1968-1972. This partly affected negotiations between the NCCCK and the WCK that led to the dismemberment of the *waqf* of Salim Mbarak bin Dahman at Takaungu. Again, internal wrangles among Commissioners that led to the resignation of the chairman, Prof. Nadji Said (Malindi) around June 2015 inhibited sittings of the board until its term expired in November 2015.

⁵³ Group interview with Mwalimu Hussein Said, Hamid Abdurahman and Abdallah Swaleh, Lamu, December, 2015; Ahmed Aboud Hadi, Malindi, October, 2015; Said *Sharif* Abdallah, Malindi, October, 2015.

⁵⁴ Correspondence between Abu Bakr Manswab bin Seyyid Hassan and the WCK, January, 1969; February - March, 1973; the WCK minute 69/1 of February, 1973, WCK archive, Mombasa.

⁵⁵ Correspondence between the WCK and different groups with diverse interest in the *waqf* from Lamu, February – May 1978.

⁵⁶ Correspondence between WCK and Advocate, July, 1978; November, 1978; January, 1979; February, 1980; minutes 3/1979(28), WCK archive, Mombasa.

⁵⁷ Correspondence between the WCK and donors, July- September, 2014; award of restoration contract to the NMK, July, 2013; interview with Muhammad Shalli, Mombasa, October-December, 2014, WCK archive, Mombasa.

of Lamu town declared as protected site and recognized by the UNESCO as well. The renovation grant and entrance of the NMK in the fray complicated the negotiations further with economic, social, and symbolic interests by different actors at stake.⁵⁸ The Lamu case is one among several others illustrating the delicate relationship and continued negotiations between the former city-states at the level of regional *umiji*. Taking *waqf* as an economic and symbolic tool in the negotiations for socio-cultural and religio-economic fields at the former Protectorate, one would not fail to appreciate the logic in the appointment of *Waqf* Commissioners and their role in maintaining internal socio-regional equilibrium of the coastal *miji*.

6.4.2 *Waqfs* and Intra-Religious Jurisprudential Interests: Protecting Sectarian Values, Competing for Symbolic and Social Power

It is acknowledged that the Muslim community is not a monolithic body. It is in this context that competing and conflicting ethnic, social, regional, and most importantly, jurisprudential affiliations among Muslims in Kenya as explained hereunder should be understood. Foremost was the greatest binary contrast in Islam – the Shi^ca-Sunni divide that came out vividly in a number of *waqf* deeds. The *waqf ahli* of Nassor bin Mohammed el-Nahdy and the mixed *waqf* of Aisha bint Abdallah bin Jabir in which “the poor and beggars of the Sunni Mohammedans” were designated as residual beneficiaries aptly fit this description.⁵⁹ Contrasted to these was the *waqf ahli* of Gulamhussein Adamji in which “pilgrims of Karbala in Iraq” [Shi^ca *ithna^cashari*] were identified as ultimate beneficiaries.⁶⁰ Comparing the two sets of *waqfs* above, it becomes evident that endowers were determined to protect their sectarian religious traditions.

Among Shi^ca Muslims, the urge was even ardent as endowers sought to further distinguish their jurisprudential affiliations as contained in some *waqf* charters. In the *waqf ahli* of Alibhai Adamji Dhar,⁶¹ and Hassanali Karimjee Dossaji,⁶² social welfare institutions of the Daudi Bohra community of Mombasa were the designated residual beneficiaries. Alibhai also warned in his

⁵⁸ When the NMK officers visited the *waqf* at the onset of renovations, it took the intervention of elders to control rowdy youths opposed to the NMK’s interests in the *waqf*. The renovation grant is claimed to have been secured by a local Lamu Muslim who is working outside the country. Interviews with Kalandar Khan and Abuswamad A. Ali, NMK, Mombasa, September, 2015.

⁵⁹ *Waqf* deeds of Nassor bin Mohammed el-Nahdy, Mombasa, fols. 62-65; 75-76; Aisha bint Abdallah bin Jabir, fol. 201, WCK archive, Mombasa.

⁶⁰ *Waqf* deed of Gulamhussein Adamji, fols. 38-39, WCK archive, Mombasa.

⁶¹ *Waqf* deed of Alibhai Adamji Dhar, fols. 78-88, WCK archive, Mombasa.

⁶² *Waqf* deed of Hassanali Karimjee Dossaji, fol. 71, WCK archive, Mombasa.

waqf deeds that “any beneficiary who renounces the doctrines of Esmā‘īliā Musta‘ali sect of Daudi Bohra community shall forfeit his interest in the *waqf*.”⁶³ In a separate *waqf ahli* by Moosaji Issaji,⁶⁴ Faize Hussein of Karachi, Pakistan, and the supreme religious leader of the Bohra community of Mombasa were the ultimate beneficiaries and *nazir* respectively. This was not different from the *waqf ahli* of Jamal Sunderji Mitha in which “the poor and beggars of Isma‘īliā Khoja community” were designated residual beneficiaries, all of which point to the protection of temporal sectarian interests.⁶⁵

Within mainstream Sunni, there also existed varied jurisprudential undertones that endowers protected and advanced through consecrations. Although the majority of Muslims in Kenya ascribe to the Shafī‘ī theology of Sunni Islam, there are also pockets of non-Shafī‘ī followers especially among migrant communities including the ‘Ibadi. This could be discerned from the *waqf* charters of Muhammad bin Omar el-Aufi in which the poor of the ‘Ibadi sect in Mombasa are the designated ultimate beneficiaries.⁶⁶ The most contemporary jurisprudential discourse witnessed in Sunni Islam, however, regards the question of reform vis-à-vis modernism (*Salafism*) against perceived conservatism.⁶⁷ Islamic reformism in Kenya dates back to early nineteenth century through efforts of local scholars like *shaykh* al-Amin al-Mazrui (1891-1947) and *shaykh* Salih Abdallah Farsi (1912-1982). The reform agenda gained impetus in the 1980s following return of indigenous Muslims from universities in Saudi Arabia, Egypt, and Sudan (Seesemann, 2006; Kresse, 2007; Kresse and Mwakimako, 2016).

Commonly referred to as *ahl al-sunna wa‘l-jam‘a* (people of the *sunna* and of the community) and *ahl al-tariqa* (lit. people of the way, conformists), the two protagonists have interpretative and jurisprudential conflicts revolving around *tawhid* (unity of God); a return to the ‘true Islam’

⁶³ *Waqf* deed of Alibhai Adamji Dhar, fols. 78-88, WCK archive, Mombasa.

⁶⁴ *Waqf* deed of Moosaji Issaji, Mombasa, fol. 120, WCK archive, Mombasa.

⁶⁵ *Waqf* deeds of Jamal Sunderji Mitha, fols. 89; 92-93, WCK archive, Mombasa.

⁶⁶ ‘Ibadis are an off-shoot of the *Khawarij* (Kharijites) splinter group that emerged following the arbitration of Ali bin Abi Talib and Mua‘wiyah bin Abi-Sufyan (seventh century). See Nicolini, B. (2014). Notes on Asian Presence along the Swahili Coast during the Nineteenth Century. *Quaderni Asiatici* 107 (September), 61-86; *Waqf* deeds of Mohammad bin Omar el-Aufi, fols. 48-49; 56-57; 58-59 and 99, WCK archive, Mombasa.

⁶⁷ The study loosely use the terms ‘*Salafi*’ and ‘Conservatism’ in relation to the two distinct ideologies on Islamic reform discourse. This is not to deny that both camps are essentially reformists though the former are seen as radicals (jihadists/fundamentalists) with literal interpretations of the text compared to their protagonists who are seen as moderates or conservatives. See Seesemann, R. (2006). African Islam or Islam in Africa? Evidence from Kenya. In R. Loimeier & R. Seesemann. *The Global worlds of the Swahili: Interfaces of Islam, Identity and Space in 19th and 20th Century* (pp.229-250). Berlin: Lit; Richard, G. (2013). *Salafi Ritual Purity in the Presence of God*. London: Routledge; Lauziere, H. (2016). *The Making of Salafism: Islamic Reform in the Twentieth Century*. New York: Columbia University Press.

as envisioned in the Qur'an and *Sunna* and exemplified in the lives of early generation Muslims; the significance of some Prophetic traditions over others; the evils of *bid'ā* (un-Islamic innovations); religious imperative of *jihad* (striving in the course of God); and the threat of Westernization on Islam among others (Gauvain, 2013:11; Richard, 2013; Lauziere, 2016). In this context, *ahl al-sunna wa'l-jam'ā*, drawing mainly from Muhammad ibn 'Abd al-Wahhab (1703-1792) and Saudi's interpretation of Islam, are the local *Salafis* who claim to champion for puritan Islam devoid of *bid'ā* allegedly characterizing their nemesis in the faith. Amidst the jurisprudential conflicts, *waqfs* have offered a platform in the range of separately established institutions like *masjids*, *madrasas*, and orphanages to propagate religious sectarian ideologies.

As basically a response against perceived conservatism in Sunni Islam, Kenya's *Salafis* have a commanding presence in almost every village in the Kenyan coast. Their network of *waqf* institutions includes those at Ramisi, Nganja, Vingujini, and Maganyakulo in the South (Kwale); al-Mahdi Islamic Institute at Kisauni (Mombasa); and Kikambala/Takaungu in the North. *Salafis* have in some instances also taken control of *waqfs* from their conservative brethren causing protracted bloody conflicts as was witnessed in *masjids* Musa in Majengo; Bahero in Kisauni; and Mlango wa Papa at Old town in Mombasa from 2012 to 2015.⁶⁸ Other takeovers, were nonetheless, 'peaceful' where the conservative group chose to avoid bloody mess as was in the recent cases of Vingujini (2008) and Bomani (2015) in Kwale. What is evidently characteristic with the *Salafis* in Kenya as is in other parts of the world is their rigid approach to interpretation of religious dogmas claiming absolute authority to Islam (Gauvain, 2013:3-4). Consequently, this easily accords the group symbolic wherewithal to negotiate the socio-religious landscape.⁶⁹ But why have *masjids* increasingly become fields of ideological and socio-economic negotiation and confrontations between Muslims in Kenya? From the experiences of Msalani *masjid* (see chapter four) to the recent (2012 to 2015) *Salafi*-conservatism confrontations witnessed in *masjids* Musa,

⁶⁸ *Masjids* Musa, renamed *shuhada* (martyrs' mosque) and Bahero were suspected of being centers for militant sermons and recruitment of sympathizers of the *Al-Shabab* jihadists in Somalia. In March 2012, security officers invaded the martyrs' mosque killing and arresting some youths with jihadist propaganda materials and weapons. Following the sacrilege vented upon the mosque, the government shortly closed it before it reverted to its original name and re-opened a few months later. Two *imams* associated with radical Islam in the area – *shaykh* Aboud Rogo Mohammad (August 2012) and Abu Bakar *Sharif* Makaburi (April 2014) were also assassinated under unclear circumstances triggering protests and violence in Mombasa. See also Mwangi, W. (*Daily Nation*, January 23, 2015). Mombasa Mosque Renamed *Masjid* Musa as Normalcy Returns. Retrieved from: <http://www.nation.co.ke/news/Mombasa-mosque-renamed-Masjid-Musa/-/1056/2599900/-/6ir2dd/-/index.html>. (Accessed April, 2016); *waqf* of Buker, (*waqf* deed unmarked), WCK archive, Mombasa.

⁶⁹ For discussion on the spread and development of *Salafi* ideology in the coast of Kenya, see Mraja, M. (2007). *Islamic Impacts on Marriage and Divorce among the Digo of Southern Kenya*. Würzburg: Ergon Verlag.

Bahero, and Mlango wa Papa among others, intra-jurisprudential negotiations among Muslims in Kenya could be explained within the context of two possible lines of thought:

In Kenya, apart from mosques serving as “centers of community worship” and other socio-political functions (Banday, 2013:110), they are also institutions that can play “a vital role of directing Muslim opinions and compensate for the absence of strong supporting civic institutions amongst Muslims” (Mwakimako, 2007:3). Therefore, controlling a mosque space in the socially constructed positions of an *imam*, *mu^cadhdhin*, *shaykh*, or committee member subtly accorded an individual the symbolic and social power as an opinion maker. These honorific titles and positions associated with *masjids* and *madrasas* became conduits through which holders benefited from economic and symbolic capital directed to such institutions either as *waqfs* or ordinary donations as was the case at Rhoda and Msalani *masjids* in Lamu and Mombasa respectively. Accordingly, Kenya’s *Salafi*-conservatism confrontations should also be understood as typical negotiations for the control of economic, social, and symbolic capital in the community through the platform of *waqfs*.

Since the U.S.A 9/11 attacks and the ‘war against terror’, Muslim institutions and personalities in Kenya have bared the brunt of state and international security institutions against alleged indoctrination and radicalization of Muslim youths. Several *madrasas*, orphanages, *masjids*, and charitable organizations (both local and international) were shut down while *imams* alleged to harbor connections with terror networks were extra-judicially exterminated (Seesemann, 2007:157-176; Ndzovu, 2014:118-126). Despite growing disillusionment among cross section of Kenyan Muslims due to perceived political marginalization, economic exclusion, and exploitation of the Muslim population by successive independent regimes,⁷⁰ none of the reviewed *waqf* charters designated *qital* (fighting) as beneficiary purpose.⁷¹

Arguably, Kenya’s *Salafi*-conservatism confrontation is a discourse over ‘correct interpretations’ of Islam manifested in the negotiation between new and old local socio-cultural orders. In the

⁷⁰ This position finds credence in the existence of the Mombasa Republican Council (MRC) – a quasi-political and militant group that advocates for secession of the coast region citing economic exclusion, exploitation, and political marginalization by the state. Sympathizers of this group are drawn primarily from coastal ethnicities but cut across the religious divide.

⁷¹ *Qital* is the specific concept that denotes physical force or fighting in the generic term *jihad* that generally stands for ‘striving in the course of God.’ See Qur’an 22:39; Qur’an 2:190-191; Alterman, J. (2007). Saudi Charities and Support for Terror. In J. Alterman & K. von Hippel (Eds.), *Understanding Islamic Charities* (pp.64-80). Washington D.C.: Center for Strategic and International Studies.

ensued controversies and conflicts that could narrowly be misconstrued for political negotiations, *waqfs* – particularly *masjids*, orphanages, and *madrasas* – only accorded the two parties the needed platform.⁷² This is, however, not to deny that Kenyan Muslims are informed of the global grievances by the *umma* including the American policy in the Middle-East and its support of Israel over Palestine; its invasion and occupation of Afghanistan and Iraq; and the ‘war against terror’ in which Muslims have become the obvious targets.

6.5 Exploitation of *Waqfs*: Non-Shari‘a Activities, Disregarding Principles of Sound Investment, and Challenges of Attaining *Qurba*

As explained elsewhere in this study, *‘ana*, *hikr* and *istibdal* are commercial transactions whereby ruined and non-performing revenue generating *waqfs* are leased, rented out, sold, or exchanged, to improve revenues or even acquire better alternatives to fulfill the aspirations of the *waqif*. It is not so common that a *mutawalli* would disregard *shurut al-waqif* on these profit maximizing investments that put *waqf* properties in private hands for long periods of lease or rent. However, with the authority of the *kadhi*, *shurut al-waqif*, especially on period of lease, could be disregarded based on best management practices for the good of the *waqf*. Within this background, therefore, *‘ana*, *hikr* and *istibdal* are clearly an exception rather than a rule undertaken in the best interests of the *waqf*. Yet it turns out that there are some *waqfs* whose rent or lease contracts fell short of the expectations of Shari‘a as elaborated in this section of the study.

The Shari‘a holds that *waqfs* should only be used in perpetuity for the purpose of seeking *qurba*. This include acts within the legal framework of Shari‘a that do not stray from the *halal* (permitted) parameters like promotion of religious ideologies other than Islam, engaging in the sale of alcohol, and brothels among others. While establishing *waqf*, therefore, the endower essentially sets out to fulfill this basic dogma but how the corpus and usufruct are used in future determines whether or not the initial aim remains. This is true when *waqfs* are looked at through the prism of perpetuity. To attain perpetuity, the Shari‘a allows *‘ana*, *hikr* and *istibdal* of the corpus, but does not preclude non-Muslims in the business contracts. Although non-Muslims

⁷² See also Anderson, D. and McKnight, J. (2015). Understanding *al-Shabab*: Clan, Islam and Insurgency in Kenya. *Journal of Eastern African Studies*, 9(3), 536-557.

who benefit from these contracts are expected to conduct legal businesses according to Shari^ca, this may not necessarily be the case as evident in two scenarios:

The first case involves unclaimed estate of a deceased Muslim handed over to the WCK by the public trustee.⁷³ As early as 1938, records indicate that the property was leased several times to different people until 1950 when it fell in the leasehold rights of a non-Muslim entrepreneur who converted it into a bar and restaurant.⁷⁴ Since then, the *waqf* changed hands between leaseholders until 1992 when the current lessee renovated it to a popular night club in town commonly known as *Casablanca*. All the while, the WCK could only sanction the transfer of leasehold rights and obtain minimal consent fee and annual rent but efforts to prevail upon the lessees to stop the un-Islamic business have proved futile.⁷⁵

The second case involves some corpus of *waqf ahli* of the Bamkele at Tudor in Mombasa town that underwent similar experiences as the one above until it was converted into a Church. Like the previous one, efforts by the beneficiaries to stop the leaseholders from conducting un-Islamic worship in the *waqf* failed. As established by the study, beneficiaries and the WCK lose control of how leasehold rights should be enjoyed because early *cana* and *hikr* contracts did not include prohibitive clauses against un-Islamic uses of *waqfs*.⁷⁶ To reverse this trend, the WCK embarked on re-drafting the contracts to provide for such clauses and deny the renewal of expired leases until lessees complied with the requirement to ensure that businesses undertaken in *waqf* premises were Shari^ca compliant.⁷⁷

Another, though yet to be explored, alternative to liberate the above *waqfs* is the invocation of sections 16(2) and 17 of the WCK Act on the disposal of *waqfs* (see chapter three). The Act

⁷³ Section 18 of the WCK Act, CAP 109 (1951) provides; “[...] notwithstanding anything to the contrary in the Law of Succession Act, any property of a deceased Muslim to which no claim has been established within one year from the date upon which that property vested in the administrator of the estate or in the Public Trustee shall be handed over to the *Waqf* Commissioners by the administrator or Public Trustee [...] in the form of money [...] into a Special Fund created for the purpose to be known as the Surplus fund.”

⁷⁴ Plot 226/xx1, Majestic /Kilindini hotel, currently *Casablanca* bar and restaurant, WCK archive, Mombasa.

⁷⁵ From 1950 to 1960, the property was sub-leased at three thousand Kenya shillings per month while the WCK was entitled to ninety shillings per month as rent. In April 1992, the lease holder sold his rights for three million and five hundred thousand Kenya shillings where the WCK got one thousand shillings only as consent fee, WCK archive, Mombasa.

⁷⁶ Contemporary lease hold contracts drawn by the WCK have a prohibitive clause over non-Islamic use of *waqfs*. It provides; “[...] the lessee hereby covenants with the leaser not to permit or suffer illegal use of the premises or any part thereof which would offend in any law and, in particular, the beliefs of Muslims which the leaser in its sole and exclusive discretion considers improper and prohibitory under Islam.” Clause (e), lease contract, 2012, WCK archive, Mombasa.

⁷⁷ Leasehold of plot xx/62/A Mombasa to Almasi M. Mukira. See also correspondence between lessees and the WCK, November, 2011; January - February, 2012, WCK archive, Mombasa.

provides for the disposal of *waqfs* whose initial goals cannot be met and the proceeds used in alternative social welfare causes. Presently, the initial purposes of the *waqfs* have adequately been tampered with inhibiting the attainment of *sawab* and *qurba*. Thus, this provides enough ground for the disposal of the *waqfs* to acquire alternative corpuses to fulfill the aspirations of the endowers rather than wait until 2040 when the leases are set to expire.⁷⁸

Moreover, a close scrutiny of decisions by the state agency to invest some *waqf* properties to improve their output reveals a disturbing picture. Foremost among violations of principles of sound investment regards the period of lease of *waqfs* in the community. A cross section of *waqfs* that provided for the leasing of the properties restricted the period to ten years.⁷⁹ Undoubtedly, this was meant to allow for periodic review of the terms of the agreement in view of *ijar al-mithal*. However, the period of lease in Kenya as informed by the land policy ranges from 33, 66, to 99 years where properties could be transferred in between from one leaseholder to another.⁸⁰ As a matter of fact, majority if not all leased *waqfs* were committed to the maximum period from as early as the 1890s shortly after the establishment of WCK. Even those whose leases expired in the 1990s were further renewed for the same period. Considering that *‘ana* and *hikr* require that priority be accorded the economic and spiritual interests of the *waqf*, it is difficult to imagine that this is achievable in circumstances where *waqfs* are eternally committed.

A number of grounds could substantiate the foregoing: First, pre-independence lease contracts, as narrated elsewhere, were devoid of prohibitive clauses against use of *waqfs* contrary to the Shari‘a. This partly explains the quagmire facing the *waqfs* of *Casablanca* and *Bamkele* that were converted into night club and Church respectively. Secondly, committing *waqfs* to perpetual leases did not consider fluctuation of the economy such as providing options for periodic review of rates in relation to *ijar al-mithal*. Consequently, with the passing of time, leased *waqfs* realized miserable returns in old rates as lessees refurbished and sub-let the corpuses at higher prices.⁸¹ Thirdly, the lease contracts lacked withdrawal clauses that could help recover *waqfs* whose lessees breached the agreement. Against this backdrop, leases became

⁷⁸ Interview with *ustadh* Abdulkadir Mao, Bayreuth, April, 2014.

⁷⁹ *Waqf* deeds of Haji Ebrahim Haji Adam, fols. 30-31; Mwanajumbe bint Ali bin Khamis, fols. 32; 34-35; Mohammed bin Omar el-Auf, folio nos. 48/49; Haji Ismael Haji Adam, fol. 51, WCK archive, Mombasa.

⁸⁰ See Sections 85 and 88, Registered Land Act, Cap 300 (Revised 2010), Laws of Kenya.

⁸¹ Interviews with Muhammad Shalli and Zubeir Noor, Mombasa, October-December, 2014.

avenues for the dismemberment of *waqfs* and to privilege some ‘noble’ individuals and business people contrary to what *‘ana* and *hikr* envisage.

A review of some *waqf* leases could aptly corroborate the above observation. First is the lease of Mombasa/Block X1/295 to Lucy Wanjiku Ndichu for a period of 99 years at the rent of twenty five Kenya shillings per annum from 1942. In March 2014, the lessee used the premise as security for a bank loan of four million Kenya shillings.⁸² This implies that the WCK would receive two shillings and eight cents per month as rent of the *waqf* until the expiry of the lease in 2041 while the lessee continues to benefit immensely. Clearly, even if the rent was economical then, it ceased being so but the contract could not be renegotiated owing to the explained reasons.

Apart from bank loans that lessees benefit from charging *waqfs*, they could as well trade their leasehold rights for profit as provided for by the civil statute, a scenario exemplified by several cases. For instance, Rashid Abdallah Ruweiny applied to lease *waqf* plot no. 165/30 in Mombasa in 1981 and offered five thousand Kenya shillings as premium and three hundred shillings annual rent for 66 years.⁸³ Six years later, Ruweiny sold his leasehold interest to Naushadhussein Mohammed Jiwa for thirty thousand Kenya shillings where the WCK only got six hundred and forty shillings as consent fee.⁸⁴ Three years later, Jiwa transferred the same plot to Abdushakoor Mohammad Hashim Khandwalla for nine hundred and fifty thousand Kenya shillings.⁸⁵

By 1992, the *waqf* plot was worthy one million Kenya shillings when it changed ownership again from Khandwalla to Ali Islam Said. This time, the WCK got one thousand shillings as consent fee.⁸⁶ In July 2001, Ali traded the plot again for two point seven million Kenya shillings to Grace Mumbi and Edith Wamatha Njuguna while the WCK got one thousand shillings as consent fee.⁸⁷ In 2004, the leasehold right of the *waqf* was again transferred at three million Kenya shillings by Njuguna and Mumbi to Jeylan M. Kollatein with the WCK getting its traditional share of consent fee and twenty five shillings monthly rent.⁸⁸ Thus, within a span of two decades, the *waqf* lost

⁸² Certificate of lease of Mombasa/Block X1/295, WCK archive, Mombasa.

⁸³ Lease of plot 165/30 Mombasa. See also minutes 86/1981(27); 19/1982(16), WCK archive, Mombasa.

⁸⁴ Transfer of lease agreement of plot 165/30 Mombasa, March, 1987, WCK archive, Mombasa.

⁸⁵ Transfer of lease agreement of plot 165/30 Mombasa, May, 1990, WCK archive, Mombasa.

⁸⁶ Transfer of lease agreement of plot 165/30 Mombasa, February, 1992, WCK archive, Mombasa.

⁸⁷ Transfer of lease agreement of plot 165/30, Mombasa, July 2001; correspondence between the WCK and Advocate, June - July, 2004, WCK archive, Mombasa.

⁸⁸ Transfer of lease agreement of plot 165/30, August, 2004, WCK archive, Mombasa.

about three million Kenya shillings at the expense of ten thousand six hundred and forty shillings as consent fee and annual rent. This scenario reverberates in most of the leased *waqfs* across the community as shown in Table 3.

| S/No | Waqf Corpus | Period/Value at 1 st lease | Period/Value at 2 nd lease | Period/Value at 3 rd lease | Period/Value at 4 th lease | Period/Value at 5 th lease |
|------|---|---------------------------------------|--|--|---------------------------------------|---|
| 1 | Empty land, 0.0535 acres (SFA 4, plot 165/30) | 1981 Ksh. 5,000/= | 1987 Ksh. 30,000/= | 1990 950, 000/= | 1992 Ksh.1 M | 2001 Ksh. 2.7 M (6 th value 2004, Ksh. 3M) |
| 2 | Empty land, 0.1315 acres, Old Town (SFA 1, plot 175/30) | 1981 Ksh. 35,000/= | 1986 Ksh. 650,000/= | 1987 Ksh. 840,000/= | 2009 Ksh. 7.5 M | Yet to be traded |
| 3 | House with land, 0.9504 acres, Kilindini Rd (SFA 5, plot 176/21). | 1942 Ksh. 900/= @ year | 1972 (Sub-leased) Ksh. 1,010/= @ year | 2008 Ksh. 7 M | 2009 Ksh. 25 M | Yet to be traded |
| 4 | Empty land, Plot 132/XLII (SFA 8), <i>waqf</i> of Salim bin Ali, Lamu | 1974 Ksh. 780/= @ year | 1984 (Lease extension) Ksh. 40,000/= | 1987 Sub-leased @ Ksh. 7,000/=month | 2013 Ksh. 6 M | Yet to be traded |

Table 3. Appreciation of some leased *waqfs* in Mombasa and Lamu towns. (Source: WCK archive, Mombasa).

As evident from the Table, the value of *waqfs* shot drastically almost immediately they were leased from the WCK at minimal rates. The value of land particularly appreciated in the 2000s, making lessees of land *waqfs* to benefit immensely at the expense of designated beneficiaries and causes. Taking *waqf* corpus no. 3 for instance, the value appreciated at 257.1per cent within one

year. The most dramatic rise was that of *waqf* no. 2 between its third and fourth transfer of the lease when the value shot to seven point five million Kenya shillings from eight hundred and forty thousand shillings. This represents 792.9 per cent rise within one decade at an average appreciation rate of about 66.1 per cent per annum.

All the while, the WCK was getting one thousand Kenya shillings as consent fee and probably less for annual rent. More ironical is the offer for lease of empty *waqf* lands as evident in cases 1, 2, and 4 in the Table that are most likely held for speculative purposes. To redress this scenario, the WCK undertook valuation of *waqfs* around 2010 where renewal of leases was since then pegged at thirty per cent of the market value of the property with annual rent equal to municipal rates or increased at twenty five per cent every ten years as decided by the WCK.⁸⁹ It equally restricted the use of *waqfs* against the Shari^ca including bars, night clubs, and Churches. These efforts, nevertheless, benefited a small portion of *waqfs* whose leases were expiring around that time, but did not affect those whose contracts were running. Worse still, they failed to redress the administrative loopholes that ‘noble’ individuals and business people exploited with impunity in total disregard of the principles of *cana* and *hikr*. This could not be so vividly captured than in the following illustrations:

6.5.1 The Case of Munir Mazrui versus Zubeda Nahdy

The lease contract of *waqf* plot 103/30 Mombasa presents a clear case where principles of sound investment of *waqfs* were compromised for the economic benefit of ‘noble’ individuals. The corpus was an empty piece of land that attracted two bids when it was offered for lease in 1983. The first bidder, Zubeda M. A. Nahdy, offered twenty thousand Kenya shillings premium and fifteen thousand shillings annual rent for 66 years. The second bidder, Munir Mazrui, offered fifteen thousand Kenya shillings premium with two hundred and forty shillings annual rent for 99 years. Paradoxically, upon deliberation, the WCK “felt that although [bidder] number two above has quoted low figures both premium and rent, they had every reason to believe that it will be proper to lease the plot to Munir Mazrui.”⁹⁰

⁸⁹ Correspondence between the WCK and Advocate, March, 2011, WCK archive, Mombasa.

⁹⁰ Minute 27/1983(26) of April, 1983, the WCK, Mombasa. See also letter of offer of lease to Munir Mazrui, April, 1983; lease contract of January, 1984, WCK archive, Mombasa.

Accepting a lower bid in rejection of a higher offer was undoubtedly not in the interest of the *waqf* as expected by the principles of *‘ana* and *hikr*. Above all, the alleged winner of the bid had by October 1984 paid only half of the premium and annual rent as required.⁹¹ Despite several reminders and petitions from Commissioners, the payments had not been concluded by 2004, two decades after award of the lease and the WCK sought to cancel the offer.⁹² In a twist of fate, four days after the ‘cancellation’ of the offer, the lessee paid the premium minus the annual rent that had accumulated to forty four thousand nine hundred and ninety four Kenya shillings.⁹³ The payment of the premium cooled down the tempo in the WCK and the lease was not recalled as scheduled.

Argued from the perspective of best management practices and the objectives of *‘ana*, Zubeda should have won the bid. More so, continued gross violation of the preferred winner of the bid provided sufficient ground to annul the lease so that it could be retendered. Could the socio-political position of the Mazrui in Mombasa and the coast region as a whole influenced the decision?⁹⁴ It is clear that social and symbolic power of the Mazrui informed the award of the lease and continues to accommodate the gross violation of the contract. The resultant effect of these compromises is to suppress the economic interests of the *waqf* to buttress the social and symbolic privileges of some ‘noble’.⁹⁵

⁹¹ Payment notice of October, 1984, WCK archive, Mombasa.

⁹² Correspondence between the WCK and Munir Mazrui’s Advocate from January, 1997 – January, 1993. See also minutes 57/93(25); 23/98(7), WCK archive, Mombasa.

⁹³ Rent demand notice of February, 2005 to Munir Mazrui, the WCK, Mombasa. See also cancellation letter of January, 2004; minute 3/2004(3), WCK archive, Mombasa.

⁹⁴ Apart from being an Arab descendant, Munir Mazrui is also an activist associated with Muslims for Human Rights (MUHURI), an NGO established in 1997 and based in Mombasa. He also served as vice chairman of the Supreme Council of Kenya Muslims (SUPKEM).

⁹⁵ In 1998 when the lessee had not completed paying the premium despite several reminders, a relative and Commissioner then, *shaykh* Khamis Muhammad Omar Mazrui volunteered to follow up the matter but failed to yield results. In 2003, the lessee undertook to pay the balance in ten days when WCK referred the matter to an Advocate with a view to taking court action, a promise that he also failed to keep. While making partial payment upon threats to terminate the contract for breach of trust, he left accumulated balances totaling almost forty five thousand Kenya shillings and still the contract was not revoked. It is this impunity hindering fulfillment of the endower’s wishes in the *waqf* that some beneficiaries questioned and cited ‘nobility’ as a likely reason for his being tolerated while other tenants were either evicted or had their properties auctioned to recover rent arrears. See minutes 23/98(7); 3/2004(3); Munir’s letter to the WCK, 27/11/2003; notice of cancellation of lease, 16/1/2004; demand notice, 14/2/2005, WCK archive, Mombasa. Group interviews with Hamid Salim Bamkele, Ali Salim Bamkele, Abdurahman Bamkele and Ahmed Bahaidar Bamkele, Mombasa, November, 2015.

6.5.2 The Case of *Waqfs* Leased to Shigog and other Rent Contracts.

Shigog Investments limited was an enterprise by a prominent Muslim businessman who immensely benefited from *waqf* leases during the 1980s.⁹⁶ With possible social, symbolic, and economic influence, Shigog won bids floated for lease of *waqfs* stretching from Mombasa to Malindi and Mamburi in the north coast. The enterprise was awarded a total of thirteen leases in one bid that beneficiaries claimed to be against *ijar al-mithal* eliciting uproar that forced the WCK to seek for renegotiation.⁹⁷ As established during the period of study, indeed the rates of several *waqfs* were due for review as negotiated between the WCK and the lessee with others earmarked for surrender as shown in Table 4.

Nevertheless, the negotiations were very delicate and involving several efforts to persuade the lessee to cede grounds with the view of “assisting the Muslim community.”⁹⁸ The WCK could not force the lessee to renegotiate or surrender any of the *waqfs* since the deal was sealed in his favor the questionable circumstances notwithstanding. It is one thing to conclude lease contracts based on informed valuation of *waqfs* and it is another to ask the lessee to renegotiate the terms of a running lease in view of changed economic circumstances. The later is not guaranteed based on mere convictions to sway the lessee to ‘fear God’ at the expense of his economic interests in a legally concluded business agreement. Until the renegotiations were concluded, the *waqfs* realized revenues below *ijar al-mithal*.

Closely related to leases were also *waqfs* offered for residential occupancy contracts contrary to best management practices of *‘ana and hiki*. Like the leases, a closer scrutiny of how the WCK negotiates the tenancy landscape also unveils a pattern with most of the *waqfs* under its custody as pointed out in a brief survey. The first involves a house in Mombasa endowed as *waqf khayri*

⁹⁶ The WCK also leased thirteen *waqfs* to Kermally Jaffer for 99 years from December 1913. The contract was un-procedurally renewed in 1985, seventeen years before the scheduled expiry of the lease. This was contested by the beneficiaries leading to court petitions that cost the state agency Kenya shillings eight million as out of court settlement for the surrender of the lease in 2010. See Civil Suit no. 156 of 2000 in the High Court in the matter of Sultanali Kermally (plaintiff) against the WCK (defendants); memo of November, 2006, minute 6/2007, the WCK, Mombasa; correspondence between the WCK and Advocates, December, 2007 to October 2010; minutes 108/2007; 10/2010; 29/2010(5); Fairlane Valuers Limited report on *waqfs* leased to Kermally Jaffer, October, 2010, WCK archive, Mombasa.

⁹⁷ Since lease agreements had sealed the rates, there was no way other than appealing to the lessees to consider the fate of poor beneficiaries of the *waqfs* either to surrender or increase their annual rents in view of prevailing market rates and persistent protests by beneficiaries. Some lessees, however, volunteered to increase the rates even before being persuaded to do so by the WCK. Interviews with Muhammad Shali and Zubeir Noor, Mombasa, October - December, 2014. See also correspondence between the WCK and Shigog investments limited, Mombasa, November, 2005; minute 42/2011(4); letter to Shigog Investments Ltd requesting for surrender of lease of plot XLI/84 (the *waqf* of Bamkele), Mombasa, May, 2012, WCK archive, Mombasa.

⁹⁸ Correspondence between WCK and Shigog investments limited, Mombasa, November, 2005, WCK archive, Mombasa.

for the usufruct of *masjid* Mandhry. This *waqf* was rented out at modest rates and faced revenue decline due to defaulting tenants.⁹⁹ To coerce tenants into paying, the WCK threatened legal action against them and this realized some payments though tenants reverted to default shortly thereafter.¹⁰⁰

| <i>Waqf</i> name | Location | Current rent @month in Ksh. | WCK proposed rent @ month in Ksh. | Shigog proposed rate @ month in Ksh. | Agreed rate |
|------------------|-----------------------|-----------------------------|-----------------------------------|--------------------------------------|--------------|
| Said & Atiya | Magogoni, Lamu | 500.00 | 35,000.00 | 2,000.00 | Under review |
| Ali Mutwafy | Old Town, Mombasa | 750.00 | 1,500.00 | 1,000.00 | 1,200.00 |
| Rashid bin Soud | Old Town, Mombasa | 750.00 | 1,500.00 | 1,000.00 | 1,200.00 |
| Bamkele | Biashara St., Mombasa | 3,250.00 | 10,000.00 | 5,000.00 | 6,500.00 |
| Mwinyikombo | Ndia Kuu, Mombasa | 1,875.00 | 1,875.00 | 1,875.00 | 1,875.00 |
| Mandhry 1 | Ndia Kuu, Mombasa | 1,250.00 | 1,250.00 | 1,250.00 | 1,250.00 |
| Mandhry 2 | Kibokoni, Mombasa | 750.00 | 1,000.00 | 1,000.00 | 1,000.00 |
| Mwijabu 1 | Makadar Rd, Mombasa | 6,250.00 | 25,000.00 | 7,000.00 | 8,400.00 |
| Mwijabu 2 | Biashara St., Mombasa | 1,250.00 | 5,000.00 | 2,000.00 | 3,000.00 |
| Shimbwa | Mzizima Rd., Mombasa | 750.00 | 1,500.00 | 1,000.00 | 1,000.00 |
| Islam bin Ali | Mambrui | 433.00 | 433.00 | 600.00 | 600.00 |
| Muhammad Shaksy | Watamu | 833.00 | - | - | Surrender |
| Lali Hadaa | Malindi | 2,292.00 | 2,292.00 | - | Under review |

Table 4: A cross section of the *waqfs* leased to Shigog investments limited, Mombasa proposed for review to reflect prevailing market rates. (Source: WCK archive, Mombasa).

⁹⁹ Letters of reminder to tenant on unpaid rent, April - June, 1938; April, 1954; October, 1955, WCK archive, Mombasa.

¹⁰⁰ Letter to tenants, June, 1942, WCK archive, Mombasa.

All the while the WCK did not get prompt revenue from the *waqf* as expected, beneficence aspirations of the endower were affected; and when revenue finally came, repair, maintenance, municipal taxes, and administration costs took precedence. On the other hand, tenants who accumulated rent arrears disappeared without paying and some even vandalized the *waqf* as they moved out.¹⁰¹

To improve the *waqf*'s revenue, WCK leased it for 99 years from 1988. Surprisingly, among the bidders were tenants who were perennial rent defaulters. The tenants, nevertheless, lost and the successful bidder paid fifty thousand Kenya shillings as premium and committed to one thousand shillings monthly rent increased at twenty five per cent every ten years.¹⁰² The lessee then renovated and sub-let the *waqf* for higher income but became a perennial defaulter to the WCK rents and municipal taxes.¹⁰³ Despite rent default by a lessee being a breach of contract that qualifies cancellation of the agreement as provided in the new (1980s) contract regulations, the WCK failed to repossess the *waqf* making it to suffer revenue deficiency at the expense of economic interests of the lessee.¹⁰⁴

The second *waqf*, also in Mombasa, concerns residential properties endowed for the benefit of *masjid* Mwijabu and rented out to improve revenue. By 1970s, the tenants owed the WCK thousands of Kenya shillings in unpaid rent prompting the state agency to take legal action to recover the arrears.¹⁰⁵ But why are tenants of *waqfs* perennial rent defaulters? Despite the WCK offering the modest rates in town, most tenants are alleged to be of the low socio-economic stratum – widows, unemployed, small-scale merchants, and casual laborers to name but a few.¹⁰⁶

¹⁰¹ Interview with Rashid Mwando, the WCK, Mombasa, October-December, 2014.

¹⁰² Lease contract on property no. 45/30, *waqf* of Mandhry, November, 1988; minute 29/88(18) of 1988, WCK archive, Mombasa.

¹⁰³ By September 2004, the lessee owed the WCK four hundred and ninety five thousand, four hundred Kenya shillings in unpaid rent. By August 2007, the arrears had fallen to two hundred and twenty two thousands, one hundred and fifty one shillings after part payment but shot again to four hundred and eighty two thousand five hundred shillings by April 2009 due to default. See also letters of reminder of unpaid rent arrears of August, 2007, WCK archive, Mombasa.

¹⁰⁴ Clause 7 of the Lease agreement states; “[...] in the event of rent herein remaining unpaid for a space of fourteen (14) days from the date on which the same becomes due and payable or if there be any breach or non-observance of covenants herein on the part of the lessee to be performed then in such event the lessors will be at liberty to determine this lease and re-enter the leased premises without prejudice to their rights for bringing separate actions for the enforcement of any such antecedent breaches.” See lease agreement template, WCK archive, Mombasa.

¹⁰⁵ Letters of reminder on rent arrears and notice to institute legal proceedings to recover rent from tenants, June, 1971- June, 1984, WCK archive, Mombasa.

¹⁰⁶ Drawing from land rates in Lamu, for instance, the WCK charges one thousand one hundred and twenty Kenya shillings annually against County rates of three thousand two hundred and fifty shillings for a similar property. Interviews with Municipal Lands Officer, Lamu, December, 2015; Mohammad Shalli, Mombasa; November, 2014; Thabit Abu Bakar Omar al-Maawy, Lamu, December, 2015.

This narrative is, however, largely untrue and misleading as established by the study. Faced by financial constraints, the WCK failed to maintain the *waqf* and it became structurally damaged attracting the attention of municipal public health officers who threatened to sue for negligence and cause of public health hazard.¹⁰⁷

Efforts by the WCK in 1987 to raise monthly rent in relation to *ijar al-mithal* were objected by tenants terming the move unfair and inconsiderate to their socio-economic plight.¹⁰⁸ Against a market rate of twenty thousand Kenya shillings the *waqf* was realizing one thousand seven hundred shillings only.¹⁰⁹ The WCK, therefore, called for bids to lease the *waqf* and as usual, it attracted interest including those from the defaulting tenants.¹¹⁰ Finally, it was offered for the maximum period at seven hundred and fifty thousand Kenya shillings premium and five thousand shillings monthly rent increased at twenty five per cent every ten years. Not without a fight though as tenants who lost the bid challenged the award.¹¹¹ A year later, the lessee sought permission to develop the *waqf* to which the WCK consented.

In July 1998, the WCK was sued by the municipal council for unpaid taxes on the *waqf*. It turns out that the lessee reneged on this responsibility as agreed in the contract.¹¹² Despite several pleas, he failed to pay council taxes prompting the WCK to invoke breach of contract to repossess the *waqf*. Two weeks after ‘cancellation’ of contract, however, the lessee paid the municipal taxes and the takeover was halted. By September 2004, he owed the WCK four hundred and ninety five thousand, four hundred Kenya shillings in unpaid rent. It was further established that he failed to renovate and develop the premises as earlier agreed, thereby leaving the *waqf* in ruins.

Plot no. 46/VI at Makadara Road, Mombasa is the third and final in this brief survey. The property was consecrated as *waqf khayri* by Mohammed bin Rashid Badai and vested in the trusteeship of the WCK. The corpus of this *waqf* was a residential flat with two units whose rent

¹⁰⁷ Warning notices from the Municipal Health Department, July, 1971-July, 1984, WCK archive, Mombasa.

¹⁰⁸ Letter of reply by tenants on notice to increase rent, July 1987, WCK archive, Mombasa.

¹⁰⁹ WYCO Valuers Company Limited report, January, 2011, WCK archive, Mombasa.

¹¹⁰ Invitation for bids to lease properties 77/38 & 78/38, Mombasa, WF/169/68, July, 1988; letter of application to lease, July, 1988, WCK archive, Mombasa.

¹¹¹ Correspondence between Advocate of the complainant and the WCK, October -September, 1988, WCK archive, Mombasa.

¹¹² Article 4 of the lease agreement states; “[...] the lessee shall pay such rates, taxes, duties, assessments and outgoings of whatever description as may be imposed, charged or assessed by any government or local authority upon the land or the building erected thereon.” See also correspondence between the WCK, Municipal Council of Mombasa and Shigog Investments Ltd, July, 1998-March, 1999, WCK archive, Mombasa.

experience is not different from the previous two. Again, the WCK sued the tenants to recover rent arrears where they were subsequently evicted for default.¹¹³ Upon eviction of the tenants, the flat was rented again but went through the same ordeal and the WCK was unable to maintain it to fulfill the aspirations of the endower. By 1987 the *waqf* was being rented to a composite tenant at five hundred and twenty five Kenya shillings per month. In its rent assessment of July 1994, however, the Ministry of Public Works and Housing recommended a raise to two thousand four hundred and fifty Kenya shillings per unit and the WCK notified its tenant of the proposed changes.¹¹⁴

Since the WCK was unable to renovate the flat, the tenant undertook the repairs and recovered his costs from the rent as well as by direct refund from the WCK. Clearly, the tenant was accorded preferential treatment because every time there were repairs, he only informed the Chief *Kadhi* who authorized him and initiated refund of his incurred expenses.¹¹⁵ This was against a policy by the state agency that neither allowed repairs by tenants nor refunded unsanctioned renovations undertaken by them. Amidst this scenario where the *waqf* was realizing minimal rent but incurring huge maintenance costs, it experienced financial challenges that could only be remedied through *tasrif* as summarized in its account statement of December 1987 to December 1996 (see Table 5). More so, continued internal borrowing to sustain the *waqf* contradicted a requirement by the WCK Act that such funds be refunded within five years.¹¹⁶

To turn round the *waqf* output, the WCK applied to the Rent Restriction Tribunal (hereafter the Tribunal) to have the rent revised in view of *ijar al-mithal*.¹¹⁷ Upon assessment, the Tribunal recommended five thousand Kenya shillings and forty down from the WCK's plea of seven

¹¹³ Civil Suits nos. 50 of 1943 and 271 of 1945, High Court, between the WCK (Applicant) vs Harban Singh Kalsi (Respondent). See also correspondence between the WCK's Advocate and tenant, February, 1943 to April, 1945, WCK archive, Mombasa.

¹¹⁴ Notice of assessment by Ministry of Public Works and Housing, July, 1994; notice to increase rent by September, 1995, WCK archive, Mombasa.

¹¹⁵ Correspondence between *shaykh* Ali Muhammad Mwinzagu and the Chief *Kadhi*, November, 1990 to November, 1996; April, 1997 to July, 1999. See also payment vouchers, January, 1991 to November, 1996; invoice for repairs, November, 1999; payment voucher, December, 1997; minutes 8/98; 32/98; 3/99(32), WCK archive, Mombasa.

¹¹⁶ Section 19 (ii) of the WCK Act provides; "[...] if satisfied that any property the subject of a *waqf khairi* is urgently in need of any expenditure for repairs or for any other purpose, the *waqf* commissioners may, notwithstanding that there exists property the subject of that *waqf*, utilize the revenue arising from the subject of some other *waqf khairi* for the purpose, if the *waqf* commissioners are satisfied that the amount of the revenue so utilized will, without prejudice to the purposes of *waqf* in connection with which it is used, be repaid out of the property of that *waqf* within five years from the date of being so utilized."

¹¹⁷ The Rent Restriction Tribunal works under the auspices of the Landlord and Tenant Act (reviewed 2007). It seeks to protect tenants against exploitation and adjudicate tenancy disputes arising from premises rented for less than fifteen thousand Kenya shillings per month. See section 3, Landlord and Tenant Act 2007 laws of Kenya.

thousand five hundred shillings per unit. Therefore, the composite tenant was to pay ten thousand and eighty Kenya shillings per month in total rent.¹¹⁸ However, he appealed to the WCK to pay two thousand five hundred Kenya shillings instead, leading to a tug-of-war between the two parties. A compromise was, nevertheless, reached in July 1999 with the two parties consenting to four thousand Kenya shillings per month waiving six thousand and eighty shillings.

| <u>Particulars/Date:</u> | <u>Debit (Ksh.)</u> | <u>Credit (Ksh.)</u> |
|---------------------------------------|---------------------|----------------------|
| Rent (Dec.'87-Dec.'96) @525/= monthly | | 73, 950.00 |
| Municipal taxes | 6, 939. 75. | |
| Administration fees | 7, 844. 65 | |
| Repair and maintenance | 59, 344. 00 | |
| Totals: | <u>74, 128. 40</u> | <u>73, 950. 00</u> |
| Balance: | | <u>- 178. 40</u> |

Table 5. Statement of account for the *waqf* of Mohammed bin Rashid Badai, Mombasa, for the period from December 1987 to December 1996. (Source: WCK archive, Mombasa).

When the WCK commissioned a valuation of some of its *waqfs* in Mombasa town in 2010, the disparity of its rates on *waqfs* in prime locations in relation to *ijar al-mithal* came to the fore as illustrated in Table 6 below. This made the WCK to implement the rates proposed by the valuer in disregard of the rate guidelines from the Tribunal. While others accepted the changes, the tenant to plot 46/VI objected and sought audience with the state agency to present counter proposals. During the consultative meeting, it was agreed that the tenant would pay six thousand Kenya shillings monthly for the rest of his life.¹¹⁹ “It is one thing for a tenant to be permanently in arrears in his rent”, observed Scott (1987:423), “it is another for him to claim the de facto

¹¹⁸ Rent Restriction Assessment case no. 89 of 1994 in the matter of plot 46/VI, the WCK (landlord/applicant) Vs. *shaykh* Ali M. Mwinzagu (tenant/respondent); Tribunal Assessment no. 89 of 1994, March, 1997; Rent Control Certificate, April, 1997, WCK archive, Mombasa.

¹¹⁹ Correspondence between the WCK and *shaykh* Ali Mwinzagu, June – October, 2011. See also minute 53/2011(8), WCK archive, Mombasa.

lower rent as a formal privilege. The former is an informal concession that can often, when the opportunity arises, be reclaimed. The latter is likely to be territory lost for good.” In this regard, conceding to the tenant’s counter proposal for life was clearly a misconceived *hikr* contract for the *waqf*.

| Plot No. | Type of <i>waqf</i> property | Location of property | WCK Rent as at 2010 (in Ksh.) | Valuers’ proposed market rates (in Ksh.) |
|-------------------|------------------------------|----------------------|-------------------------------|--|
| Msa, 33/38 | 2 units residential flat | Kibokoni, Mombasa | 15, 000.00 | 20, 000.00 |
| Msa, 17/697 | 4 units residential flat | Gulshan, Mombasa | 12, 000.00 | 16, 000.00 |
| Msa, 24/41 | 2 units residential flat | Makadara Rd, Mombasa | 30, 000.00 | 36, 000.00 |
| Msa, (37/72)46/VI | 2 units residential flat | Makadara Rd, Mombasa | 4, 000.00 | 12, 000.00 |

Table 6: Monthly rent charged on selected residential *waqfs* in Mombasa town as at 2010. (Source: WYCO Valuers Co. Ltd report, January, 2011, WCK archive, Mombasa).

A number of issues in the brief survey of *hikr* cases merit comments. It turns out that there exists profound perception among cross section of Kenyan Muslims, particularly in the former Protectorate, that *waqfs* should be reasonably cheap if not entirely free. This perception was nowhere obvious in three incidents experienced during field work. The first concerns the two Swahili women who complained of increased rent on *waqf* houses (see chapter four). The second concerns a rhetorical question common among tenants of *waqfs* in Lamu posed to the agent whenever he goes round collecting rent thus, “*kwani cha nskiti nchako?*” (Is it yours that which belongs to the mosque?).¹²⁰ The irony here is why one would be bothered by public rather than personal issues.

The third incident involved a tenant who came to the WCK office to pay his rent following threats to sue him for default. While paying, he lamented against the rates being so ‘high’ not different from municipal ones yet the property was *waqf*. “*By nature waqf kitu cha rahisi bana!*”

¹²⁰ Interview with Thabit Abu Bakar Maawy, Lamu, December, 2015 (translation is mine).

(*waqf* is naturally cheap!), remarked Jelian Haji Badawi Boosri. In this occasion, Badawi was paying thirty four thousand four hundred and seventy Kenya shillings as three years' rent arrears.¹²¹ While lamenting paying this lump sum as accumulated arrears, he was oblivious of having denied the execution of the aspirations of the endower for the past three years. Accordingly, drawing from these incidents, perennial default by tenants of *waqfs* should be interpreted as being attitudinal with little to do with the low socio-economic stratum of the tenants. In their thinking, tenants are enjoying rights bestowed upon them by their predecessors - the endowers. In this view, rent restrictions by the Tribunal on some *waqfs* in disregard of location and market forces of demand and supply only worsen an already bad situation.

Again, since *waqfs* are perceived as cheap, they are susceptible to dismemberment by entrepreneurs. Prospecting entrepreneurs, or their cronies who claim to be of low socio-economic background, occupy the *waqfs* as tenants waiting for the moment when the property shall be offered for lease to acquire and develop it to gain higher profits and pay low rents to the WCK. This view could not be far from the truth given the propensity by some defaulting tenants turning round to bid to lease the *waqfs* once they were offered or even challenge lost bids.¹²² Nevertheless, this is not to deny that there could be genuine people of low socio-economic status occupying the *waqfs*, but they must be very few with the majority mainly renting them for speculative purposes as argued.

Another concern regards the apparent inability by the WCK to offer leases and rents commensurate to *ijar al-mithal* as well as implementing terms of the contracts with the view of repossessing *waqfs* from defaulting lessees. However, this could be the tricky part considering the aspect of *umiji-wamiji* being, arguably, a significant consideration in the award of some contracts. The main purposes for *‘ana* and *hikr* are to improve the output of revenue-bearing *waqfs* to maintain their perpetuity, and the economic interests of *waqfs* should, therefore, reign supreme over other considerations when undertaking such business contracts. However, as evident in the majority of cases in this section of the study, it is difficult to rule out the socio-

¹²¹ Researcher's field experiences, Mombasa, November, 2014. Badawi is a tenant to *waqf* property Block XX/57, Mombasa, paying nine hundred and fifty seven Kenya shillings and fifty cents per month as ground rent fixed on Municipal rates (translation is mine).

¹²² Group interviews with Hamid Salim Bamkele, Ali Salim Bamkele, Abdurahman Bamkele and Ahmed Bahaidar Bamkele, Mombasa, November, 2015; Mwalimu Hussein Soud, Hamad Abdurahman and Abdallah Swaleh, Lamu, December, 2015.

ethnic *umiji-wamiji* dynamics at the expense of sound investment ideals of *‘ana* and *hikr* based on competitive open tendering processes.

This view is further augmented by protests from several beneficiaries including those of the *waqf* of Bamkele (Mombasa) and the *waqf* of al-Darmaky (Malindi).¹²³ Despite several tenants and lessees being perennial defaulters, the WCK do not revoke their contracts with a view of awarding them to other interested bidders. Clearly, there is conceivably a complex configuration of social and symbolic forces within the state agency that safeguards the economic and social interests of some ‘noble’ individuals and locales. This was aptly summed up by an informant that rent defaulters in *waqfs* “*ni jamaa zetu, tutafanyaje*”? (...they are our people, what can we do?).¹²⁴

In this regard, social and symbolic capital are not only key to establishing, but also maintaining meaningful networks for negotiating the lease and rent terrain in the WCK for economic benefits. While those belonging to the network of ‘our people’ (read *wamiji*) or their cronies are considered for appointment to the state agency; awarded lease and rent contracts below *ijar al-mithal*; tolerated for default; or even accorded room to re-negotiate the rates, those outside the network are denied similar favors making the former to behave like a cartel in the Muslim community.

Conclusion

This chapter has summed up the socio-cultural landscape of *waqfs* in the Kenyan Muslim community. Of significance, the discussion has endeavored to bring into fore the various types of *waqfs* and how their *manfa‘a* were distributed in relation to the Qur’anic and non-Qur’anic formulas. It has been established that though *waqfs* were consecrated for the purpose of attaining *qurba* and *sawab*, the ‘distinctly human trait of altruism’ was also an important consideration among endowers in relation to the socio-ethnic and cultural negotiations of the Muslim community. Consequently, *waqfs* were also endowed for the purpose of safeguarding temporal social, ethnic, regional, as well as jurisprudential interests.

¹²³ Interviews with Said *sharif* Abdallah, Malindi, October, 2015; Hamid Salim Bamkele, Ali Salim Bamkele, Abdurahman Bamkele and Ahmed Bahaidar Bamkele, Mombasa, November, 2015.

¹²⁴ Interview with Rashid Mwando, the WCK, Mombasa, October-December, 2014, (translation is mine).

Relevant case studies have shown that claims of establishing *waqfs* as an avenue to retain the control of wealth, particularly within the confines of male descendants, do not cut across the global Muslim community. This was evidenced by various females being designated as beneficiaries and *mutawallis* in the exclusion of males in some *waqfs* among Muslims in Kenya. On the other hand, use of *waqfs* as gifts *inter vivos*, as shown in several instances, could be an affront to the Qur'an guidelines of inheritance, albeit unwittingly. However, owing to the limited jurisdiction of the *kadhi's* courts, such violations could not easily be rectified even as the will was evident among some beneficiaries in the community.

The flexibility and compatibility of *waqfs* with the ever changing socio-economic and cultural needs of the society are aptly propounded by the principles of *‘ana*, *hikr*, *istibdal*, and perpetuity. The Shari‘a allows for the contravention of *shurut al-waqif*, particularly, on lease period so as to improve the economic viability of revenue generating *waqfs*. However, due to competing interests, best management practices of *‘ana*, *hikr* and *istibdal* were flouted jeopardizing perpetuity of the *waqfs* and designated beneficiaries and causes. This underscores the significance of requisite qualifications and unquestionable virtues in the holder of the position of *mutawalli* to see to the best of the *waqf* under his custody, and by extension, the beneficence ambitions of endowers.

Chapter Seven

Conclusion

At the onset, this study endeavored to explore the development and administration of *waqfs* as an Islamic socio-cultural heritage in a secular state milieu from the British colonial to the postcolonial times. The underlying objective was to establish how the interplay of secular state policies and civil courts' judgments during the period under investigation generated trends that informed *waqf* practices among Muslims in Kenya. This is because, as an Islamic institution, *waqf* was expected to be administered by and according to the Shari'ah with the institutions of the *kadhi*, *mutawalli*, and the *ʿulama* not only interpreting the normative precepts, but also guiding the *waqfs* towards attainment of *qurba* and *sawab*. In chapter three, the study relied on historical data to reconstruct this interplay in the trajectory of administration of *waqfs*. It was established that there existed profound state involvement that consequently interfered with normative traditions in administration and development of *waqfs*.

The urge by the colonial government to control resources as perpetuated by subsequent postcolonial governments interfered with normative precepts on *waqfs*, effectively creating a disillusioned community of 'Muslim peasants'. In the pre-British colonial times, the Islamic judicial institution of the *kadhi* had an extensive mandate in the Shari'ah including civil and criminal matters affecting Muslims. Accordingly, the *kadhi* and the *ʿulama* also retained their traditional roles in *waqfs* as interlocutors of Islamic knowledge and authority. This changed upon establishment of the Protectorate where the jurisdiction of *kadhi*'s courts was restricted to a narrowly defined Muslim personal status law that excluded *waqfs* (see chapter three). The resultant effect was a vacuum in the administration of *waqfs* that justified the establishment of a state agency (WCK) to discharge the role once performed by the *kadhis*.

The study pointed out that redefining the jurisdiction of *kadhis* with a view to establishing a state agency to control *waqfs* by the British colonial government was a conscious process and strategy informed by past experiences in India and Egypt where uncontrolled *waqfs* posed a significant opposition to the colonial project. Having *waqfs* under state control, therefore, meant not only controlling resources but also checking the influence of the *mutawallis*, *ʿulama*, and the diverse groups of beneficiaries, both institutions and individuals, who relied on *waqfs* in the society. This

was made possible by appointing Muslims perceived as loyal to the colonial government as *Waqf* Commissioners who worked under strict guidelines and supervision of British officers seconded to the state agency (see chapter three).

The British colonial government also used its legislative powers to establish policies that in effect hindered the development of *waqfs* in the region. Through land laws, it was impossible to consecrate or even develop land *waqfs* without titles of ownership that were difficult to attain by the majority of locals (see chapter three). Neither did civil land statutes recognize *waqf* deeds as valid documents in the transfer of *waqf* lands to the beneficiaries and *mutawallis* for administration as they did not identify legal persons to whom the transfers were made. This was because, since the restriction of the mandate of the *kadhis'* court, *waqfs* were categorized as real estate whose contracts were guided by civil statutes. As a result, some *waqfs* were ruined.

The study further indicated that under the compulsory acquisition policy, the colonial government could alienate properties, some of which were *waqfs*, for public interests. Some of the alienated *waqfs* were, however, not compensated making it impossible to establish alternative *waqfs* as required by the Shari^ca. Yet, even those compensated, the colonial government used its powers within the state agency to ensure that no replacement *waqfs* were consecrated (see chapter three). This dealt a blow both to the spiritual aspirations of endowers and the social, economic, and cultural output of the large numbers of beneficiaries.

The study confirmed that control of the judiciary by the British colonial government also influenced the judicial process as rulings were made based on the British understanding of the Shari^ca. This occasioned the ambiguous application of the Shari^ca consequently invalidating some *waqfs* that would have otherwise been valid (see chapter three and four). The study also revealed that civil policies and institutions on *waqfs* established by the British colonial government were seamlessly inherited by subsequent postcolonial regimes. Efforts to question and amend the policies on state control to restore *waqf* administration to traditional Muslim institutions and precepts were thwarted during the review of the constitution (see chapter five). As a result, the status quo thus remains. This scenario confirmed that indeed civil legislations and judicial constructs in a secular state milieu influenced *waqf* practices among Muslims in Kenya.

Using extensive empirical data to derive the analysis presented in chapter three and four, it was established that strict control of *waqfs* by the state consequently entrenched socio-economic and cultural subordination of the Muslim community. The state did not only influence the decision making process in the WCK, but also used *waqf* resources against designated causes denying traditional actors, institutions, and beneficiaries their economic mainstay, ruining their social, economic, and cultural significance in the society. Accordingly, a cross section of Muslims was disenfranchised and exited from state controlled *waqfs* to *non-labeled waqfs* and uncontrolled charitable institutions including *zakat*, *sadaqa*, private trusts and community associations. These did not only guarantee freedom, control, and exercise of social, symbolic, and economic power once found in *waqfs*, but also accorded Muslims the opportunity to express piety within a wider framework of Islamic charity and *qurba* (see chapter five).

More so, Muslims' exit from state controlled *waqfs* was intrinsic, spontaneous, uncoordinated, and not declared in the conventional sense of a resistance movement against state control of *waqfs*. Majority of Muslims did not comply with the rule on compulsory registration of *waqfs* during the colonial period when none could be seen to contradict imperial authority. During the postcolonial times, imperial control of *waqfs* was relaxed, though secular state policies, civil institutions and judicial constructs on *waqfs* were not amended, causing an ambiguous relation between the state and the institution of *waqf*. Consequently, Muslims continued with the non-compliance with registration rule on *waqfs* apart from relying on *non-labeled waqfs* and uncontrolled charitable institutions as provided by the Shari^ca for socio-cultural welfare in the community (see chapter five). This demonstrates that subordinate communities have the ability to discern the contradictions in state policies and react appropriately in proportion to their capital at disposal. The alternative charitable practices accorded Muslims the opportunity to reverse ownership and control of resources, power, and privileges without arousing suspicion that could put them at cross path with imperial authorities.

In synthesizing *waqf* as a discursive tradition in Islam, the study reconstructed the historical trajectory with a view to exploring and situating the contours in the evolution and development of the institution at various epochs in the Muslim world. Significantly, the analysis sought to understand the nature of *waqfs* in Kenya as an evolving tradition vis-à-vis the global Muslim landscape. Arguably, the institution of *waqf* in Kenya suffered stunted growth. It got stuck in the

‘formative age’ though it exhibits symptoms akin to the ‘redundancy and stagnation’ and ‘disillusionment and new awakening phases’ (see chapter five). This explains the ambiguous nature of *waqfs* in the community for its potential as a socio-cultural heritage remains to be fully exploited. *Waqfs* in Kenya are largely perceived along traditional utility patterns and corpuses – *masjids*, *madrasas*, *da^cwa*, and cemeteries among others rather than means to socio-cultural and economic development. In the backdrop of changing dynamics of *waqfs* and Islamic charity in the global Muslim civil society, only small portions of *waqfs* contribute to job creation, healthcare provision, education, and food aid during Ramadan and *‘id* festivities in the community.

This is to emphasize that there is limited link with transnational Muslim charitable institutions and private foundations, particularly those that have survived state onslaught against the ‘war against terror’ in the country. They include the IR (UK), AMA, WAMY, and KFF among others. Consequently, very little is felt of the IDB products like APIF and WWF in form of interest free loans, grants, *waqf* shares or other facilities and contemporary trends adopted by the Muslim civil society in other parts of the Muslim world to spearhead Islamic charity and provide alternatives to state controlled *waqfs*. Accordingly, the lack of information on the contemporary trends on *waqfs* among the majority of Muslims in Kenya renders the twenty-first century wave on the resuscitation of Muslim civil society and Islamic charity sweeping across global Muslim *umma* largely of no effect in the country.

As pointed out in chapter six, despite their limited contribution, *waqfs* have an indispensable role in the socio-cultural wellbeing of the Muslim community and the Kenyan society at large in the provision of health care, education, housing, and job creation. The spiritual benefits that a *waqif* is believed to derive from an endowment needs not to be emphasized. The study further confirmed the central place of *waqfs* in the preservation of the sixteenth century Swahili history and culture as evident in the active engagement of the NMK and UNESCO in *masjids*, cemeteries, and whole sections of *miji ya kale* in Mombasa and Lamu (see chapter three and four).

It was pointed out in the study that institutionalization of socio-ethnic segmentation among Muslims in Kenya, and the coast region in particular, predates the British colonial period. During the Bu Sai^cdi Sultanate, Arab Muslims were accorded preferential treatment over African

Muslims, especially, in administrative positions of the *liwali*, *mudir*, and in the judiciary as *kadhis* (see chapter three). The study found out that the British colonial government upheld this socio-ethnic hierarchy placing African Muslims at the bottom strata by recognizing Arabs as leaders of the communities at the coast. Apparent failure by subsequent postcolonial regimes to redress the socio-ethnic hierarchy in the Muslim society only served to heighten socio-ethnic tensions among Muslims as evidenced in the appointment of the *‘ulama* occupying the positions of Chief *Kadhi* and *Waqf* Commissioners (see chapter four).

Analysis presented in chapters four and six indicates that historical ethnic and regional struggles for identity, belonging, and supremacy are endemic in the community manifested in the microcosm of the institution of *waqf*. The Chief *Kadhi* being the government advisor on Islamic issues is also the ‘Muslim opinion’ in the appointment of *Waqf* Commissioners. The study revealed that Commissioners were appointed on historical inclinations as opinion makers and symbolic figureheads to maintain socio-ethnic and regional equilibrium rather than on professional qualifications and religious virtues (see appendix 3). This provided fertile ground for the development of cartel like behaviors that locked out qualified Muslims, *waqifs*, *mutawallis*, and other stake holders from the state agency not only from the coast region, but also the entire country. Consequently, consecration, administration, and benefiting from *waqfs* are perceived as privileges preserved for certain Muslim groups and locales.

In exploring the complex internal dynamics of the Muslim community in Kenya, the study proposed the concept of *umiji–wamiji*. It is one thing to demonstrate seeming uniform response against subordination and it is another to be actually united in purpose. Islam in Kenya is, apparently, an insufficient factor of identity, belonging, and mobilization amongst Muslims in a predominantly Christian society rendering the *umma* non-monolithic. The perception of *umiji–wamiji*, therefore, provides an invaluable paradigm in re-assessing and understanding the relations amongst Muslims themselves and between Muslims and the secular state taking negotiations for the control of *waqfs* as a microcosm.

The study has appropriately illustrated how the perception of *umiji–wamiji* is central in Muslims’ negotiation of the secular state and civil milieu in the performance and trends of *waqfs* and charity practices (see chapter four and six). Muslims in Kenya have a rather peculiar history and society making process as they grapple with multiple internal and external challenges dating

back to the pre-colonial times. Three incidents particularly, warrant recall: the furor that followed the appointment of *shaykh* Lithome as Commissioner in 2009 (see chapter four); the hostile reception of NMK officials at Lamu where they had gone to inspect the renovation of *masjid* Rodha; and the persistent calls by beneficiaries and the community in Malindi and Lamu to disband the state agency and replace it with *miji*-based *waqf* boards (see chapter six).

These foregoing scenarios present different readings. First, they illustrate group cohesion and solidarity among *wamiji* in these *miji* with a view to excluding *non-wamiji*. Within this context, Muslims strongly identify themselves with *miji* that in essence, due to colonial and postcolonial structures, were socio-ethnically constructed and maintained. There are conscious efforts by some Muslims, owing to shared history of socio-economic and cultural exclusion, marginalization, and exploitation by the state, to identify themselves with particular locales. Consequently, they feel obliged to protect and advocate for temporal interests while perceiving the *non-wamiji* as potential threats to their wellbeing. The discontent by Lamu and Malindi against the appointment of *shaykh* Lithome aptly fits this description. It was not that Lithome was not a qualified Muslim. Neither was the position to be simultaneously occupied by the two *miji* nor the entire *wamiji*. Rather the mere perception that he was an ‘outsider’ and not ‘one of our own’ suffices to understand the urge to protect temporal interests of a socio-ethnic group in a given locale.

Moreover, the above position is corroborated by the apparent ‘behavior’ by some Muslims who, despite migrating and settling in other *miji*, continue to identify themselves with their parent *miji* and even perceived as such by their hosts. This begs the question as to what point an ‘immigrant’ ceases to be one? Or what does it take for a supposedly ‘immigrant’ to be accepted in the host community and be able to shade off his tag? Muslims from Lamu in Mombasa, for instance, remain as ‘*watu wa Amu*’ (people from Lamu). This also applies to other ‘non-indigenous’ groups in Mombasa and elsewhere in the former city-states as established by the study. This explains, for example, the preference to local dialects by such ‘immigrants’ like *kiamu* (Swahili dialect) as evident in some Lamu *‘ulama* in their sermons and teachings in *waqf* institutions – *madrasas*, *masjids*, etc. in the town (and elsewhere in the former Protectorate) despite settling there for long periods. This is also true among Muslim socio-ethnic groups within one *miji* across the former city-states.

Taking *Thenashara Taifa* in Mombasa, for instance, their being perceived as one group has undoubtedly not stopped them from identifying themselves in the distinct sub-groups within the Swahili Muslim federation in relation to the Mazrui-*Thenashara Taifa* continuum. Thus, in the wider context, mentioning one's *mji* of origin evokes fond memories of long held traditions of identity, belonging, and culture, including scholarly traditions and political alignments. These markers of identity, therefore, not only point to who one really is but also what he is capable of within the context of fluid *umiji-wamiji* identity and belonging, and *waqfs* ownership, control, and access in particular (see chapter four and six).

Secondly, the hostile reception of NMK officials in Lamu and unwavering calls to replace the WCK with *miji*-based *waqf* boards illustrate the Muslims' perception of the state agencies as tools and symbols of imperial subordination that have not only outlived their usefulness but also ought to be dismantled, or better still, re-invented. Through such calls, Muslims have shown that their 'exit' from state controlled *waqfs* to retain control of resources within their socio-ethnic spaces and locales through symbolic resistance is not only important, but there is also the ardent urge to erase such state images within their midst that evoke memories of socio-ethnic and regional exploitation, exclusion, and marginalization. On the other hand, the calls also point to internal dynamics within the Muslim community to exclude *non-wamiji* from *waqf* benefits and administration, and by extension, perpetuate the *umiji-wamiji* discourse among diverse Muslim groups in the country. Within this context, it becomes easier to talk of 'Muslim communities in Kenya' rather than a 'Kenyan Muslim community'.

Clearly, relationship among the diverse Muslim groups in the country as evident in the three incidents above is ambiguous. This ranges from coastal Muslims against their up-country brethrens (read national *umiji*) to Mombasa against her neighboring *miji* like Takaungu, Malindi, and Lamu (read regional *umiji*); those within one *mji* like Mombasa as vivid in the case of Mazrui against Swahili federation (read *wamiji*) to Muslims within one theological and doctrinal persuasion like the Sunni as manifested in the case of *Salafi*-conservatism acrimony. It is this fluid but complex and internal rivalry with history and trajectory that inhibits crystallization of Muslims into a monolithic community. In view of this, though still part of the global *umma*, unfolding events involving Muslims in some distant parts of the world may not necessarily trigger a united response in the local 'Muslim communities' owing to the concerns pre-

occupying them. Thus the perception of *umiji-wamiji* is particularly important in understanding the internal dynamics of the ‘Muslim communities’ in Kenya as opposed to the shared concerns of a global *umma* and could, therefore, form the basis for further research on the ‘Muslim communities’ in Kenya.

7.1 Theoretical Implications

My study endeavored to investigate the enacting of an Islamic socio-cultural practice in the midst of a secular state milieu spanning close to a century. Accordingly, invoking Pierre Bourdieu’s theory of practice (1977), specifically the concepts of field, capital (social, economic, political, and symbolic), and symbolic violence, was relevant as it appropriately fits the state-society negotiations between the Muslim community and the British colonial and postcolonial governments. As argued in chapter one of the study, constituent concepts in the theory of practice appropriately fit the interrogation “of the relationship between religion, class and power; religion, race and ethnicity; and religion and colonial conquest” that the investigation undertook (Rey, 2007:82). In essence, religion is only one of the significant yet interrelated elements constituting human society that Bourdieu envisaged in his works (Rey, 2007; Echtler and Ukah, 2015). This complex yet ambiguous relationship between the constituent elements came to the fore during the decades of colonial project in the East African Protectorate. *Waqfs* proved an important socio-economic resource and an avenue for power control that the British colonial government took keen interest in, a scenario that was replicated during the postcolonial period.

With *waqfs* among other resources under imperial supervision and control, the socio-economic welfare of the Muslim community was dealt a blow. Consequently, this created the power binary between the dominant colonial and postcolonial governments and the subordinate Muslim community. In his view, Bourdieu understands “the dominated as virtually and structurally unfree and thus unable to rise up, resist, and act to change the very social order that enables their oppression” (Rey, 2007:122; Martin, 2000). However, as demonstrated through Scott’s (1976) symbolic (ideological) resistance, the perception that subordinate communities are unable to challenge oppression is no longer tenable. Bourdieu’s view partially understands resistance in terms of public, and at times bloody protests, and political activities. Accordingly, it fails to take

cognizance of the subordinates' silent yet effective acts of sabotage, desertion, withdrawal, feigned ignorance and non-compliance with official demands that require no formal organization (Scott, 1985, 2008).

Symbolic resistance against state control and supervision of *waqfs* was vividly demonstrated in the non-compliance with official requirements for compulsory registration of *waqfs* by a cross section among Muslims; the establishment of community associations; private trusts; and non-governmental organizations. All these 'exit' strategies were in essence vehicles through which the subordinate community practiced in fulfillment of religious obligations to attain *qurba* and *sawab* in place of state controlled *waqfs*. Significantly, they were (still are) not only uncontrolled and uncoordinated, but also accorded Muslims the control over resources and privileges similar to those of *waqfs*. This subtly illustrates that resistance by subordinate groups in the society does not necessarily have to take the political dimension especially when it involves mortal risks. The main goal of symbolic resistance is to re-create autonomy to resource ownership and control but not to confront imperial authority as was illustrated in the alternative acts of *qurba* and *sawab*.

As a socio-cultural heritage, practices of *waqf* also go beyond the binary power relations between the colonizer and the colonized; the ruler and the ruled; or the dominant and the subordinate. In view of this, while Scott's concept of symbolic resistance was relevant in challenging Bourdieu's perception of the subordinate community in the face of imperial authority and control of resources, neither of them could adequately explain the non-state *waqf* milieu amongst Muslims themselves in the society. Consecrating *waqf* is a religious undertaking with wider ramifications in the socio-cultural fabric of the society. It involves the *waqif's* urge to demonstrate piety to the creator while at the same time showing responsibility to the community; the recipients' role in appreciating the *waqif* in understanding their plight and maintaining the social fabric; the place of the *ʿulama* in interpreting and guiding the *waqif* in living to the Shariʿa of consecration to the later; the role of the *mutawalli* in ensuring that the *waqf* fulfills the designated causes; and the political leaders, if necessary, not only to endow as part of their individual social responsibility and *qurba*, but also provide conducive environment where *waqfs* would fulfill their designated causes. These are significant aspects of *waqf* that neither Bourdieu's nor Scott's concepts could aptly account for, hence the coinage and adoption of the concept of *umiji-wamiji*.

Moreover, Muslims and *waqfs* existed before, during, and after colonization. Accordingly, the concept of *umiji-wamiji* takes cognizance of the socio-cultural forces and factors that informed identity and belonging during and after colonization (the period under investigation) that guaranteed or even denied individual's access to rights and privileges within the 'Muslim communities'. Significantly, it seeks to explain the practices of *waqf* among Muslims outside the secular state milieu.

The concept of *umiji-wamiji*, therefore, goes beyond the struggle for material control and domination; the power binary between colonizers and the colonized; and relations between the secular state and the Muslim community. It aptly describes how 'intra-Muslim communities' relations are negotiated and mediated outside the glare of the secular state authorities and civil institutions in Kenya. It provides a framework to understand how *waqfs* are appropriated as a vehicle through which the complex local Muslim socio-cultural fabric is mediated and the trends it generates. More importantly, the concept is efficacious in answering questions (iv) and (v) of the study in exploring the various *waqfs* and how Muslims use them for socio-cultural development in the society.

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Appendix 1

| National totals/ Provincial Percentages | Formal Education Attainment | | | | | | | Employment | | Electricity Connection | Sewerage | | Piped Water connection |
|--|-----------------------------|------|------|------|------|------|------|------------|------------|---------------------------|----------|-------------|------------------------------|
| | 1 | 2 | 3 | 4 | 5 | 6 | 7 | Employed | Unemployed | | Main | Pit latrine | |
| | 6,49 | 17,8 | 6,08 | 1,18 | 526 | 68, | 234 | 15,7 | 2,186 | 1,989 | 973 | 6,10 | 2,62 |
| | 1,97 | 26,4 | 4,32 | 5,43 | ,30 | 33 | ,92 | 86,3 | ,882 | ,740 | ,57 | 0,23 | 6,62 |
| | 5 | 30 | 0 | 0 | 2 | 0 | 1 | 31 | | | 1 | 4 | 9 |
| Nairobi | 2.5 | 6.0 | 15.5 | 24.3 | 36.5 | 12.1 | 3.9 | 8.9 | 11.1 | 35.8 | 58.1 | 6.1 | 28.4 |
| Coast | 10.0 | 8.2 | 7.2 | 8.0 | 5.7 | 9.7 | 6.7 | 7.5 | 10.3 | 11.1 | 10.2 | 6.6 | 12.9 |
| Central | 4.8 | 12.0 | 16.5 | 16.4 | 13.4 | 19.7 | 0.3 | 13.3 | 6.6 | 19.3 | 11.1 | 16.8 | 18.5 |
| R/Valley | 32.4 | 25.1 | 22.3 | 21.8 | 20.8 | 18.2 | 0.8 | 25.2 | 23.0 | 18.4 | 12.2 | 24.1 | 18.6 |
| N/Eastern | 20.6 | 2.6 | 1.4 | 0.7 | 1.0 | 1.6 | 85.6 | 4.0 | 22.5 | 7.1 | 0.3 | 1.6 | 1.4 |

Distribution of opportunities and essential services according to Provincial administrative boundaries. Note how predominantly Muslim regions (Coast & N/Eastern) fared. (Source: The Kenya Population and Housing Census (KNBS), Vol. 2, 2009, Nairobi. Retrieved from: [file:///C:/Users/USER/Downloads/Volume%20Population%20and%20Household%20Distribution%20by%20Socio-Economic%20Characteristics%20\(1\).pdf](file:///C:/Users/USER/Downloads/Volume%20Population%20and%20Household%20Distribution%20by%20Socio-Economic%20Characteristics%20(1).pdf).

Key:

1. Never attained formal education.
2. Attained primary School level.
3. Attained secondary School level.
4. Attained Tertiary level.
5. Attained university education.
6. Attained at least basic literacy.
7. Attained *madrassa* education.

Appendix 2

| National totals/ District percentages | Formal Education Attainment | | | | | | | Employment | | Electricity Connection | Sewerage | | Piped water connection |
|--|-----------------------------|------|------|------|-----|-----|------|------------|------------|------------------------|----------|-------------|------------------------|
| | 1 | 2 | 3 | 4 | 5 | 6 | 7 | Employed | Unemployed | | Main | Pit latrine | |
| | 6,49 | 17,8 | 6,08 | 1,18 | 526 | 68, | 234 | 15,7 | 2,186 | 1,989 | 973 | 6,10 | 2,62 |
| | 1,97 | 26,4 | 4,32 | 5,43 | ,30 | 33 | ,92 | 86,3 | ,882 | ,740 | ,57 | 0,23 | 6,62 |
| | 5 | 30 | 0 | 0 | 2 | 0 | 1 | 31 | | | 1 | 4 | 9 |
| Nairobi West | 0.5 | 1.4 | 3.2 | 4.5 | 9.2 | 2.2 | 0.2 | 1.9 | 2.4 | 35.8 | 5.6 | 2.4 | 4.6 |
| Mombasa | 0.7 | 1.2 | 2.1 | 2.9 | 2.8 | 2.1 | 1.4 | 1.2 | 2.0 | 4.5 | 4.7 | 1.3 | 1.7 |
| Kirinyaga | 0.7 | 1.6 | 1.9 | 1.3 | 0.9 | 2.4 | 0.1 | 1.9 | 0.5 | 1.3 | 0.6 | 2.2 | 2.4 |
| Nakuru | 0.5 | 1.1 | 2.0 | 2.4 | 2.3 | 1.3 | 0.1 | 1.1 | 1.7 | 3.6 | 3.4 | 1.3 | 3.3 |
| Mandera Central | 3.3 | 0.5 | 0.3 | 0.1 | 0.1 | 0.1 | 23.0 | 0.6 | 2.9 | 0.01 | 0.03 | 0.2 | 1.1 |
| Malindi | 1.3 | 1.0 | 0.6 | 0.5 | 0.4 | 0.6 | 0.4 | 0.9 | 0.9 | 0.7 | 1.0 | 0.4 | 1.6 |
| Lamu | 0.3 | 0.3 | 0.2 | 0.1 | 0.1 | 0.2 | 1.3 | 0.3 | 0.2 | 0.2 | 0.1 | 0.3 | 0.3 |
| Kwale | 0.5 | 0.4 | 0.2 | 0.2 | 0.1 | 0.4 | 0.3 | 0.3 | 0.4 | 0.1 | 0.1 | 0.3 | 0.4 |
| Isiolo | 0.5 | 0.2 | 0.2 | 2.0 | 0.2 | 0.1 | 0.1 | 0.2 | 0.3 | 0.3 | 0.2 | 0.2 | 0.5 |

Distribution of opportunities and essential services in Kenya according to District administrative boundaries. Note how predominantly Muslim Districts (Mombasa, Mandera Central, Malindi, Lamu, Isiolo, Kwale) fared. (Source: The Kenya Population and Housing Census (KNBS), Vol. 2, 2009, Nairobi. Retrieved from: [file:///C:/Users/USER/Downloads/Volume%20Population%20and%20Household%20Distribution%20by%20Socio-Economic%20Characteristics%20\(1\).pdf](file:///C:/Users/USER/Downloads/Volume%20Population%20and%20Household%20Distribution%20by%20Socio-Economic%20Characteristics%20(1).pdf)).

Appendix 3

Waqf Commissioners since Colonial Times

Until 1957:

- *Sh.* Al'Amin b. Said al- Mandhry (Mombasa)
- *Sh.* Abdallah Salim (°Ibadi Muslim, Mombasa)
- *Sh.* Mohammad b. Abdallah Shatry (Mombasa)
- *Sh.* Ma'amun b. Suleiman al- Mazrui (Mombasa)
- *Sh.* Amir b. Naheed al- Nahdy (Mombasa)
- *Sh.* Hyder Mohammad al-Kindi (Mombasa)

*There was no Chief *Kadhi* from 1950 to 1963 after the resignation of *Sh.* Sayyid Ali b. Muhammad Badawy (Lamu) in 1950. Besides, *kadhis* were more of judicial officers, so, *liwalis* could nominate one person to the *Waqf* Commission, though they never sat in the *waqf* board themselves.

1957-1962:

Board retained except for *Sh.* Al'Amin b. Said al-Mandhry. It is not clear who replaced him.

1962-1967:

- **Sh.* Al-Amin b. Said al-Mandhry (Mombasa)
- *Sh.* Abdallah Salim (Mombasa)
- **Sh.* Muhammad b. Kassim al-Mazrui (replaced Ma'amun b. Suleiman al-Mazrui, Mombasa)
- *Sh.* Abdallah Ndovu Mwidau (replaced *Sh.* Mohammad b. Abdallah Shatry, Mombasa)
- *Sh.* Amir b. Naheed al-Nahdy (Mombasa)
- *Sh.* Hyder Mohammad al-Kindi (Mombasa)

**Sh.* Muhammad b. Kassim al-Mazrui was appointed the Chief *Kadhi* in 1963. He was replaced in the Commission by *Sh.* Abdurahman Muhammad Hatimy.

**Sh.* Al-Amin b. Said al-Mandhry resigned in 1965 citing commitment after being transferred to serve in Kerugoya, Central Kenya. It is not clear who replaced him.

1968-1972:

There were no *Waqf* Commissioners during this period. Neither was there a Chief *Kadhi* following the resignation of *Sh.* Muhammad b. Kassim al-Mazrui in 1968 citing ill-health. This was also a period of changes in the administrative structure of the government where the positions of the *liwali* and *mudir* were abolished. Following this change, the mandate to nominate one 'prominent Muslim' to sit in the *waqf* board was given to the Provincial

Commissioner, Coast Province, and the Commissioners' term reduced to three years from the previous five.

1972-1975:

- *Sh. Ali Abdallah Ali Maawy* (Mombasa)
- *Hon. Juma Ferunzy* ((Mombasa)
- *Sh. Awadh Saleh* (Mombasa)
- *Sh. Salim Muhammad Muhashamy* (Mombasa)
- *Sh. Majid b. Said al-Busaidi* (Malindi)
- *Chief Keya Swedi* (Mombasa)
- *Chief Kadhi: Sh. Salih Abdallah Farsi* (ex-officio)

1975-1978:

- *Hon. Juma Ferunzy* (Mombasa)
- *Sharif Alwi Muhammad Alwi* (Takaungu, Kilifi)
- *Sh. Hassanali Mussa Jetha* (Indian descent, Mombasa)
- *Sh. Awadh Saleh Sherman Nguru* (Hadhramy Muslim, Mombasa)
- *Sh. Hyder Muhammad al-Kindi* (Mombasa)
- *Sh. Salim Muhammad Muhashamy* (Mombasa)
- *Chief Kadhi: Sh. Salih Abdallah Farsi* (ex-officio)

1978-1983:

- *Sh. Alwi Muhammad Alwi* (Takaungu, Kilifi)
- *Sh. Salim S. Bahamadi* (Lamu)
- *Hon. Juma Ferunzy* (Mombasa)
- *Sh. Ahmad Muhammad Jahadhmy* (Lamu)
- *Sh. Hassanali Mussa Jetha* (Indian descent, Mombasa)
- *Sh. Seif Salim Omar* (Ibadi Muslim, Mombasa)
- *Chief Kadhi: Sh. Nassor al-Nahdy* (ex-officio, Mombasa)

1983-1986:

- *Sh. Mwinyihamisi Mohammad Haji* (Kwale)
- *Sh. Muhammad Salim Shirazi* (Mombasa)
- *Sh. Al'amin Said al-Mandhry* (Mombasa)
- *Sh. Rashid Ali Riyami* (Mombasa)
- *Sh. Ahmad Muhammad Jihadhmy* (Lamu)
- *Sh. Rashid Azzan* (Ibadi Muslim, Malindi)
- *Chief Kadhi: Sh. Nassor al-Nahdy* (ex-officio, Mombasa)

1986-1989:

Board retained on recommendations by the Chief *Kadhi*, *Sh. Nassor al-Nahdy*.

1990-1993:

- *Sh. Salim Ali Jeneby* (Mombasa)
- *Sh. Ali Abdallah Shikely* (Mombasa)
- *Sh. Salim Ali Hussein al-Hadhry* (Lamu)
- *Sharif Hussein S. Aidarus Saggaf* (Lamu)
- *Sh. Rashid Azzan* (‘Ibadi Muslim, Malindi)
- **Sh. Al’amin Said Abu Said al-Mandhry* (Mombasa)
- Chief *Kadhi*: *Sh. Nassor al-Nahdy* (ex-officio, Mombasa)

**Sh. Al’amin al-Mandhry* resigned shortly in 1990 after being re-appointed citing poor health. It is not clear who replaced him.

1993-1995:

- *Sharif Alwi Muhammad Alwi* (Takaungu, Kilifi)
- *Sh. Abdulmalik Abdurahman Maawiyah* (Lamu)
- *Sh. Bakari Abdallah Mwawasaa* (Kwale)
- *Sh. Awadh Swaleh Sherman* [Nguru] (Mombasa)
- *Sh. Abdurahman Mwinzagu* (Mombasa)
- *Sh. Hamisi Omari al-Mazrui* (Takaungu, Kilifi)
- Chief *Kadhi*: *Sh. Nassor al-Nahdy* (ex-officio, Mombasa)

1996- 1999:

- *Sharif Alwi Muhammad Alwi* (Takaungu, Kilifi)
- *Sh. Abdulmalik Abdurahman Maawiyah* (Lamu)
- *Sh. Bakari Abdallah Mwawasaa* (Kwale)
- *Sh. Abdurahman Mwinzagu* (Mombasa)
- *Sh. Awadh Swaleh Sherman* [Nguru] (Mombasa)
- Chief *Kadhi*: *Sh. Nassor al-Nahdy* (ex-officio, Mombasa)

1999-2003:

- *Sh. Ahmed Aboud Hadi* (Malindi)
- *Sh. Bakari Abdallah Mwawasaa* (Kwale)
- *Sharif. Alwi Muhammad Alwi* (Takaungu, Kilifi)
- *Sh. Abdulmalik Abdurahman Maawiyah* (Lamu)
- *Sh. Abdurahman Mwinzagu* (Mombasa)

- *Sh. Awadh Swaleh Sherman* [Nguru] (Mombasa)
- Chief *Kadhi*: *Sh. Nassor al-Nahdy* (ex-officio, Mombasa)

2003-2005:

- *Sharif Hussein Ahmad Hussein* (Mombasa)
- *Sh. Nassor Muhammad al-Nahdy* (former Chief *Kadhi*, Mombasa)
- *Sh. Abdurahman Mwinzagu* (Mombasa)
- *Sh. Abdurahman A. Maawiyah* (Lamu)
- *Sh. Khamis Muhammad al-Mazrui* (Mombasa)
- *Sh. Ahmed Aboud Hadi* (Malindi)
- Chief *Kadhi*: *Sh. Hamad Muhammad Kassim al-Mazrui* (ex-officio, Mombasa)

2006-2009:

Board retained on recommendation by the Chief *Kadhi*, *Sh. Hamadi Muhammad Kassim al-Mazrui*.

2009-2012:

- Dr. Abdallah Muhammad Abu Bakar Khatib (Mombasa)
- *Sh. Said Muhammad Ali Machele* (Mombasa)
- *Sh. Athman Errey* (Mombasa)
- *Sh. Hafidh Shihabudin Chiraghdin* (Mombasa)
- **Sh. Ibrahim Lithome* (Nairobi)
- *Sh. Amir Swaleh* (Mombasa)
- Chief *Kadhi*: *Sharif Hussein Muhdhary* (ex-officio, Lamu)

**Sh. Ibrahim Lithome* (Nairobi) was replaced by Prof. Nadji Said (Malindi) in 2010 following complaints from Malindi and Lamu citing lack of representation.

2012-2015:

- *Prof. Nadji Said (Malindi)
- *Sh. Juma Ngao* (Mombasa)
- *Sh. Zuber Noor* (Mombasa)
- *Sh. Said Errey* (Mombasa)
- *Sh. Amir Swaleh* (Mombasa)
- Dr. Hamadi Boga (Kwale).
- Chief *Kadhi*: *Sharif Hussein Muhdhary* (ex-officio, Lamu)

*Prof. Nadji resigned in June 2015 but was not replaced.

(Source: WCK archive, Mombasa).

Appendix 4

Key Informants

1. Abu Swamad A. Ali, National Museums of Kenya, Mombasa.
2. Abdallah Juma Mwakuyugika, Tiwi.
3. Abdallah Nassor Said, Malindi.
4. Abdallah Swaleh, Lamu.
5. Abdulmalik *Sharif*, Lamu.
6. Abdurahim Bakathir, Mombasa.
7. Abdurahman Bamkele, Mombasa.
8. Ahmed Aboud Hadi, former *Waqf* Commissioner, Malindi.
9. Ahmed Bahaidar Bamkele, Mombasa.
10. Ali Darusi, *Waqf* Commission, Zanzaibar.
11. Ali bin Khamis, Mombasa.
12. Ali Salim Bamkele, Mombasa.
13. Amuru Omar, *Waqf* Commission, Zanzibar.
14. Dr. Abdallah Kheri, Nairobi.
15. Dr. Esha Fakkii, Nairobi.
16. Dr. Kalandar Khan, National Museums of Kenya, Mombasa.
17. Dr. Wario Halkano, Nairobi.
18. Hamdoun, *Waqf* Commission Agent, Malindi.
19. Hamid Abdurahman, Lamu.
20. Hamid Salim Bamkele, Mombasa.
21. Maulid Abdi, Tiwi.
22. Muhammad Abdallah, Mombasa.
23. Muhammad Hussein Abdulkadir, Malindi.
24. Muhammad Shalli, *Waqf* Commission Secretariat, Mombasa.
25. *Mwalimu* Hussein Soud, Lamu.
26. Omar Jenjewa, *Waqf* Commission Secretariat, Mombasa.
27. Rahma Abdallah, Mombasa.
28. Rashid A. Mwandeo, *Waqf* Commission Secretariat, Mombasa.
29. Rashid Ali, Mombasa.
30. Rashid Muhammad Salim al-Mazrui, Takaungu.
31. Said Hussein Chiphele, Tiwi.
32. Said *Sharif* Abdallah, Malindi.
33. *Shaykh* A.S. Hussein Muhdhary, Chief *Kadhi*, (current) Mombasa.
34. *Shaykh* Hamad Muhammad Kassim al-Mazrui, Chief *Kadhi*, (former) Mombasa.
35. Thabit Abu Bakar Omar al-Maawy, *Waqf* Commission Agent, Lamu.
36. *Ustadh* Abdulkadir Mao, Lamu (informal talks at Bayreuth, Germany).
37. *Ustadh* Hamisi Swalehe Mwambewe, Msambweni.

38. *Ustadh* Muhammad Hussein Abdulkadir, Malindi.
39. *Ustadh* Salim Swaleh (Swadi), Msambweni.
40. *Ustadh* Yussuf Bakari Mwamzandi, Msambweni.
41. Zubeir Hussein Noor, *Waqf* Commissioner, Mombasa.

Appendix 5



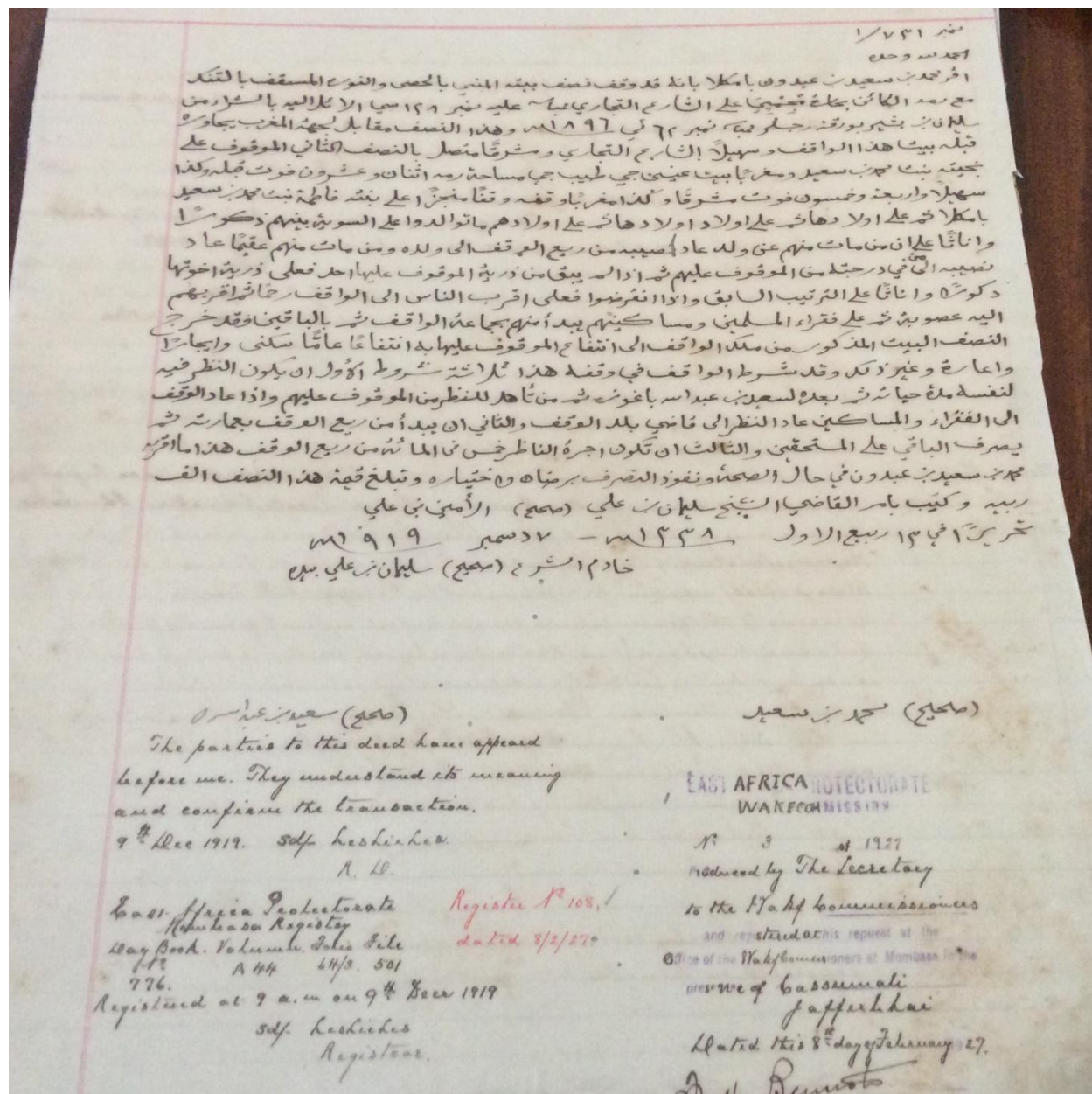
Masjid Mandhry, Mombasa. Note the 16th century architecture and minaret. (Source: Chembea, S.A., 2014).

Appendix 6



Inside *masjid* Mandhry, Mombasa. Note the infusion of modern and ancient architecture in the *banaa* (*manaa*) ceiling.
(Source: Chembea, S.A., 2014).

Appendix 7



A copy of a *waqf* deed in Arabic transcript. The English versions of such deeds were offered by the *kadhi* courts and attached alongside the Arabic versions. (Source: WCK archive, Mombasa, 2014).