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The Idea of Charity - a case study in continuity and flexibility of an Islamic Institution

War bis vor einigen Jahrzehnten noch die Vorstellung vorherrschend, daß das islamische Recht und damit die islamische Zivilisation, zumindest bis zum 19. Jahrhundert, starr, stagnierend und uniform gewesen sei, so wird seither zunehmend die Dynamik und Flexibilität des Rechts und der Kultur im Islam betont. Doch diese Feststellung ist inzwischen auch wieder zu einem Cliché geworden, das wenig zum Verständnis des zentralen Problems der Beziehung zwischen Kontinuität und Wandel in der islamischen Welt beiträgt. Im folgenden Aufsatz wird der Zusammenhang zwischen Kontinuität und Wandel an einer besonderen islamischen Institution, dem *waqf*, untersucht: 1. Innerhalb des rechtlichen Kontextes. Hier konzentriert sich die Diskussion darauf, wie Konflikte zwischen dem wagf-Recht auf der einen Seite und sozio-ökonomischem Druck auf der anderen gelöst wurden; 2. Im Rahmen der Interaktion zwischen privatem und öffentlichem Bereich. Hier liegt der Schwerpunkt auf der Rechtsprechung innerhalb des *waqf*; 3. Im Rahmen des ideologischen Kontextes. Hier steht die Definition der Idee der Wohltätigkeit und ihre praktische Umsetzung im Mittelpunkt der Diskussion.

The subject our study group at the Wissenschaftskolleg has been trying to tackle in the course of the year was defined as »The History of Traditions: Continuity and Affirmation of Traditional Institutions in the Middle Eastern and North African Society and Culture, 1750-1950.« One of the basic problems encountered during our group's discussions was that of the nature of change in Islamic civilization. In the course of the past few decades the idea, which had been very common in the literature, that Islamic law, and therefore Islamic civilization, at least until the 19th century, was rigid, stagnant, uniform, has been giving way to a more dynamic notion, emphasizing the flexibility of Islamic law and culture. To a large extent, however, this notion too has become somewhat of a cliché. To be sure, there are a number of studies in which an attempt has been made to come to grips in a more meaningful way with the notion of flexibility. Most of these studies focus on Islamic legal theory and try to show in what ways certain laws could be and were circumvented or supplemented in the course of the centuries. My approach will be somewhat different. I believe we stand a better chance of coming to grips with these terms, of understanding the limits of flexibility, its components, its nature, by examining their expressions in a specific context - that of one institution and one idea.

The *waqf* – the Islamic endowment institution - is particularly well-suited for such an attempt. It allows us to examine the questions of flexibility and continuity in three main contexts: the legal context of *waqf* laws; the context of the interaction between the private and public spheres and the ideological context.

The following is an outline, briefly summarizing preliminary results of the examination of the above mentioned points. The discussion will, in the main, be situated in the pre-modern period and in the Ottoman universe. In other words, most of the examples relating to the actual administration of endowments, social, economical and political aspects of the endowment system, will be taken from the Ottoman Empire, roughly from the 17th through the 19th centuries. In terms of *waqf* law, I shall focus on the Hanafi school - one of the four orthodox sunni schools of law - which was adopted by the Ottomans and became the official school of law in their Empire. I shall not deal with the radical reforms of the endowment system undertaken, in the course of the 19th and 20th centuries, either by colonial rulers or by some of the modern Middle Eastern states.

The legal context: continuity and flexibility in conflicts between principles and socio-economic pressures.

From amongst the many rules governing various aspects of the Islamic endowment system I shall deal with one topic only: the rule of inalienability of *waqf* assets and the solutions, incorporated into the law, to socio-economic problems raised by a strict observation of this rule.

Contrary to other property, which can be sold, mortgaged or otherwise disposed of freely by its owner, an asset made *waqf* is by definition inalienable *(waqafa* = to freeze, make inalienable). It is the inalienability of *waqf assets,* that is, their exclusion from commercial transactions which clashes most conspicuously with normal economic activity.

The rule of inalienability of *waqf* assets stems from one of the fundamental principles of Islamic endowment - its perpetuity or permanency - which, in its turn, should be traced to the close relation between the idea of charity and religion. In Islam, this relation is construed as follows: charity is recommended to the Muslim as an act which is apt to bring him closer to God and secure his reward in the life to come. The permanency of the reward is conceived of as dependent on the continuity of the good deed on earth. Hence the importance of the permanency or eternity of the endowment.

The original connection between charity and religion is common to many civilizations. So is - in one way or another - the idea of life beyond

death, as well as the close relation between man's acts on earth and his fate in the other life. It is, therefore, not surprising to find that the Islamic endowment system shares both the principle of permanency and the rule of inalienability with endowment systems in other civilizations.

In a comparative study of the Islamic *waqfwith* endowment systems in other civilizations, carried out by the late Gabriel Baer, the idea of permanency was found to have prevailed in the Jewish *heqdesh,* the Greek and Roman foundations, the Christian Church foundations both in the East (the *piae causae)* and the West, even in secular foundations in European civilizations - the *Fideikommiss* or entail - the Anglo-American charitable trusts which developed from the English »use,« the Brahman endowments and the Nepalese *guthi.* Typically the only clear exception was the Buddhist system of endowments, since Buddhists do not believe in eternity or permanence. As a corollary to permanency, inalienability was the rule in many of these endowment systems as well. The results of the cross-cultural investigation showed, however, that endowment systems in other civilizations were more flexible in many ways than the Islamic *waqf* in terms of both the perpetuity and the inalienability principles.

On the face of it, *waqf law* indeed remained inflexible on both these issues. Under Hanafi law, in its practice according to Abü Yüsuf, no temporary *waqf is* considered valid. The perpetuity element of the endowment must be clearly and unequivocally established. All *wagfs* are inalienable in principle, and hence cannot be sold or mortgaged.

However, I believe it would be wrong to conclude that Islamic law was rigid in this respect, or that Muslim jurists were either insensitive to social and economic requirements or did not try to face practical problems and provide for solutions.

Just as in other civilizations, perpetuity and inalienability of *waqf* property clashed with some basic economic requirements. The need for space re-allocation as a result of the expansion of towns, growth of the market, changes in market orientation, the construction of water-systems, roads and other improvements - were all incompatible with a strict application of the inalienability rule. The problem became particularly pressing in view of the enormous proliferation of endowments which, in the course of time, covered a quite considerable proportion of all kinds of estates in towns as well as in the countryside. Moreover, *waqf* property was not more, and many believe much less immune to normal delapidation processes resulting in many assets having been run down and standing in ruins, but still inalienable.

Waq f law provides for two ways of dealing with the conflict between the principle of perpetuity of endowments and its corollary - the rule of inalienability - and the socio-economic difficulties they raise:

a) long-term or perpetual leases;
b) exchange - in kind or for money - of *waqf* assets.

A detailed examination of the stipulations of the law governing these two contracts is outside the scope of this paper. Suffice it to say here that these contracts, which were permitted in exceptional cases only, allowed for full or partial transfer of *wagf property,* which was certainly not in line with strict observation of the inalienability rule. However, in all cases permanency of the endowment was maintained, some would say fictitiously. Practical solutions were, thus, made to cohabit with principles, achieving both flexibility, dictated by economic pressures, and continuity of the system and the basic principles of the law.

2. Flexibility and continuity in the interaction between the private and public spheres.

Another important component of flexibility is related to the distribution of jurisdiction and competence between *shari* – sacred or jurists' - law and courts on the one hand and extra-shari rules and regulations enacted by the political authorities and exercised by them or by bodies or persons to whom they delegated their powers, on the other.

This division ensued from the development of sunni legal doctrine and the legal practice of the Islamic state from the stage in which the realm of the *qâd i* was restricted to *shari a* law, at the beginning of the Abbasid period (roughly the middle of the 8th century). Right from the formative period of Hanafi law onwards, the political authorities were vested with the trusteeship of what is known as »the claims of God« *(huqûq allah).* These included the protection of the interests of religion and state, that is, the overall public order and interests of the Islamic community, sometimes referred to as the sphere of public law. Already in the classical period, Hanafi jurists recognized the need to concede a measure of discretion to the political authorities, which alone could enable them to fulfill their task as guardians of »the claims of God.« This recognition was embodied in the principle of *siyâsa* – political considerations - which was then incorporated formally into the *shari°a* and termed *siyâsa shar`iyya.* This concept and the idea behind it were described by Coulson as a system of government, whereby the ruler was »bound to give effect to the general purposes of God for Islamic society« and which granted the ruler »an overriding personal discretion to determine, according to time and circumstances, how the purposes of God for the Islamic community might best be effected.«

The realm of the jurists was that of the »claims of men« *(hugaq al-`ibâd)* and in practice their sphere of interest, and usually of competence as well,

was in the main: family law, inheritance, civil transactions and injuries and the *wagf.*

As Baber Johansen has pointed out, this division of jurisdiction found expression in the jurists' manuals as well where the focus is, in a very pronounced way, on »the claims of men;« the sphere of »the claims of God,« apart from worship, hardly being dealt with if at all. In this last sphere, *shari*^{c}*a* law defined no more than a very general outline of what ought to guide the activities of the political authorities. Within this very general framework, room was left to variations according to time, local conditions or other considerations of raison d'état.

The division of jurisdictions and the principle guiding it - *siyâsa* – are certainly among the most notable components of the flexibility of Islamic law and civilization. The Muslim endowment institution is a particularly convenient subject for a closer look at the nature of this particular component of flexibility. Since it comprises both endowments for individuals and for charitable purposes serving the general public interest, both »the claims of God« and »the claims of men« are represented in the *waqf* Moreover, both spheres are combined in one and the same institutional framework and subject to one legal system.

The public and private spheres are represented in the two types of endowments. Under *waqf* law, a founder of an endowment is free to determine the identity of beneficiaries of the endowment. He may designate a succession of beneficiaries, the primary and intermediary of whom are either specific members of his family (according to Abü Yüsuf he may even designate himself as the first beneficiary) - the endowment will then be described as *waq f ahl i* – family *waqf,* or a charity of his choice, for example, the poor. In this latter case the *waqfwill* be referred to as *waqf khayri* – charitable *waqf* It is important to note that until the 20th century these were descriptive terms only, not two different legal types.

However, families were not conceived of as permanent. In order to ensure the perpetuity of the endowment, the ultimate beneficiary of any *waqf* had to be the poor or a charity of an equivalently permanent nature. A *waqf* which did not include this element was invalid. Thus, every *waqf* deed had to have a charitable *(khayri)* element in it.

In practice, many if not most endowments established by the rank and file in the Ottoman Empire in the 18th to 20th centuries were indeed family *waqfs.* However, families died out at one stage or another, and, in the course of time, many properties - large parts of the real-estate in many towns - found their way to some of the ultimate charitable *(khayri)* beneficiaries of originally family *awgâf.*

Wagflaw gives the founder freedom to indicate as an ultimate beneficiary a charity of his choice. However, at least for a very large number of family endowments, a tendency seems to have developed to select the

ultimate charitable beneficiary from amongst a small number of alternatives. These were large mosques, mainly the principal mosques in many towns, some famous institutions of higher learning, famous local mystical establishments, the poor, the holy places of Islam - the al-Agsd mosque in Jerusalem and especially the poor of the Haramayn - Mecca and al-Madina. Some of these charitable *(khayri)* beneficiaries thus accumulated enormous wealth in the course of time and became institutions in their own right.

As already indicated, all *awgâf* were subject to one and the same *waqf* law. However, although the existence of institutions controlling a large number of endowments naturally called for specific regulation, one would look in vain, even in a *waqf manual* of the last decades of the 19th century, for a systematic treatment of problems raised by their existence. There are no special sections dealing with such institutions and only on rare occasions would one find reference to them. One of the most conspicuous *lacuna* concerns the question of appointment of administrators to these large institutions. As a rule the founder is free to appoint a succession of administrators to the endowment. When a stage is reached where no adminstrator is provided for in the endowment deed, the *qâd i* is the one with whom the decision rests. Although the question of administration, the duties of the administrator, the limits of his freedom of action, cases in which he can be dismissed, instances where the *gâdl* intervenes - are all meticulously laid down in the manuals, no mention is made of the procedure for the appointment of administrators to some of the largest and most prosperous endowment institutions. Indeed, reading through the manuals one gets the impression that there was no difference whatsoever between the family stage of *awgâf* and the charitable *(khayri)* stage in as far as the appointment of their administrators was concerned - in both cases they were appointed either by the founder or by the *gâdi*. This seems to have been the case for small mosques and other small charitable establishments built and provided for by one individual. It was, however, not the case for the larger mosques, for a number of other charitable establishments, and certainly not for the most prosperous endowment institutions.

Once they reached their charitable *(khayri)* stage, all endowments whose beneficiary was one of these institutions were lumped together to form the patrimony of that particular institution. The entire patrimony, composed of a large number of individual endowments, was then administered as one unit, neither the individual founders nor the *qâd 1* having a voice in the choice of the administrator. In fact, these institutions were administered in one of several ways, all securing the political authorities at least a voice in their administration.

In some cases the political authorities exercised direct control over at

least the largest *wagfinstitutions* by creating special governmental offices to administer and supervise them. For example, the Haramayn offices in the Ottoman Empire prior to the 19th century administered imperial and other large endowments.

In other cases control by the political authorities was exercised in less direct ways. Rather than being supervised by a special governmental office dealing with various sorts of *awgäf,* many charitable and religious institutions had their own separate administrations. The political authorities secured control of these endowments by reserving to themselves the prerogative of appointing administrators or at least endorsing them in their position. These administrators were chosen from amongst three types of people:

a) Descendents of the founder, as was the case with various mystical establishments;

b) `Ulamd[3] – men of higher religious education - who administered such institutions ex-officio. For example, the administration of endowments for the Great Mosque of Algiers was, as a rule, entrusted to whoever held the position of Maliki *mufti* (legal advisor) of the town;

c) Individuals who were appointed to these positions because of their connections with the government and/or their prominent position within the local population. For example, the governing body of the endowments for the poor of Mecca and al-Madina in Turkish Algiers, was composed of two members of the Turkish military ruling class and two local people, all appointed by the government.

The measure of actual control by the political authorities over appointments and therefore over the endowment institutions varied, of course, according to time and place. However, the fact that none of these appointed individuals had any legally defendable right to the administration assured for the political authorities an instrument with the help of which they could, at will, either loosen or tighten their grip over endowment institutions.

The political authorities intervened in yet another area of the administration of some of the large endowment institutions: the distribution of their income. It is one of the basic rules of the waqfinstitution that income from the endowed property should be distributed according to the founder's wishes as stipulated in his endowment deed. Thus, the only legitimate beneficiaries of the endowment for the poor of Mecca and al-Madina were indeed the poor of these two cities. However, they actually received only part of the income of these endowments in Algiers. Decisions as to the sums to be sent to the two cities from Algiers, just as those concerning the disposal of the remaining sums, rested with the government of Algiers. In this case, just as in the case of endowments for the same purpose in Istanbul, some of the income was transferred by the

government to meet public needs other than those of the poor of the two holy cities.

Thus, some of the largest endowment institutions differed from regular *awgâf in* two important respects: the appointment of their administrators and the distribution of some of their income. It thus seems that the general division, characteristic of Islamic law, between the two spheres of the »claims of men« and the »claims of God«, as well as the principle of *siyâsa shar`iyya* operated within the *waqf* institution as well. The large charitable institutions by their very nature could rightfully be classified within the realm of public interest of the Islamic community - the »claims of God« - as indeed some of them, like the Friday mosques, explicitly were. As such they, or at least some aspects of their administration, were outside the purview of *shariʿa* law. These aspects were omitted from the manuals of *waqf* law as they came under the jurisdiction of the political authorities whose prerogative it was to regulate them according to the interests of the Islamic community, that is, in an ad hoc manner determined by considerations of time and local circumstances.

These special characteristics of the large endowment institutions did not, however, place them outside *waqf* law. Neither, until the 20th century, did they bring about the creation of two different legal types of endowments. Thus, in all respects, except for the two mentioned above, the assets making up the patrimonies of the large charitable *(khayri)* institutions were run according to the stipulations of *waqf law:* They were non-negotiable in principle, the rules governing the leasing of *waqf assets* were applied to them, all transactions such as exchanges or perpetual rents were subjected to normal wagfregulations and were performed after investigation and on special legal authorization.

Flexibility, allowing for considerations of raison d'état and based on the principle of *siyâsa shar' iyya* thus cohabited with the unity of the endowment system and the continuous preservation of its fundamental principles.

3. Elements of flexibility and continuity in the idea of charity.

From its very inception, the *waqf was* conceived of as a charity, as can be seen from the very early terminology attached to it: *sadaqa mawqûfa* = a frozen charity = which preceded the abbreviated term *waqf* Although charity could be exercised in various ways, e.g. by means of a gift either in the course of a man's life or from that part of his inheritance which he was free to dispose of, the great bulk of charity was actually exercised through endowments and was institutionalized in the endowment system. The institutionalization of endowments called for a defini-

tion of the idea of charity, that is a definition of what was considered a charity and thus a legitimate beneficiary of a *waqf.* A valid purpose for the benefit of which one could endow the income or produce of one's property was defined as anything which was apt to bring the founder nearer to his God. It was expressed by the Arabic term *qurba.* This is obviously a very broad definition, encompassing a very wide range of valid purposes of endowment. It allowed for the inclusion of family members, freed slaves and other individual Muslims as primary or intermediary beneficiaries of an endowment. Establishments which could be considered as serving the general interest of the Islamic community, or a specific part of it, a group of people, like the poor in general or of a certain community, a crafts' guild, even a group of animals, provided the definition included an element of permanence - were all valid ultimate purposes for whose benefit one could constitute a *wagf.*

The flexibility inherent in a very broad definition, allowing for a large measure of variety and diversity is, thus, characteristic of the ideological context of our discussion. If flexibility in the former contexts originated in a need to come to terms with economic or political requirements, the flexibility inherent in the idea of *qurba* ensued from the most basic conception of Islam which, from its inception, never conceived of itself as a religion regulating the sphere of worship only, but as a political community guided by and devoted in all spheres of human activity to Allah. Care for the general interest of the Islamic community, just as for a particular family member, could and indeed were thus equally considered as acts apt to bring a Muslim nearer to Allah.

Besides the care for a family or other individuals, a great variety of what we may refer to as public services was in fact supported by endowments. This included religion, education and learning, and welfare, but also political and economic purposes such as colonization, urbanism, economic infrastructure, and was common practice not only in the Ottoman Empire, but in many other parts and periods of Islamic history prior to the 20th century as well. In many cases endowments for these purposes were either made by the rulers and their entourage or encouraged by them. The broad definition of charity in Islam made it possible to include all these services within the endowment system. It did not, however, dictate this enormous proliferation of endowments. The fact that it actually took place, and, in particular, the role played by the political authorities in upholding the system and supporting it therefore calls for an explanation on the historical level.

I believe that the main explanation lies in the fact that the *waqf* system was particularly well-suited to the requirements of a patrimonial, premodern system of government.

1. Support of endowments for various Islamic purposes was of a nature

to enhance the position and prestige of a Muslim ruler as the upholder of the sacred tradition binding the majority of the population, thereby securing their loyalty to the ruler.

2. As we have seen, many of the endowments accumulated in the prosperous *waqf* institutions were established by the rank and file. Although many of them were originally family endowments, they eventually found their way to their ultimate charitable *(khayri)* beneficiary. Economically this meant that through the *waqf* system the political authorities succeeded in mobilizing capital from the population for the support of various public purposes without resorting to additional taxation and by perfectly peaceful means. This, of course, eased the government's financial burden.

3. The role of the political authorities themselves in the great proliferation of endowments should, I believe, be understood in terms of the financial system prevalent in many pre-modern states, and certainly in the Ottoman Empire. Instead of a budgetary system, the common practice of meeting expenses was rather to allot revenue from specific sources to cover specific expenses. Just as many of the senior officials of the state and of the Ottoman army officers were granted the right to taxes from particular lands instead of a salary (= the *timar* system), or the special taxes of non-Muslims of certain localities were allotted to cover specific expenses, so were expenses for particular public services - be it a mosque or a water-system - met by establishing endowments by the rulers or their retinues, that is by assigning to them specific sources of income.

4. Some of the components of flexibility discussed above enabled the Islamic political authorities to make extensive use of the endowment system without, however, incurring some of the risks inherent in a patrimonial system. Thus, contrary to what happened in the case of the Christian church, the broad scope the idea of charity acquired in Islam was not conducive to the creation of an independent economic basis for a rival political power. It was the control over many of the larger endowment institutions which enabled the political authorities in Islam to prevent a similar development. Moreover, control of appointments to the administration of the large *waqf institutions* served the Islamic rulers as a political regulatory instrument. By manipulating appointments to the administration of these institutions, the loyalty of important sectors of the population - *`ulamâ':* local notables, etc. - could be secured.

5. By having recourse to the principle of *siyâsa* the political authorities were able to transfer funds from a prosperous *waqf* to a needy one, thus securing the proper functioning of the various public services supported by endowments.

6. The components of flexibility in the *waqf law* – making it possible to meet economic requirements through exchanges or long-term leases and

yet preserve the permanency of the endowment - prevented the *waqf* system from becoming a serious obstacle to socio-economic development on the one hand, and made it possible to maintain the intrinsic religious nature of the institution on the other.

It was when some of the modern Islamic states transformed their administrative system, assuming direct responsibility for the upkeep of public services and resorting to modern budgetary policy, that charity was reduced to the nature of the exceptional act of individuals that it has in the Western World. Just as it owed the exceptionally broad scope it acquired in practice in the Islamic World to its instrumentality for the political authorities and their system of government in the past, it was the change of the system of government which dictated the limiting of the scope of the idea of charity to is present dimensions. It was the flexibility inherent in the concept of *qurba* – nearness to God - as well as the division of realms of jurisdiction in Islamic law and above all the principle of *siyâsa* - discretion left to the ruler - which made both these developments possible.

Bibliographical Note

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