

ISLAMIC INSTITUTIONS AND PROPERTY RIGHTS: THE CASE OF THE 'PUBLIC GOOD' WAQF*

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Abstract

The paper examines the institutional economic performance of the *public good waqf* with the intent of demonstrating the relevance of institutions to the momentous debate over Islamic backwardness and European progress and the *waqf*'s role as supporter of learning institutions and promoter of social integration. Through the application of two sets of theoretical paradigms designed for measuring institutional behaviour, property rights and institutional arrangements, to legal cases supplied by *fatwās* from North Africa and Muslim Spain it will be possible to analyze and evaluate the impact of one of the major institutions of the pre-modern Islamic world on economic progress.

L'article étudie la performance économique du *waqf* fiduciaire public, (*waqf khairi*), en tant qu'institution économique. Le but est de démontrer la pertinence de cette performance quant au débat sur la décadence économique des sociétés musulmanes par rapport au progrès que connut l'Europe. Sera étudié le rôle de l'activité économique institutionnelle du *waqf* en général, et particulièrement dans les fonctions qui lui étaient attribuées, comme le soutien des institutions scolaires ainsi que la promotion de l'intégrité sociale. Par l'application de deux paradigmes théoriques conçues pour mesurer le comportement institutionnel, les droits de propriété et l'adaptation aux changements dans les conditions économiques rapportés par les documents juridiques tels les *fatwās* de l'Afrique du Nord et de l'Espagne musulmane, il sera possible d'analyser et d'évaluer l'impact de l'une des plus importantes institutions du monde islamique pré-moderne sur le progrès économique.

Key words: economic performance, property rights, institutions

In recent years, economic historians and anthropologists have focused their attention on property rights and institutions in various contexts and applications, advancing a theory which suggests that together they have provided a mechanism to drive, guide and govern the economic progress of individuals and society.¹ Behind this theory lies a new economic philosophy which sees the

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¹ For economic history mostly the work of Douglass C. North. See North & Thomas, 1973. North expanded his investigation of national economies and economic growth in his

institutions' role in economic growth as much more instrumental than that of individuals. While individuals need to be assured that property rights are secure and enforced in order to successfully engage in investment and other economic activities, it is the institutions' role in defending them that is crucial. This role is particularly important in defending the public property rights which commonly suffer from free riders, individuals who abuse public property, taking advantage of it either by claiming more than their share, or by not contributing their share. The flexibility with which institutions are capable of replenishing them if property rights fail to be secure and enforced is important. For instance, institutional arrangements make it possible for the institution to adjust for changing market conditions, offering a mechanism of efficiency, risk minimizing and high returns, all requirements for sustained economic growth.² The theory is even more relevant to the debate over Islamic decline and backwardness and European advances and progress, allowing us to compare institutional behaviour rather than technological innovations. The idea that "innovations, economies of scale, education, capital accumulation, were not causes of growth, but *were growth*,"³ which is the consequence of the theory of property rights, sits well with Islamic historians who maintain that such attributes were in evidence in the medieval Islamic world, but for some reason did not generate the same economic progress which occurred in Europe in the 16th and 17th centuries.⁴ Speaking comparatively, the Islamic problem might well have been the institutions rather than lack of technological innovation, capital accumulation etc. So far, the argument of the European breakthrough has focused on European technology, but this may well be challenged after institutional arrangements and property rights are examined in the context of non-Western historical

book, *Structure*, 1981, but revised some of his conclusions in his *Institutions*, 1990. In this last publication more emphasis is put on economic institutions and their performance. As far as anthropology is concerned, I have found the recent literature on women and property rights particularly useful for the study of women's legal status in Islamic societies. See Rose, 1992; Goody, 1976; Hirschon, 1984; Stone, 1982.

² The paradigms are summarized in North & Thomas, 1973. I have paraphrased here the author's introductory overview, focusing on the elements which I will be using later for the purpose of comparison. The rates of return for individuals and society are not always the same. A discrepancy between the two sets of rates of return "occurs when property rights are poorly defined", or poorly enforced, which will result in individuals being discouraged from participating. North & Thomas, 1973, p. 2.

³ North & Thomas, 1973, p. 2. See the discussion of the assumed "backwardness" of Islamic economies in comparative context in Shatzmiller, 1994.

⁴ On technical innovations in the Islamic medieval Mediterranean see Ashtor, 1977 and 1989. On the division of labour and specialisation of the manufacturing sector of the Islamic economy, see Shatzmiller, 1994, ch. 5.

experience and in the Islamic context in particular.⁵ Since the interest in investigating the role of property rights in economic organizations peaked, some 30 years ago, an array of paradigms, analytical tools and scholarly framework for measuring their effect on society's economic progress have been developed and applied, enabling us to study economic institutions in different societies and historical conditions comparatively. It is the theory's combination of scholarly significance and analytical tools, which makes it uniquely suitable for measuring the economic performance of the Islamic *public good waqf* and helping us understand how it functioned.⁶

The Islamic *public good waqf*, the Maghribi *ḥabūs* and the Middle Eastern *waqf khayrī*, "endowment set apart for a charitable or religious purpose",⁷ has been the focus of much scholarly attention,⁸ but have yet to be examined in a theoretical framework which would interpret its workings as an institution and relate them to their economic performance.⁹ We need to do this because there is a significant discrepancy between the reputation of the *waqf* as a successful economic institution and the actual historical record of its performance. Two major concerns have been raised, which highlight the inconsistency in the his-

⁵ North acknowledged that he did not carry out a detailed specification of historical forms, nor did he use primary sources, and that his model is based on national dimensions, rather than on smaller organizations. See North, 1990, p. 71.

⁶ Not much has been written on public property rights in Islamic law, however, see Ziadeh, 1993. His article speaks only about land, and the author maintains that there is no general theory of property law in the *shari'a*, and that the relevant issues are scattered in different parts of the Islamic law corpus. Papers on property rights were read at the 1980 conference in Belaggio, Italy, now published in Mayer, 1985, and dealt exclusively with the pre-modern and modern Middle East and North Africa. Nonetheless, see the papers by Rémy Leveau and Abraham Marcus, which refer to *waqf*.

⁷ Wehr, 1976, p. 1093. Because the term *waqf* is used in the literature for both family and charity purposes, I opted to use here the term *public good* to distinguish the charitable endowment for the support of public municipal and religious institutions from the family one.

⁸ The literature dealing with the various aspects of the *waqf* is too extensive to be reviewed here in detail. The *Encyclopedia of Islam's* new entry is currently being written while the old one is outdated. Two special numbers, one of the *Journal of the Economic and Social History of the Orient* 38.3 (1995), the other of *Islamic Law and Society*, 4.3 (1997), were devoted entirely to its social, economic and legal aspects. For review of the articles in the *JESHO* volume see Van Leeuwen, 1999. For review of recent studies see Hoexter, 1998. I will refer to studies of the *waqf* in this paper in relation to issues as they occur in the discussion, or when needed in comparative context.

⁹ Previous studies acknowledged the importance of the interaction of the legal and economic framework as a worthwhile subject, for instance, Arjomand, 1998, p. 110 et sq. Others focused on the financial side, like Çizakça, 1995, p. 313 et sq. As far as the smaller, non-rulers' *waqf* is concerned, which is the subject of this paper, the number of studies devoted to the medieval financial aspects is limited. With the exception of studies on Egypt, either Geniza or Mamlūk documents, most regions lack sufficient documentation dating from the earlier period.

torical economic performance of the *waqf*. The first is its failure to produce and support the kind of institutional learning experience which enhanced Europe's scientific leap forward, despite the fact that it was supposed to have done so as the great supporter of religious and municipal life and institutions, and especially higher education.¹⁰ What conferred a unique historical significance on the *public good waqf*, was the fact that for hundreds of years it provided the only regular financial support for the *medresa*, a provider of higher education. Fulfilling this role, which was critically dependent on successful economic performance, might well have been insufficient. The second concern is that over the years, the *public good waqf* formed a considerable property presence in every Islamic land. Its mere survival as a working institution into the 20th century has given historians of Islamic societies reason to describe it as "the promoter of social interaction and economic integration".¹¹ Yet, contemporary observers of the *waqf* alluded to some practices, such as "abnormally low rent which is charged for the rent of habous property", which contradict sound economic sense.¹² But the mere fact that the *waqf* survived into the 20th century is not an indication of excellent economic performance. Institutions can be economically inefficient and still survive for hundreds of years, through a combination of non-competitive markets which cause fragmentary feedback of information, and actors incapable of acting upon the information because of weak ideology.¹³ In North's view, "In a dynamic world characterized by institutional

¹⁰ See Huff, pp. 98-99 on the legal system; pp. 71-90 on institutions; pp. 151-160 on the *medresa*. All of his observations are based on Makdisi's work on the colleges. Toby Huff identified two major blocks in the progress of Islamic science. One to be found in the legal system, the other in Islamic institutions, in particular the *medresa*.

¹¹ In particular the late Gabriel Baer, the great champion of this image. See Baer, 1997. See also Garcin 1998, p. 108 on the eunuchs' *waqf* as an instrument of liberation and social integration.

¹² Geertz, 1979, p. 151. Geertz actually thought that the low rent was a positive contribution to the bazaar's economy, even though it does not make any economic sense. See pp. 153-154. He puts the blame for this situation not with the Mālikī law, but with the trading community of Sefrou which was entrusted with managing the *waqf*. The conspicuous fact about the Mālikī *waqf* is that in spite of its poor performance, it continued to exist well into the 20th century. This is how anthropologist Clifford Geertz described the *waqf* in the Moroccan town of Sefrou in mid 20th century: "183 shops and ateliers, 4 ovens, 4 founduqs, 3 public baths, 4 grain warehouses, a slaughterhouse, 40 houses, 28 rooms within houses and forty water-supply systems for houses. 103 gardens mostly irrigated, 305 fields mainly in rainfall wheat, thousands of live trees, and branches of olive trees separately dedicated. Users and lessees of this great number of properties pay, abnormally low rent which is charged for the rent of habous property and makes for its stabilization at this level".

¹³ North's study of institutions addressed this historical phenomenon, by suggesting that the persistent inefficient economic institutions as well as poorly performing economies in general was not a phenomena unique to Islam but was shared by Latin American and Asian societies, and attracted the attention of economic historians. See North, 1990, pp. 92-104, where the author provides an analysis of the model which explains this particular phenomena.

increasing returns, the imperfect and fumbling efforts of the actors reflect the difficulties of deciphering a complex environment with the available mental constructs-ideas, theories, and ideologies.”¹⁴ Some of the divergent perceptions of the *waqf*'s economic performance can be explained by source material and methodology. Studies based on archival records, mostly of *waqfiyyas*, the acts of endowments registered and kept in the local or regional archives,¹⁵ have so far painted a picture of an auspicious, dynamic economic institution with considerable resources,¹⁶ drawn from endowments made by powerful rulers and their families, the wives and mothers of sultans,¹⁷ and their entourage, wealthy individuals of substantial means, military commanders, merchants and traders.¹⁸ These individuals endowed property for a whole array of public institutions, building monuments, such as shrines, *medresas*, *khanqas*, *zawiyas*, bathhouses and mosques, many of which still stand today, isolated amidst the urban decay of the medieval Islamic cities.¹⁹ In North Africa and Muslim Spain, the Islamic West, inscriptions on buildings and in books as well as chronicles compensate for the lack of archival records for the history of the *waqf*. The Granadan endowments registered by the church's administration following the conquest of the city in 1492, constitute the exception which proves the rule.²⁰ This methodology has some flaws, initially because of its over-reliance on *waqfiyyas*, which only capture the initiation of the endowment. It is now agreed that in order to write the long term economic history of the *public good waqf*, we need to move beyond the early stages of the endowment, and examine what happened to these assets after one or several generations. The *waqfiyyas* establish the location and identity of the property endowed, objectives, amount of money devoted to each, and other regulations of the endowment, but fail to tell us what happened to it later.²¹ Sadly, the *waqfiyyas* also distort the picture of the donors' identity and

¹⁴ North, 1990, p. 96.

¹⁵ The most comprehensive listing of *waqfiyyas* exists for medieval Egypt. See Amin, 1981. For a general view see McChesney, 1991.

¹⁶ The size of the land endowed by the Mamlūk sultans as *waqf* is astounding. See details of the endowments made by the two last Mamlūk sultans, Petry, 1998.

¹⁷ See Petry, 1991, for the huge amounts of money invested in buying the endowed property by women of the sultan's household.

¹⁸ On the identity of donors in Mamlūk Egypt see Denoix, 1995.

¹⁹ *Waqf* studies today include more and more topographical and architectural investigation of the endowed monuments, complementing the textual study of their *waqfiyyas*.

²⁰ See Villanueva and Soria, 1954 and Villanueva Rico, 1961 and 1966.

²¹ This limited scope of research solely based on *waqfiyyas* did not escape scholars' attention: "Ideally, every *waqf* foundation would leave a trail of legal documents beginning with the *waqf* deed." McChesney, 1991, pp. 19-20. McChesney's book is unique among *waqf*'s studies for its attempt to trace a continuous history of the institution by studying the endowments and the monuments over some 400 years.

volume of donations, since they report exclusively the endowments made by powerful donors. No evidence of endowments made by non-affluent commoners or small artisans has been found in the archives of Egyptian *waqf* archives, so neither they, nor their small contributions have been taken into consideration when the overall picture is reviewed.²²

Clearly, the methodological approach to the *waqf* needs to be reviewed and reassessed, even for more recent times, when scholarly interest in the question of the *waqf* and property rights was motivated by the status of the conquered and settled lands under colonial rule. The question of property rights in Islamic law, especially that of the Mālikī school in the Maghrib, came up for the first time after the French conquest of Algeria (1830) and again after the declaration of the French Protectorate in Morocco (1912), with obvious results.²³ The French jurists concluded that property rights were a grey area in Islamic law, and that there was a basic contradiction between the inheritance system and *waqf* making which needed to be solved if lands were to be rescued from eternal immobilization. Basing the argument on their reading of the early Mālikī jurists in North Africa, the French jurists questioned whether Islamic law possessed property rights at all since ownership of the land was reported, in theory and in practice, to be in the hands of the state, and only the right to its cultivation and building on it, lay in the hands of individuals.²⁴ The French protectorate practice of placing the right to the land in the hands of the state, rescuing it from becoming *waqf*, was based on this opinion, and was later used by the authorities of pre- and post-independent Morocco to implement it in social reality.²⁵ Whether or not these views were valid, they established a historiographical, if not a historical link, between the weak state of property rights in Morocco, and the popularity of *ḥabūs* making among Moroccans as a means of protection from confiscation and government misappropriation, despite of its corrupt managerial practices.²⁶ Regardless of biases, both old conclusions and

²² For instance, endowments by artisans have so far remained elusive, leading the investigator of the Egyptian *waqf*'s archives to write, "The latter group is quasi non-existent, and it is clear that they did manage their property and that the pious foundations did not interest them at all." Denoix, 1995, p. 35.

²³ See Michaux-Bellaire, 1909; Milliot, 1918. For the evaluation of the French policies for land acquisition in North Africa see Levau, 1985.

²⁴ On the medieval view of the legal status of land holding and the state's domain, see Shatzmiller, 2000, ch. 9.

²⁵ Leveau, 1995, p. 83, note 5. See history and analysis of colonial jurists attitudes to Islamic law, inheritance and *waqf* in Powers, 1989, especially on the debate surrounding the legitimacy of the *waqf* vis-à-vis the inheritance law.

²⁶ "Supervisors or trustees who managed the trust . . . wound up enriching themselves," Levau, 1995, p. 62.

new findings should be questioned with different paradigms in mind to see whether the idyllic picture of a rich, well-endowed, well-run institution with a good economic performance was accurate or whether we can postulate that in reality it was just the reverse.

For the purpose of this study two sets of issues based on the new theory described above have been selected to be applied against the evidence. The first deals with secure and enforced property rights, the second, with institutional arrangements.²⁷ In the next section I propose to apply these issues to a group of *fatwās*, mostly of Moroccan provenance, taken from the corpus of Mālikī *fatwās* of the Islamic West, known in short as the *Mi'yār*, collected by a Moroccan scholar, al-Wansharīsī, in the 16th century and gathered into a compilation.²⁸ The editor has grouped together all the questions and legal decisions dealing with *waqf*'s matters into one volume entitled *nawāzil al-aḥbās*, which is the 7th of the 13 volume set of the 1982 Rabat edition of the *Mi'yār*. 75% of the 400 different *fatwās* deal with endowments for the *public good*, the rest with family *waqf*.²⁹ The *fatwās*, written between the 10th and 15th centuries, are presented in the customary question and answer form, giving details of the problem encountered, followed by the resolution. 40 *fatwās* are briefly summarized here, to display the issues mentioned as a representative sample of the many conflicts surrounding the endowed property which appear in the volume. The assets referred to in the *fatwās* were endowed several generations earlier and managed over the years by a series of different managers and public office holders. The *fatwās* are requests by managers for legal solutions to difficulties encountered managing the properties under their care, and sent to jurists living in Muslim Spain and North Africa for their advice. By placing the *fatwās* in their legal and economic context the discussion will pick up the historical thread where it was left, beyond the particularities of the *waqfiyyas*, and will provide a better, more accurate picture of the institutional behaviour of the *public good waqf*, and a more correct economic history of the institution.³⁰

²⁷ These issues are featured in North, *The Rise*. I have paraphrased the author's introductory overview, focusing on the elements which I will be using for the purpose of comparison. On rates of return, North, *The Rise*, 2. But in contrast to North's non-primary sources, and the large national economies, the analysis here is based solely on primary sources and investigates smaller economic organizations.

²⁸ Al-Wansharīsī, 1981-82.

²⁹ This enormous collection of several thousands *fatwās* has recently been the focus of intensive historical scrutiny, used especially for the social, economic and legal aspects. See Powers, 1990. On *fatwās* dealing with the family *waqf* in this volume, Powers, 1993.

³⁰ McChesney has used *fatwās* of the Ḥanafī school to render the economic and legal attributes of the *waqf* in central Asia. See McChesney, 1991, pp. 11-18.

The first question in the next few *fatwās* is that of the property rights of the new asset endowed. An undated *fatwā* from al-Andalus speaks of a conflict surrounding a cow endowed to provide milk for the poor.³¹ Some time after the endowment was made, the donor changed his mind and designated the prisoners, rather than the poor, to be recipients of the milk. The manager of the *public good* properties questioned whether the owner had the right to change the beneficiary at that time. The jurist replied that if the donor brought out the milk to the poor with his own hands, then he did not sever his property rights in the cow, the transfer of property rights over the cow was never complete and the original endowment act was thus invalid. As a result he could indeed name a different recipient for the milk. Another example of the insecure nature of the assets in the *public good waqf* is provided in a *fatwā* written in Fez in the 15th century concerning an orchard endowed to provide income for the maintenance of a mosque.³² The donor had given an extra sum of money to cover the administrative costs of the registration, the notary's work and the witnesses' fees for signing the document transferring the property from himself to the *public good*. But the endowment was challenged in court and never completed. The donor requested the return of the money he had previously given for registration in order to pay for the costs of the litigation. He received the money back from the *waqf* and won his case, after which he once again endowed the orchard and again gave money for the notarial registration, but this time, he requested it back from the orchard's revenue now in the hands of the *waqf*. The manager of the *waqf*'s properties wrote to the *muftī* asking whether this could be done. The jurist replied that the registration fee could not be paid back from the proceeds of the orchard, since in the first instance the transfer was never completed, and the donor could claim back the money he had given. In the second instance the transfer was complete, the asset was property of the *waqf*, and no more claims on it or on the income from it by the donor could be entertained.

The difficulties with establishing property rights over the assets endowed for the *public good waqf* were compounded by the frequency of endowments of only a half or a portion of an asset, a direct outcome of the inheritance law which divided property into small shares. When this happened, management of the property became difficult and at times downright impossible. This can be

³¹ *Mi'yār*, 7: 76. A *fatwā* written in al-Andalus, unfortunately recorded by al-Wansharisī without the author's name but attributed to "some of the religious scholars".

³² *Mi'yār* 7: 84. The *muftī* who ruled over this case, 'Abd Allah al-'Abdūsī of Fez, is author of many of the *fatwās* discussed here. On the *muftīs* who provided the legal rulings, see Benmira, 1989.

seen in the next 3 cases, taking place in 14th century Granada and 15th century Fez.³³ The purpose of the endowment of the first two properties is unknown, while the income from the third one was to go towards the maintenance of a mosque. The managers in all three *fatwās* reported difficulties in handling the properties because property rights were shared between two owners: the *public good* and a private owner. In the first *fatwā*, half a hall, *qā'a*, was endowed but the exact share was not specified, either by measurement or during the transfer process, *ḥiyāza*. In his answer, the Granadan jurist Ibn Lubb explained that the way to handle this problem was to approach it as if it was a partnership of precisely equal shares, between two owners, who had each contributed equal parts and were entitled to equal benefits.³⁴ If, despite his *fatwā*, more problems occurred, then the partners should appeal to the court for a rule on this issue. In the two *fatwās* from Fez, a half of a house and a half of an oven were endowed for a mosque, and again the respective parts of the property were not established. The house was rented out and a small amount was deducted from the rent because of the double ownership, a situation prospective tenants learned to dread over the years, given the decline that was known to take place in properties under public administration. The public oven, the object of the last endowment act, stood idle because the manager of the *public good* properties objected to the contract negotiated by the private owner of the other half for activating the oven. The owner blamed the *nāzīr* for depriving both him and the mosque of income, and the jurist advised that the agreement between the private owner and the baker should stand, despite the manager's opposition to it.³⁵ Again the transfer process did not establish that property rights over the assets endowed were legally, fully and correctly transferred from the owner to the *public good*.

Related to the issue of secure property rights is the issue of *free riders*, the most frequently encountered problem in the *public good waqf's fatwās*. Three types of *free rider* can be detected: an individual who benefits from the *public good* without contributing to its maintenance, an individual who takes too large a share from the *public good* benefits, and an individual who appropriates the

³³ *Mi'yār* vol. 7: 72, 93-94, 42-43. The first two cases were addressed to the *muftī* Abū Sa'īd Ibn Lubb, active in 14th century Grenada, d. 782/1381. The third by Abū Muḥammad 'Abd al-Raḥīm b. Ibrāhīm al-Yaznāsani, d. Fez, 834/1430.

³⁴ Partnership in capital, labour or credit, was an economic enterprise sanctioned and regulated by the law. See Udovitch, 1970.

³⁵ David Powers also found that in cases of family *waqf*, "Endowments created from jointly held property frequently resulted in disputes between the endowment beneficiaries and the founder's other heirs. In several instances, the dispute was resolved by the physical division of the property." Powers, 1993, p. 395.

public good property for his exclusive use. All three appear in different endowments and localities, communal services and undertakings.

The first type of common *free rider* is displayed in two *fatwās* from 12th and 15th century Fez.³⁶ The first is not directly related to an endowed property, but to voluntary contributions for religious services normally covered by income from endowments. The *free riders* are shepherds living in a *bādiya*, a village somewhere in the countryside, where the community hired an *imām*, to lead the prayer. The young shepherds, who went out searching for pasture, only returning to the village at intervals, refused to help pay the *imām*'s wages, saying "we will not pay taxes with you since we are present only irregularly, *illā ghīb^m*, with you in the prayer behind the *imām*". The community argued that the performance of legal obligations included participation in religious services and, therefore, required paying for them. Each member of the community had to share in the costs of the mosque and the welfare of the community, even if they only attended irregularly. If their dwellings were in the village they had to pay other financial obligations, *lawāzim*, taxes like the *'ushr* and the *fitra* and the *maghram* of the sultan etc. In fact the jurist imposed payment on the shepherds, saying that upholding, *iqāma*, of the law of Islam was indeed incumbent on every person and on every village. The second *fatwā* describes a refusal to pay for repairs of a large waterwheel, located 4 miles away and maintained by revenue from *waqf*, which provided the small town with water for irrigation, for the mosque, for the public bath and for drinking. The income from the endowments was insufficient for the repairs and an appeal was made to the public treasury, the *bayt al-māl*, to help pay for the repairs. Later on, the community was required to collect funds to repay the treasury, but some members said that only rich were obligated to pay taxes for charity levied as a percentage on property and income, *'ushr* and *zakāt*, therefore the same thing should apply to items for the *public good*. The jurist disagreed and ruled that the whole community should contribute.

The next three *fatwās* display the second type of the common *free rider*, one who takes a larger share of the *public good* benefits or revenue for himself. The first two *fatwās* from 15th century Fez involve teaching children in the mosque.³⁷ The *free rider* was the teacher, taking the mosque to be the public domain, and conducting classes there, thus saving himself the cost of renting a special location for this purpose. His justification was that the mosque was maintained by the communal *public good* funds. However, the jurist ruled that

³⁶ 7: 70-71 and 11-12 respectively. The first *fatwā* by Qāḍī 'Iyāḍ. The second by 'Abd Allah b. Muḥammad al-'Abdūsī, d. Fez, 846/1442.

³⁷ 7: 36 and 7: 83-85 respectively. First *fatwā* by al-Mazjaladī, the second by al-'Abdūsī.

“God did not intend people to make a living in a mosque in this way, in some places, people could no longer pray because of the number of children around.” In the second *fatwā* dealing with the same problem, the *free rider* used an analogy that the judges held court in the mosque, therefore he could teach there as well. The jurist ruled that both teacher and children should be banished from the premises.

The third, most common type of *free rider* was an individual, who appropriated *public good* property for his own exclusive use, as demonstrated in several *fatwās*. In the first case,³⁸ artisans, married men, worked at their trades in the *medresa*'s rooms, initially endowed to house the students. The manager demanded to know whether they should be made to leave or whether rent should be collected from them. In theory, artisans and other manual workers generated income for themselves, and they could well have paid rent, as did other users of *waqf* owned stores. In this case however, since the *medresa*'s rooms were not endowed for this purpose, the jurist resisted the temptation to increase the income of the *public good*, and made the tradesmen leave. In two *fatwās* written in 14th and 15th century Fez,³⁹ individuals used building materials left over from the building of the mosque for private use; one used rocks, the other sold an old pillar which belonged to the *waqf*. The first claimed that the rocks were left lying in a field, and used them to build a wall of a castle. He justified it in several ways, first claiming that he had a *fatwā* allowing him to do so, then that the rocks were excavated when the foundations were dug out, and since the palace belonged to the state's treasury, the *makhzen*, he was justified in using those left over. The jurist rejected his claim, saying that the rocks belonged to the *waqf*, and could not be used for anything else, regardless of whether or not the government was involved. In the second instance, a man had removed a pillar from a ruined mosque and installed it in the Friday communal mosque, *jāmi'*, in order to replace an existing pillar. The discarded pillar was then sold to a private contractor, who built an arc and two elevations on it. The jurist said that the pillar could not be diverted to private use, therefore the guilty parties should return the property. The old pillar was returned and everything built on it destroyed. The expenses were to be paid by the man who removed it from the mosque. 15th century Fez jurists received more than a few complaints about *free riders* of the *waqf*'s property. The *waqf*'s management complained about someone using endowment revenue for fixing his women's quarter,⁴⁰ about

³⁸ 7: 7-8, by al-ʿAbdūsī.

³⁹ 7: 59 and 39-40 respectively. First *fatwā* by al-Lakhmī, d. 872/1467 in either Fez or Meknes, the second by al-Suyūrī.

⁴⁰ 7: 31. *Fatwā* of Aḥmad b. ʿUmar al-Mazjaldī, d. 864/1459-60 in Fez. The case involved

others who appropriated land endowed for a *ribāʿ*⁴¹ yet others who appropriated land endowed to benefit the poor,⁴² others who took advantage of an oven and a house endowed for maintenance of the great mosque,⁴³ and in another case, users who caused the loss of endowed rope and a pail.⁴⁴

In 15th century Taza, individuals requested repair of the roofs covering endowed stores which had been damaged in a riot.⁴⁵ The repairs were estimated at 30 gold dinars and the people who lived in the quarter and wanted to make walkways to protect their houses and themselves approached the *waqf* and demanded that the income from the rent of the stores should be used for this purpose. The monthly rental payments would allow them to rebuild the roofs of the

unspecified funds, from endowments for the upkeep of a community living in a fortress, *ḥiṣn*, defending the frontier. The problem occurred when an individual had used the money to fix his women's quarters. The jurist forbade this use of the revenue because the endowment was made for the welfare of the community as a whole. The repair of one person's women's quarters was not something from which the whole community would benefit.

⁴¹ 7: 37, by al-Mazjalādī. In this *fatwā*, written to and answered by the same jurist, we encounter a community who lived on the frontier. Land sown with esparto, *ḥalfāʿ*, which was sold every year for around 3 dinars, was endowed for their support. The neighbours of this frontier community took control of the land, burned the esparto, planted the land with other crops and gave a quarter of the grain harvested to the fortress' people but refused to allow them to herd their flocks on the land, or use its water. The jurist ruled in favour of the *ribāʿ*'s people: if the *wāqif* specified esparto in the endowment act, no other crop could be grown on the land.

⁴² 7: 63, by al-Suyūrī, d. 800/1397. The land in this case was taken over by an individual, who claimed to be poor, and cultivated it with the promise to share the proceeds with the other poor of the city. His claim was denied, the land in question was seized, even though he had already ploughed it.

⁴³ 7: 77-78, by al-ʿAbdūsī. The two properties fell into disrepair and became a garbage dump, and the neighbours, whose properties were adjacent to the ruined oven, *furn*, made illegal use of them. Since the properties were no longer in their original state no rent could be collected from them. A neighbour from across the street built a wall in the lane and a door inside it and used one of the dwellings to stable his cow. Another grew hay in it and another planted a fig tree inside the oven and refused to pay rent. He said the wall was built to shield the people from the garbage. The other neighbour said his father had rented two small halls in a courtyard but now the rental period had expired and he said to the manager "I don't need those". The wall protecting the two rooms remained in the courtyard, hiding the room from sight preventing anyone from renting it. The decline in value made it impossible to collect rent or user's fee, and the managers seemed to be at a loss to either recover the property or collect income from it, especially when the neighbours were using it for their own purposes.

⁴⁴ 7: 55-56, by al-ʿAbdūsī. It happened in a mosque, which drew its water from a canal. A pail and a rope, which were used to draw water for use in the required ritual ablutions, were lost after some neighbours of the mosque used them for irrigation or to carry water to their homes. The jurist ordered that rent should be collected from people who used the mosque's property for their own benefit, and if they damaged it, they should be held responsible for replacement. The *fatwā* reveals that in spite of reiterating the ban on using public property for private use, the jurist allowed rent to be claimed from individuals who did use the tools.

⁴⁵ 7: 79, by al-ʿAbdūsī.

mosque and their walkways, which, they said would benefit the mosque, the stores and the houses in front of the mosque. The jurist disallowed the request, saying that no changes to the instructions of the original endowment act were allowed.

The *fatwās* displayed disruptions in the workings of the *public good waqf* which were all related to property rights, some to the fact that property rights were not established, the other, that they were not secure. In order to understand why and how this process occurred we need to look into the legal and historical framework of property rights. The first set of disruptions resulted from the failure to properly establish the rights of the *public good waqf* over the property endowed. Again, this was not simply a symbolic act. A public declaration of ownership change is a requirement justified by economic efficiency, as property owners need to keep communications in this respect perfectly clear: "Clear titles facilitate trade and minimize resource-waste conflict."⁴⁶ The transfer of property rights is strictly regulated by the Islamic law. The Mālikī school requires that all the owners' rights in a property which was given away or sold should be abrogated and definitively terminated, in order for the property to be legally owned by somebody else. The transfer of property rights from the donor to the *public good* was to be taken care of through this legal procedure called *hiyāza*, which was intended to advertise the fact that the property had changed owners, and which had to be performed in each and every possession taking procedure. It involved a written document, signed before a notary and witnesses, attesting that transfer of property rights had occurred. The Mālikī school seems to have been, more than any other, extremely attentive to the performance of a *hiyāza*, and Mālikīs left a whole array of legal documents ranging from law manuals, *fiqh*,⁴⁷ to *fatwās*,⁴⁸ to *wathā'iq*, the contract formularies from Muslim

⁴⁶ Rose, 1985, p. 16.

⁴⁷ The practice took several hundred years to develop, however by the 14th century, the legal routine and the problems associated with *public good waqf* making were well in place. Best rendered by the 14th century Andalusian jurist Ibn Juzayy, a contemporary of some of the *mufīis* mentioned in a summary in his comparative law manual, as follows: "If the donor made a certain condition in his endowment, it is obligatory to follow it; the management of the endowment should go to whomever he indicated, if he did not appoint anybody, the *qādi* will; the donor can not manage his endowed property, if he did, the endowment is annulled; the property would be maintained using the income it generates, if this runs out, income should be taken from the *bayt al-māl*, if this runs out as well, the property should be left to deteriorate; the donor is not obligated to provide support for it; for a horse, support should come from the *bayt al-māl*; if there is no money in it, it should be sold and another property should be bought instead, which does not require maintenance like a weapon; Ibn al-Majisūn does not permit such sale and it is not permitted to destroy the building, nor to change it if part of it broke down, it is allowed to sell it but it should be used in the same manner as the damaged part but others say it should be sold and not passed on to the *ḥabūs*, if everything around it was in ruins." Ibn Juzayy, n.d., p. 281.

⁴⁸ We can easily recognize in Ibn Juzayy's entry, and specifically in the second part, the

Spain which provide a variety of *ḥiyāza* contract models,⁴⁹ to actual archival documents from Granada, which documented the insistence on complete termination of property rights of previous owners.⁵⁰ As the 14th century Mālikī jurist Khalīl, explained: “*There is effectively no transfer of property right if the property returns to the donor’s possession during the year, whether as rent, passive possession, the donor’s clandestine return to the property or even his presence there as a guest.*”⁵¹ The *fatwās* show two very important consequences resulting from the Mālikī insistence on transfer of property rights. The first was the development of a central administration for all *public good waqf*’s properties, whose managers were public office holders or administrators and the authors of our enquiries. The second, was that, when not properly secure, this practice would bring the regular supply of revenue to a halt. Because the insistence of the Mālikī legal school that properties endowed for the *public good waqf* could not be managed by previous owners or their families the Mālikīs do not permit “self directed” endowments.⁵² This directly affected the way the assets were managed under Mālikī rule, since in the Islamic West, the managers would only rarely be members of a family favoured by the regime.

This unique historical development of the Mālikī *waqf* is particularly noticeable in comparison with *waqf* under the regime of other schools, which were not bent on forcing the previous owner to sever his links to the property. It seems that in the East, under the Ḥanafī or Shāfi‘ī schools, the practice was not to oppose or prevent the donor himself or a member of the endowing family from becoming a *de facto* manager of the endowed properties.⁵³ Examples of

issues raised in the *fatwās* by the managers, the legal provision they invoked, and the decisions reached by the *muftīs*. It demonstrates how the legal body of the *waqf* provisions, registered by Ibn Juzayy was shaped and formed through a process of discussion of concrete and actual cases submitted to the *muftīs* and argued in the courts until, it became a codified, well synthesized body of regulations.

⁴⁹ For an Andalusian formulary of a *Ḥiyāza*, see Ibn al-‘Aṭṭār, 1983, pp. 359-360 and Ibn Mughith al-Ṭulayṭulī, 1994, p. 308. On these manuals see the introduction in Hoenerbach, 1965.

⁵⁰ A notarized document written in 1495 in Granada provides a glimpse of the *ḥiyāza* contract’s historical significance, especially for females. It was used here in the transfer of property rights to a minor daughter, in a manner which enabled parents to dispossess themselves of a property and then take possession of it on behalf of their daughter still under interdiction. This is done in order to guarantee a smooth transfer of the property after she reaches maturity or in case of their pre-mature death. See Seco de Lucena, 1961, p. 145.

⁵¹ Quoted in Linant de Bellefonds, 1973, p. 367.

⁵² The performance of the *ḥiyāza* is of great importance. None of the acts such as gift, endowment or dowry for that matter, would be valid until a *ḥiyāza* has taken place. This is clearly more than a symbolic act. On the *ḥiyāza* see also Linant de Bellefonds, 1973, pp. 360-367.

⁵³ *Nāzīrs* were appointed in Egypt and *mutawallis* in central Asia, but were mostly

this practice could be cited from contemporary Mamluk Egypt,⁵⁴ or from central Asia where several generations of Anṣari family members continued to hold the *tawliyat* of Mazār-i-sharīf near Balkh, or where the Aḥrārī family managed the Aḥrārī *waqf* in Kābul for generations as well.⁵⁵ Studies of these cases seem to indicate that self management, or the appointment of managers closely connected to the donor have provided good results and better management than the Mālikī practice.

Property rights also need to be secured and defended. The second set of *fatwās* dealing with the *free rider* displayed the problem of preventing an individual from abusing the *public good*, or forcing him to participate in financing it. By far the most common obstacle to the enforcement of property rights encountered in the *fatwās*, it was not unique to the *waqf* institution: Economists refer to it as “classic” in the context of the *public good’s* property rights, but our evidence shows that the access to the *public good* property was so easy that the damage of the *free rider* bore a direct and easily measurable cost to the economic efficiency of the *waqf*.⁵⁶ The *fatwās* show that every stage of the process suffered intervention and interference from individuals who had access to the property, the revenue, or both. Apart from speculating and embezzling accumulated funds left to them to be managed, which was a prerogative of supervisors and custodians,⁵⁷ ordinary people could address the lessees of *waqf’s* property directly, threaten them, use the utensils and the water provided by the installations, take over buildings and building material and abuse the system in every possible way, without adequate deterrence. The chroniclers described numerous examples of managers carrying out major frauds with *waqf’s* revenue, for example the Fezi *khaṭīb* al-Mazdaghī, lost 30.000 gold dinars of the Fez’s *public good* money speculating in wheat for his own account.⁵⁸ The existence of a

appointed by the donor himself attesting to a mutual benefit. For examples from 15th century Cairo, see Garcin and Taher, 1995a, pp. 161, 176. Denoix, 1995, p. 39. Such was the case of the two last Mamlūk sultans. See Petry, 1998, pp. 113-114; Or the two Zuhrawī brothers in 17th century Aleppo, who appointed themselves administrator and supervisor of their endowments. See Salati, 1995, p. 198. On the Ḥanafī practice in central Asia see McChesney, 1991, pp. 13-14, 41-45.

⁵⁴ In addition to the evidence from the sultans’ *waqf* quoted in previous notes, see J.-C. Garcin and M. A. Taher, 1995b.

⁵⁵ McChesney’s, 1991, pp. 248-256. Stephen F. Dale and Alam Payind, 1999.

⁵⁶ North & Thomas, 1973, pp. 6-7.

⁵⁷ As happened in the case of the *khaṭīb* al-Mazdaghī in 14th century Fez, see Shatzmiller, 1977.

⁵⁸ As early as the 12th century, under the Almoravids, the managers of the *waqf* in Fez and Marrakesh helped themselves to the public treasury, recorded by al-Jaznā’ī in his chronicle *Zahrat al-As*. Another major case of a manager’s speculation with the *waqf’s* revenues occurred in the 14th century and recorded by two chronicles. See Shatzmiller, 2000, ch. 5.

large number of *free riders* indicated that the *public good waqf* had no defence against them, because, as an institution, it did not have the appropriate means to do so. Defense of property rights, in this case preventing *free riders* from abusing the *public good*, can be achieved by using ideology through which society instills in its members reverence for property rights, or by the state. Because of the monopoly it held over means of enforcement, the state was ideally placed to defend property rights at a lower cost than voluntary organizations, such as the *waqf*'s donors or *waqf*'s management.⁵⁹

In our case none was available. The ideology behind Islamic philanthropy is given the primary role as the dominant motivation for *waqf*'s making among individuals in the secondary literature. Looking at this ideology as a factor in the economic context, however, reveals its weakness to deter *free riders*. This ideology's hold over the community's members was weak. As the evidence presented here seems to indicate it was ineffective in deterring individuals. Muslims did not view the *public good* property rights in the same way they viewed individual property rights. The idea that the proceeds of voluntary giving would be guarded and shared equally by all, did not convince members of the community to refrain from abusing the *public good*. Whether because of weak ideology, or trust in the helplessness of the system to retaliate, members did not hesitate to engage in practices depriving the *public good* of revenue. The Islamic ideology system provided the legal mechanism to endow for the *public good*, but did not provide strong enough measures to force *free riders*, managers, or even sultans for that matter, to respect the property rights of the *public good* and not to abuse them.⁶⁰

The other factor which could have deterred *free riders* was the state, by defending and enforcing the property rights of the institution. This did not happen in the case of the Mālikī state in the West.

It is not clear at what stage in the *waqf*'s development the Islamic state, as a central administrative power, withdrew from providing systematic support to

⁵⁹ See North, 1981, pp. 45-58.

⁶⁰ A study of the endowments made by the Marīnid rulers of Morocco in the 13th-15th centuries for the public good, revealed that their endowment was individually motivated by a combination of piety and political gain, but was never undertaken by them or by other members of the dynasty in a persistent nor unanimous manner. The assets they endowed were substantial: houses, squares, apartments, stables, public baths, flats, mills, orchards, public ovens, inns, halls, manufacturing stores for weaving and soap making, arable land and food items, and the income they provided went to support mosques, schools, hospitals, fountains and cemeteries, but their management was as insufficient as anybody else. The stand off between Marīnid rulers and the religious milieu in 14th century Fez epitomised this process. See Shatzmiller, 1976.

religious and municipal institutions, or even, whether it ever has.⁶¹ Unlike the medieval European state, the Islamic state enjoyed very early, at least under the ‘Abbāsids if not earlier, a well developed, sophisticated administration, especially in fiscal matters such as tax collection, *dīwāns* etc. However, it neither endorsed nor developed a policy of financing municipal services such as primary education, health or religious services, including mosques.⁶² This task was left in the hands of individuals. When rulers endowed from their own wealth, or used the state’s funds over which they had control, they acted as private citizens. This alienation of the state from acting as an institution, with the idea of supporting municipal institutions, at least in the historical experience of the Islamic state in the West, might well have been triggered by the inherent antagonism between the state and the religious milieu, including the jurists.⁶³ The rivalry between a group of pious, yet strong willed, individuals, armed with ideology, who felt superior to the holders of secular power, did not bode well for the financial future of religious personnel and institutions. The state never returned to support public and religious institutions, instead, when assets and revenue from private endowments grew, it tried to claim a share of the income accumulated in the hands of the *public good waqf*. In the Eastern regions, the practice was different. There the state succeeded in gaining control over revenue and interfering in management, but at the same time also provided defense of property rights. In the case of the central Asian *waqf*, the supervision of the *public good waqf* by the court, was more pronounced and the *waqf* paid taxes to the state.⁶⁴ Voluntary groups incurred higher costs for enforcement than the state and therefore had an incentive to trade with the state, giving it revenue (taxes) in turn for the rigorous definition and enforcement of property rights.⁶⁵

⁶¹ In spite of the abundant local writings dating from the 10th century onwards, the chronological and institutional evolution of the *public good waqf* still eludes us. We understand the legal aspects of the *waqf*’s endowment process and the way it financed the various functions, but we are not fully aware of the origins of the institution, the model which shaped its structure, nor the state’s role in its creation. Most views hold that the existence of an ancient model of charitable bequest in the areas inherited by the Muslims inspired the Islamic *waqf*, or that it was self-generated by independent social and economic forces in the early Islamic world. See Arjomand on possible models and the references cited.

⁶² See article “Maristān”, *EI*².

⁶³ I have documented the tension between the religious milieu and the Marinid rulers in Morocco in the 14th century in Shatzmiller, 1976. Here I clearly take a different interpretation of the role of the magistrates in the Islamic state from the position upheld by Arjomand and McChesney that judges and *mufītīs* were tools of the state. The evidence I presented here does not allow this view.

⁶⁴ Properties which paid taxes before being endowed continued to be taxed, while those which were not did not. McChesney, 1991, p. 46.

⁶⁵ North & Thomas, 1973, p. 7.

This was exactly the situation with the Ḥanafī *waqf* in central Asia, “The state is an acknowledged party to the legal operation of the waqf.”⁶⁶ In 11th century Iran, the *qāḍī* had the power to intervene and make changes to the *waqfiyya*, and the fact that he was in the government’s service could be taken as a sign of the state’s involvement in the operation of the *waqf*.⁶⁷ There are other historical instances of state’s intervention in the East. Under the Fāṭimids and, apparently, under the Ayyūbids, the *dīwān al-ahbās*, or *al-ḥubūs* might have been independent from the main *dīwāns*, but was still administered by the state. It was considered a special category of assets, but its revenue was used for religious purposes, even though from the time of Badr al-Jamālī, in the 11th century, it was also used to pay military salaries.⁶⁸ Yet, in the Islamic West, the patterns evolved differently. Not only did the *qāḍīs* and *muftīs* not act on behalf of the state, they actively opposed any attempt by the state to intervene in the *waqf*’s management. There was a neat separation between the public (*waqf*) revenue and the state and the ruler’s private treasuries. The Mālīkī *waqf* did not pay taxes to the central administration. By the 10th century the *waqf*’s revenue in Muslim Spain, was held in a special treasury managed by the grand *qāḍī* and his agents. It was housed separately, in a purpose built room called the *bayt al-māl*, in the great mosque of the capital, to distinguish it from the *khizānat al-māl*, the public treasury of the state placed within the Ummayyad court itself.⁶⁹ This pattern was transferred to Morocco and was fully in evidence under the Almoravids, Almohads and Marinids, during 11th to the 15th centuries. There too, the revenue of *waqf*, orphans’ deposits and unclaimed inheritance money, were placed in a separate room in the al-Qarawiyyin mosque, the central mosque in Fez where a *qāḍī* or a *khaṭīb*, was in charge of it.⁷⁰ In spite of the *muftīs*’ insistence on maintaining an arms length distance from the *waqf*’s money, individual rulers attempted from time to time to gain access to the *public good waqf*’s revenue. *Fatwās* kept by al-Wansharīsī show that Marinid sultans tried to gain access to the *waqf*’s revenue, even claiming back their endowments, no matter whether or not this revenue came from assets they

⁶⁶ McChesney, 1991, pp. 13-14.

⁶⁷ Arjomand, 1998, p. 117. Based on statements made by McChesney.

⁶⁸ See Cooper, 1974, p. 8.

⁶⁹ Lévi-Provençal, 1953, pp. 71-71.

⁷⁰ The public treasury, *bayt al-māl*, had the right to claim the estate when there were no heirs present. The Malīkī *bayt al-māl*, kept this practice like the one regulated by other schools, and became the legitimate heir to the estates of intestate individuals. See Linant de Bellefonds, 1973, pp. 112-114. Layish, 1983. Shares in the inheritance were claimed, legally or illegally in many instances by representatives of the Mamluk *bayt al-māl*, who were present during inventories of property of dying persons, see Little, 1985, p. 233.

had endowed. The *waqf*'s managers and the jurists fought back, even denying claims that the money was needed for communal services, such as building benches around the mosque for the community, or preparing for the *Jihād*.⁷¹ So, whether the assets were large and numerous and endowed by the sultans and their entourage, or small, nickel and dime *waqf*, endowed by people of little means, their fate was the same: to be managed by the *waqf*'s administration, with the attendant problems. To all intents and purposes, the state's role in enforcing the *public good waqf*'s property rights in the Islamic West was lacking.⁷²

The second set of issues in the conflict ridden *waqf*'s management deals with the lack of institutional arrangements. These were needed when changes took place. One such occurrence was when the *waqfiyya* was lost and the institution had to adjust to the new conditions. In 14th century Fez, a manager was faced with the loss of revenue from land leased to an individual who built a stable on it.⁷³ After the death of the lessee, his children inherited the use of the property and paid rent for it. When the building fell into disrepair, they refused to pay further.⁷⁴ The jurist advised that if no written document, *bayyina* or *iqrār*, which might provide any details of the endowment act or the renting out contract, could be found, they were not liable for payment. A similar case occurred in 14th century Fez, where a store and other unspecified properties were endowed to provide income for an old mosque and a hospital.⁷⁵ The *waqfiyya* was lost and an attempt to build a wooden platform in the mosque came to a halt. Unlike the previous case, however, the jurist ruled that the person in charge should do whatever he deemed necessary, despite the loss of the founding instructions. The loss of the *waqfiyya* in another incident in 15th century Fez, resulted in confusion about what to do with surplus income. This time the income was considerable, and the jurist ruled that half should be used for building expenses and half to provide food for the poor: "If the income is not sufficient for both purposes, then it should go first to provide food because the sick are needy." A jurist from 15th century Tlemcen also agreed to disregard the loss of the *waqfiyya* in a case submitted to him regarding an arable land

⁷¹ See *fatwā* by al-Abdūsī about such a proposal sent to him for decision, discussed in Shatzmiller, 1991.

⁷² Notice how the Egyptian geographer al-'Umarī comment on the little amount of *waqf* in Marinid Morocco, while his contemporary, the Andalusian vizir Ibn al-Khaṭīb, visiting Fez said that its endowments "were numerous". See Shatzmiller, 2000, ch. 8.

⁷³ 7: 44. *Fatwa* by 'Abd Allah al-'Abdūsī.

⁷⁴ Compare with North & Thomas, 1973, p. 6.

⁷⁵ 7: 40 and 7: 83-84 respectively. First *fatwā* by al-Suyūrī, d. 800/1397. Second *fatwā* by Abū 'Abd Allah al-'Abdūsī.

endowed to support a scholar.⁷⁶ The support was halted when it was discovered that the original instructions, including the specifications for selecting a beneficiary, had been lost. In his response, the jurist showed concern for the efficiency and expediency of the process: “To avoid loss of revenue, the best candidate available for the position should be selected”, he suggested, “a change of the existing regulations to a simple legal partnership arrangement should be done. Instead of receiving his share after the threshing of the wheat is completed, he should be able to gain access to it immediately after the harvest”. Even when the *waqfiyya* was available, the instructions were sometimes insufficient, as it was in the case of unspecified property endowed to buy metal edges for the roof of the great mosque in 15th century Taza.⁷⁷ The dilapidated metal edges, which had been endowed some time ago, were useless, and unless repaired, were at risk of being lost. The manager requested that the jurist assume the responsibility of making the decision whether to fix them, because he, the manager, had no power to override the *waqfiyya*. The jurist complied: “. . . the metal edges should be sold, and items of potential benefit to the mosque should be bought with the money . . .”.

Institutional arrangements were also necessary when market conditions changed. Detrimental for economic performance, the results of not having these in place could also be far reaching for the social fabric, as the next *fatwās* will show. Three *fatwās* from 14th-15th centuries’ Fez differ slightly from each other but share a common problem: the decline in revenue affected directly the wages paid.⁷⁸ In the first case, several employees of the mosque, including an *imām*, leader of the prayer, a *mu’adhdhin*, who calls for prayer, a *nāzir*, supervisor, and a *qābiḍ*, a revenue collector, and others, received regular wages. Over the years, as the income from the *waqf*’s properties grew, the *imām* requested a raise and he, along with the other employees, such as the Qur’ān reader, the commentator, and the *ḥazzābūn*, received one. The raise remained in effect until sometime later, when the income declined. Conflict arose when, faced with the dwindling revenue, the manager had to make a decision which service to dispense with, or whether all wages should be reduced and revert to the original state. He asked the *muftī* whether office holders should be dealt with according to seniority or to the utility of their service, or should the *imām* be favoured rather than the *mu’adhdhin*. The jurist decided to maintain equality among the

⁷⁶ 7: 43. *Fatwā* by Ibn Marzūq, d. 842/1438-39 in Tlemcen.

⁷⁷ 7: 52, by ‘Abd Allah al-Abdūsī.

⁷⁸ 7: 5-6. al-‘Abdūsī, Abū Muḥammad Abd Allah b. Muḥammad d. Fez, 849/1445-46, another member of a family who produced *muftīs* for 150 years. 7: 41-42. *fatwā* by al-Yaznasinī, Sidi Abū Ishāq Ibrāhīm b. Muḥammad d. Fez 794/1391. 7: 17-18 *fatwā* by the jurist, Khalaf al-Mālikī.

different employees and, if the wages needed to be reduced, then everyone's should be reduced equally. In the second case a group of *mu'adhdhins* were paid wages from the rent of endowed stores, but the revenue in question was also used to defray other costs relating to the mosque. The *nāzir* increased the *mu'adhdhins*' wages to 70 dirhams a month but paid it out of the surplus from other sources. He also increased their number to seven, even though the mosque traditionally employed only four. However, in the following year the mosque needed repairs to its roof. With financial help from other mosques, the *nāzir* spent more than 300 dinars on this, and refused to give the *mu'adhdhins* their usual supplement. The *mu'adhdhins* took the matter into their own hands, going to the endowed stores and demanding that the individuals renting them should pay them the additional money or vacate the premises. They, the *mu'adhdhins*, claimed that they could use them themselves or rent them out as their right. Some artisans paid up, while others were unable to do so and decided to leave. When no one else wanted to pay the increased rate some of the stores remained unoccupied for some time. The jurist resolved the crisis by retaining only four *mu'adhdhins*, abolishing the increase, restoring the leases to their previous level and paying back the extra money the *mu'adhdhins* had extorted. In the third case, the revenues endowed for the benefit of a *medresa* declined and the beneficiaries, comprising students and staff, a *mu'adhdhin*, a teacher, a servant and a guardian were faced with the question of whether all staff should continue to receive their entire wages, and only the balance be distributed among the students, or whether the declining income should be shared equally among all. The jurist decided that the servant and the guardian were the only ones to receive their full wages. Firstly, because that was how the *wāqif* wanted it, secondly, because the *medresa* depended on their services. The jurist al-ʿAbdūsī who dispensed justice in 14th century Fez, spent much of his time dealing with the *waqf*'s property problems. In the next case he had to decide which of the mosque's services would be affected by the decline in revenue: wages, the amount of oil used, or the number of lamps lit.⁷⁹ The case involved a man who was employed as a "lighter", *waqqād*, in the great mosque for the sum of 12 "small" dinars every month. When he was hired the mosque had 120 lamps but as the income declined, the number of the lamps was reduced to 60 and the lighter received only half his previous wages. He protested, claiming that the number of lamps should be increased so that he could continue to work and be paid as before. The jurist's decision was that only if the original act of endowment specified his wages, and there was an increase in the revenue, would he

⁷⁹ 7: 85-86, by al-ʿAbdūsī.

be entitled to receive his entire wages. If there was no income to cover the increase needed to provide more oil and lamps in addition to paying his full wages, he should be offered the option of accepting the reduced wages, or leaving, and someone else should be hired in his place. The decline in income was caused by too many available stores and houses for rent and since these rents provided most of the revenue for wages and maintenance, the employees were directly and immediately affected by it. How to generate income when the assets endowed no longer produced sufficient income, or no income at all was a dilemma to which some managers responded by implementing an investment strategy. One manager in 14th century Fez, suggested to replace an ablution facility with an inn,⁸⁰ another, to convert a house into a silo in 15th century Fez,⁸¹ yet another suggested the sale of a source of water on endowed land in Taza.⁸² An opening for investment occurred when the Jews of Fez requested permission to dig a canal from the courtyard of the mosque adjacent to their quarter, to supply them with water.⁸³ Given the mosque's fragile state, the structure could be damaged by digging in the courtyard, but the Jews offered to pay for the repairs. Here was an opportunity to benefit the mosque by investing in its foundations and generating some extra income at the same time. However, the manager could not make the decision since he was not sure whether allowing such an action constituted an infraction of the endowment instructions. Following his appeal to the court, the jurist, who saw no contradiction in the

⁸⁰ 7: 57, by al-ʿAbdūsī. The case involved unspecified property, the income of which paid for maintaining two ablution facilities, *dār wuḍūʿ*, for a mosque. One of the facilities became inactive for lack of water, and the *nāzīr* wanted to sell it and buy an inn. The jurist denied permission, saying that as long as there was any chance that water could be channelled to the facility and that it could be reactivated, the property could not be sold nor could an inn be purchased.

⁸¹ 7: 78-9, by al-ʿAbdūsī. An endowed house fell into disrepair but a man wanted to build two silos in it to keep grain. He offered to pay for constructing the silos so they would benefit both the house and the mosque. The earth which would be removed in building those 2 silos, will be used to embellish the house, which would then yield a higher rent. Yet, the jurist refused to allow it, saying: "If you are satisfied that the house does not now, or in the future, need the 2 silos, and if you can rent it in its present condition, you may not improve it without the express permission of the person who made the endowment."

⁸² 7: 88-89. Undated *fatwā* by Muḥammad b. Abd al-Muʿmin. (I am unfamiliar with this *muftī*). A lot endowed for support of a mosque, could not attract occupants. The lot had a source of drinking water on it which the manager wanted to sell separately, but was not sure whether it was permitted for someone to buy the water and use it for another place? "If the share of profit we can derive from the water is neglected and not sold, it will be taken away illegally and become a private property with the passing of time", he said in his enquiry. The jurist's decision was to adhere to the instructions and not allow the sale, even though it contributed to a decline in revenue for the mosque.

⁸³ 7: 52-53, by al-ʿAbdūsī.

offer, allowed it on condition that the Jews repaired and improved the canal. One of the most interesting cases revealed in a *fatwā*, occurred in 15th century Tunisia.⁸⁴ A row of stores was endowed so that the rent would provide for maintenance of the city's walls but a decline in economic conditions resulted in the stores remaining empty for a long time. In the meantime the walls required repair and the security of the city was threatened. The jurist was asked whether artisans and merchants could be forced to occupy endowed stores, so that income could be generated for fixing the walls. The jurist forbade such action.⁸⁵

Other *fatwās* refer to historical events which affected market conditions, such as the advancing Christian Reconquista in Spain. The first was a general question as to who should be held responsible for providing fodder for a horse endowed for the *Jihād*.⁸⁶ The jurist replied that the donor was no longer responsible for the fodder and absolved him from any lingering responsibility. Another *fatwā* from 10th century al-Andalus, provided a decision about the future use of endowments for a fortress, which fell into the hands of the enemy.⁸⁷ The jurist answered that the income should be used to support one of the other Muslim forts in the same manner. A jurist in 14th century Granada was asked about properties endowed in Bijāya to support people exiled from Almeria.⁸⁸ The recipients included a manager and Qur'ān readers, orphans and unmarried young women, and there was also money for dowries for poor girls, lighting of the mosque and maintenance of its coverings, and pious deeds in general. The revenue produced by the endowment was insufficient to finance all these items. Would it be legal to supplement it with income generated in Almeria from properties whose original purpose was not known? The jurist explained that in order to fulfil the mission of a "charitable and a good deed", one is entitled to a share in the revenue generated from assets whose original purpose was unknown. To his mind, revenue whose purpose was no longer known was similar to surplus revenue from assets whose objective was known. He also referred to a decision allowing this solution and implemented by judges in Cordoba. Unlike previous *fatwās*, which were mere consultations, this one referred to an actual court case, where a ruling, *ḥukm*, was issued. The last two *fatwās* come from 14th-15th century Fez refer to changes following the demographic decline in North Africa. This decline which was confirmed by contemporary

⁸⁴ 7: 58, by jurist Ibn 'Arafa.

⁸⁵ The practice of forcing artisans and merchants to occupy stores built by the state has been recorded by chroniclers of medieval North Africa.

⁸⁶ 7: 58, by 'Abd al-Ḥamid al-Ṣā'igh. For a notarial endowment formulary of a horse destined for the *Jihād*, see Ibn al-'Aṭṭār, 1983, pp. 206-07. Clearly, there was a common question which is also dealt by Ibn Juzayy in his manual.

⁸⁷ 7:64, by Ibn Zarb, lived in Cordoba, d. in 381/991.

⁸⁸ 7: 91-92, by Ibn Lubb.

chronicles,⁸⁹ was not seasonal and unlike the yearly market fluctuations, was a new reality which the managers needed to confront. Two *fatwās* described abandoned villages whose inhabitants had disappeared, but their mosques had assets endowed for them, and these were still producing income. The jurist was consulted by the managers about whether the endowments of a mosque in a deserted village could be sold.⁹⁰ The managers were eager to spend it on other mosques, but in both cases the jurists' decision was unanimous: endowments which still provided income should not be liquidated as long as there was hope of resettlement. If there was no longer any chance of that, then the land or the rent from it should go to the Friday mosque, the *jāmi'*, or the next mosque, but under no circumstances could the property be sold. Some of the properties endowed were quite insignificant, nickel and dime endowments, but the problems they caused required just as much attention and time, which bore no relationship to their economic worth.⁹¹ A woman endowed a saw to be rented out to produce income. The saw had remained in one person's house for 12 years, but now it was feared that it might break. The manager asked what to do. He was also confronted with a similar situation, where an endowed room was inhabited, but so run down that no rent could be collected for its use. The manager offered to sell the endowed properties and buy more profitable ones, but first wanted to know whether it was permissible to do so. The jurist advised that it would be better to sell the saw and buy half a house, or a quarter of a store, so that the mosque would receive the rent from it. As for the room, the jurist disapproved of the option of replacing it with a store, or a water cistern, which would yield revenue.

The *fatwās* show that in the scramble to resolve conflicts, both the managers and the jurists turned to the *waqfiyyas*, whose disappearance, absence, insufficiency, loss or vagueness were detrimental to the smooth flow of economic activities. Could *waqfiyyas* or the jurists for that matter, be regarded as agents for introducing institutional arrangements? Judging by the context the *waqfiyyas* could not be seen as supplementing institutional arrangements. Useless in dealing with conflicts, they contributed rather to paralysing the situation. The jurists were better placed to supplement institutional arrangements. They were shown attempting to address problems by encouraging the managers sometimes to ignore the lost instructions, and sometimes to use their common sense. They

⁸⁹ On the demographic decline in the region, see Shatzmiller, 1994, pp. 55-68 where the supporting evidence is discussed.

⁹⁰ 7: 56 and 7: 62. First *fatwā* by al-ʿAbdūsī, second by al-Qabbāb, d. 778/1376-77 in Fez.

⁹¹ 7: 54-55, 7:64. First *fatwā* by al-ʿAbdūsī, second by Ibn ʿArafa, d. 803/1400 in Tunis, friend and sometime rival of Ibn Khaldūn.

recommended the preparation of a budget, with careful accounting to specify the income, the expenses, future needs and anticipated income. They advocated using tools which would favour better management: good record keeping, and quick resolution of problems before they could become full blown confrontation. Why the jurists could step into the role of agents of conflict resolution is clear. Unlike the managers, they felt more confident in the environment through the power of *futya*, legal opinion, given to them. However, their power to institute new arrangements was limited, firstly by the law itself, secondly by the nature of their intervention, which occurred infrequently, non-systematically, on a per case basis, and at a late stage in the development of the particular conflict. Moreover, informed economic decisions need to be swiftly implemented, and, as the *fatwās* show, the necessity of appealing to the *muftī* or *qāḍī* in the absence of arrangements to implement immediate resolutions and informed investment decisions, delayed action by the managers and prevented them from acting immediately as needed. Moreover, the same problem resurfaced again and again indicating that no arrangement was institutionalized. The need to appeal to the jurists to solve disruptions also took up a great deal of time for both jurists and managers, sometimes in no proportion to the anticipated benefit for the community. The managers of the properties and of the revenue exhausted the jurists' time by asking them to deal with questions which were essentially economic, but had to be disguised as legal matters. The large number of *waqf* related *fatwās*, decisions made by numerous *qāḍīs* and *muftīs*, for very similar causes, indicated frequent disruptions and frequent appeals. But it was the social upheaval resulting from the disruption which highlighted the weakness of the institution. Rather than being "the promoter of social interaction and economic integration", the distress caused by the way the institution operated was expressed in the managers' frustration, and in the coercion used by clients in handling the difficult situations, tearing into the social fabric, and pitting members of the community against each other.⁹² The damage to the economic potential of the *waqf* to generate income is also visible. At times the *waqf*'s managers were shown to be aware of how to remedy the situation and willing to engage in other investments, but they were prevented by the lack of power, or tools, in other words deprived of institutional arrangements to affect change. This lack of power to affect change was a great impediment to initiate, and discouraged the managers from taking advantage of the investment opportunities which were available and accessible to private investors. For instance, managers of the *waqf* did not invest the proceeds in trade, speculate in grain,

⁹² Compare North & Thomas, 1973, pp. 5-6.

or conclude investment partnerships, all common investment techniques widely practised at the time by Muslims in the very same regions, where individuals, and family trading houses engaged in these practices.⁹³ Instead, the *waqf* revenue was derived from one source: user fees and rent, whether from land or real estate. This dependence on one single source of income, precluded other investment venues, and was punitive in times of economic decline, if not down right self defeating in terms of the *waqf*'s mandate. The limitation to rent did not protect the *waqf* from risk, instead it condemned it to face new economic conditions with no power to make changes. Again, the contrast with the East is striking, where it was often possible for Ḥanafī *qāḍīs* and managers to effect changes to the *waqfiyyas*.⁹⁴

To sum up, the institutional history of the *public good waqf*, was distinct from that of the family *waqf*, which evolved concurrently. Its institutional behaviour was shaped by several factors, not shared by the latter, chief among them, ideology. It embodied the Islamic ideal of personal piety, of voluntary giving, which was the proclaimed driving force for endowing property to benefit the *public good*. For the individual endowment meant, not only the voluntary rejection (*waqf*, from *waqafa* i.e. to stop, end, arrest a motion) of full ownership, without personal compensation or future say in management or benefits, but also sharing the benefits on an equal footing with the community. Both required a strong ideological motivation. At the same time there was much more to the making of a *public good waqf* than just philanthropy. Endowment for the *public good* had a definite political motivation in many instances, since private and political interests were never far away,⁹⁵ with patronage, ensuring the loyalty of civil and religious clientele, and control of resources outside the inheritance system, all found to have existed.⁹⁶ Yet, more than anything else it was the legal factor, which shaped its institutional behaviour, because it defined and regulated its activities. Thus the performance of the *waqf* hinged upon the fulfilment of two mandates: the first strictly legal, to remove a given asset from private ownership and give it a new legal status, as public property owned and operated by the *waqf*'s administration. The second, economic, to carry out the instructions of the *waqf*'s maker as stated in the *waqfiyya*, efficiently, but essentially to generate income, preserve and manage the asset and prevent its abuse and dilapidation. In this manner the legal and economic mandates of the *public*

⁹³ See entry "Tidjāra" *EI*². (Maya Shatzmiller).

⁹⁴ "In the Ḥanafī manuals current in Balkh in the period of this study there were provisions for sale, exchange, and/or lease of waqf property . . .", McChesney, 1991, p. 13.

⁹⁵ On the Islamic view see Arjomand, 1998.

⁹⁶ For two cases see Marcus, 1985, p. 123 on Aleppo, and for Fez, Shatzmiller, 1991.

good waqf were intertwined, mutually dependant and influential. Despite the clearly defined mandates the evidence discussed here shows a *public good* institution whose economic performance was flawed. Problems were expressed in two ways: in procedure, the everyday operation of the system was conflict ridden and prone to come to a halt; and in lack of economic growth. The *fatwās* show institutional behaviour resulting in loss of revenue, confusion, interruption of work, increased costs, declining revenue or no income at all. The returns for both the institution and society, were at best insufficient and in many instances completely absent. In the long run the compounded structural problems resulted in the liquidation of the assets and the failure of the institution to carry out its institutional mandate, to support religious, municipal and scholarly life and institutions. The causes could be traced back to several issues, primarily, insecure property rights and lack of institutional arrangements. Here the legal system, which defined and regulated the *waqf*, failed to provide adequate institutional arrangements, while its ideology and the state, failed to enforce the *public good* property rights. Nonetheless, the *fatwās* examined were Mālikī and the way the Mālikī *waqf* developed in the Islamic West diverged from the way it developed in other regions. This might have had a direct impact on its institutional economic performance.

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