

***Waqfs* and the Dynamics of Muslim Charity in Secular Milieus, Kenya 1900-2010**

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Abstract

Waqfs (religious endowments) were the mainstay of a plethora of beneficiaries evolving to a socio-economically secure constituency of Muslims. Secured of socio-economic well-being, beneficiaries threatened and often advocated for social and political positions independent of and in opposition to political establishments. This saw the creation of state agencies to control *waqfs* as evident in both Muslim and colonial powers. State agencies did not, however, annihilate *waqfs* as envisaged but beneficiaries diversified into alternative charitable activities as provided by the Shari'a. Using James C. Scott's concept of 'symbolic resistance' and Talal Asad's view of Islam as a 'discursive tradition', I argue that use of uncontrolled charities like sadaqa and private trusts in Kenya's secular milieu does not only accord Muslims the wherewithal to negotiate the socio-cultural and economic spheres, but also provide a means to fulfilling religious obligations outside the purview of the state.

Keywords: *Waqf*, resource control, symbolic resistance, private trusts, discursive tradition.

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Introduction: *Waqfs* and State Control in the Muslim World

Waqf consists of a revenue-generating or revenue-consuming property endowed for a specific pious purpose. The property is held in trust by a *mutawalli* (custodian) appointed by the *waqif* (endower) who directs its usufruct towards the set objectives for eternity (Barnes 1986; van Leeuwen 1999; Hennigan 2004). The institution of *waqf* lies somewhere between the Islamic law of *mirath* (inheritance) and *sadaqa* (charity) where the dedicator permanently gives out a section of his wealth that though its corpus remains inalienable, benefits are directed to predetermined causes. This gives us three distinct types of *waqfs*: *waqf awlad* (also *ahli*, or *dhurri*, posterity) for the economic and social security of the endower's progeny; *waqf khayri* (public or charitable), for the socio-cultural welfare of the society; and *waqf mushtarak* (mixed) that caters concurrently for posterity and public causes at agreed ratios (Hoexter 1995:140-141; Deguilhem 2008; Oberauer 2008). Consequently, *waqfs* catered for a wide range of social welfare services in the community including the socio-economic security of the endowers' descendants, education, religious institutions, and provision of water and health care outside the purview of political establishments. It is these inherent privileges that made *waqfs* to be perceived as invaluable platform for autonomous groups to coalesce into a constituency that could advocate for socio-cultural and economic interests of its members in opposition to the political establishments. Carmichael (1997:209) observes:

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

Although the context in the above observation was on the British colonial government in Kenya as shall be discussed herein, it could rightfully apply to several scenarios where the management of *waqfs* is seen as an avenue for exerting socio-economic and political power (Powers 1989; Burr & Collins 2006).

Along the East African coast, and Kenya in particular, the institution of *waqf* dates back to the eighth century when Islam was introduced in the

region. As an Islamic socio-cultural practice, *waqfs* were consecrated, mediated, and managed by and according to the Shari'a and the office of the *mutawalli*. The *kadhis* (Muslim judges) and '*ulama* (clerics) on their part, provided the interpretative insights on how endowers could achieve their set objectives of helping humanity as well as attaining *qurba* (divine closeness) and *sawab* (divine merit) apart from adjudicating disputes on *waqfs*. This is premised on the fact that the Shari'a, and *kadhi* courts for that matter, had largely been in existence in the region as an integral part of the Muslim judicial system long before the coming of the British colonial authorities (Sperling 1988; Anderson 2008; Stockreiter 2015).

As a legal administrative and dispute resolution institution, the Muslim judiciary encompassed all matters of the Shari'a. Muslim courts have historically no precedent of legal jurisdiction over issues affecting the society based on the nature of disputes. No separate courts for commercial disputes or civil litigation different from family law are recorded to have existed in the history of Islam (Powers 2011; Layish 1997; Reiter 1996). As far as *waqfs* are concerned, some commercial transactions like '*ana* (lease), *hikr* (rent), *istibdal* (exchange or sell), and *tasrif* (intra-*waqf* borrowing), are beyond the mandate of *mutawallis* and could only be sanctioned by the *kadhis* (Makdisi 1981; Cattan 1984; Sanjuan 2007).

Therefore, based on their position in the institution of *waqf* as interlocutors of Islamic knowledge and authority, *kadhis* and '*ulama* had control not only over economic and socio-cultural resources, but also a wider constituency of the socio-economically secure Muslim beneficiaries making them potential antagonists of colonial and Muslim political establishments. 'During the 19th century, however'. writes Powers (1989:538), 'the religious scholars came in to conflict with Muslim and non-Muslim rulers who wanted to weaken' their power by gaining access to *waqfs*. This saw the establishment of *diwan al awqaf* (departments or Ministries of Imperial *Waqf*) and civil guidelines to control the institution with personnel appointed by the state among collaborating Muslims (Kozlowski 2008; Powers 1989). This was replicated from the Abbasid Caliphate (A.D. 750-1258) to the Ottoman Empire (1299-1923); from the French Algeria, Syria and Lebanon, to the Italian colony of Libya (1911-1941), and the British East Africa Protectorate (1888-1963), India and Palestine (Deguilhem 2008; Medici 2011).

Since the establishment of secular policies and state agencies to regulate *waqfs*, life in the institution became a constant negotiation between

different actors for the control of economic, social, political, and symbolic privileges associated with such properties. This paper seeks to highlight such negotiations between the state secular-based policies and the institution of *waqf* among Muslims in Kenya. Figures from the Kenya National Bureau of Statistics (KNBS) derived from the 2009 National Population and Housing Census puts Muslims at 11.2% of the 38 million Kenyans². Moreover, predominant Muslim regions, according to the survey, fade significantly against their Christian counterparts in socio-economic and cultural development predating the political (both colonial and postcolonial) (dis-) engagement with the community. Characterized by conflicting and competing socio-ethnic and jurisprudential affiliations, clearly, Muslims are a minority and marginalized group in a predominantly Christian society where *waqfs* are administered by a state body, the *Waqf* Commissioners of Kenya (WCK), through secular statutes like the *Waqf* Commissioners Act (1951). To what extent did secular policies and decisions by the civil institutions influence the development of *waqfs*? And how do Muslims negotiate these secular policies and civil constructs vis-à-vis the practices of *waqfs*? The answers to these questions concern the central focus of this article informed by ethnographic research grounded on two theoretical frameworks - Scott's concept of 'ideological (also symbolic) resistance' and Talal Asad's concept of 'Islam as a discursive tradition'. The article argues that state control of *waqfs* in Kenya interfered with normative precepts causing the loss of control of resources and socio-cultural privileges associated with the practice among Muslims. Consequently, a cross section of Muslims exited from the state controlled *waqfs* to uncontrolled charitable practices such as *zakat* (alms), *sadaqa* (charity), private trusts, and community based organizations provided by the Shari'a. This development did not only help them retain control of resources and socio-cultural power but also fulfill the religious obligation on charity.

² Several sources, however, contest the KNBS figures to give varied estimates of the Muslim population ranging from 8% to 25%. See KNBS, Population and Housing Census, Nairobi, 2009. Available at: file:///C:/Users/USER/Downloads/Volume%20Population%20and%20Household%20Distribution%20by%20Socio-Economic%20Characteristics%20(1).pdf. (Accessed on April, 2016); Oded (2000); Ndlovu (2014).

Judicial Space Control: Secular Policies and Civil Courts' Judgments Influencing *Waqfs* in Kenya Since Colonial Times

According to Mann and Roberts (1991), 'law formed an area in which Africans and Europeans engaged one another - a battleground as it were on which they contested access to resources and labor, relationship of power and authority, and interpretations of morality and culture' (quoted in Mwa-kimako 2011:332). This observation aptly describes the East African Protectorate milieu, first by the British colonial authorities and inherited by subsequent postcolonial regimes, where various legislative and civil judicial undertakings led to the control of *waqfs* as 'economic capital' (Bourdieu 1986:241; Mahr, Harker, and Wilkes, 1990) by the state. The Protectorate, a narrow coastal strip stretching only ten miles inland from the coast, from Vanga in the south to Kipini in the north, was part of the Zanzibar Sultanate administered according to the Shari'a different from the predominantly Christian upcountry Kenya colony (Hailey 1979; Carmichael 1997; Eliot 1996).

Until the establishment of the Protectorate in 1897, there was neither a legal body in-charge of *waqfs* nor separate court that adjudicated disputes related to the properties. Whereas litigation pertaining to *waqfs* fell under the jurisdiction of the Shari'a courts, management of the properties resided with *mutawallis* as required by normative traditions (Powers 1989; Hennigan 2004; Stockreiter 2015). Upon establishment of the Protectorate, however, the British colonial government established a wide range of secular policies and civil institutions to control resources, establish capitalist economy and consolidate political hegemony. These policies effectively restructured traditional institutions impacting normative precepts on *waqfs* in the region.

First was the East African Order in Council (1897) that re-organized the judiciary in two categories of 'Native Courts'. The first group was composed of the High Court, the Chief 'Native Court', Provincial Courts, District Courts and Assistant Collector's Courts. Presided by a British judicial officer, these courts were guided by the Indian Civil Procedure Code (CPC) and the Indian Penal and Criminal Procedure Codes (PCPC) introduced in the region. The second category consisted of the Shari'a courts and Court of local chiefs (African local courts) presided by a native authority, but also guided by the CPC and PCPC as well as the native laws or customs existing in their respective jurisdictions (Anderson 2008; Hashim 2005; 2010). This categorization enabled the British colonial government to closely supervise the

‘native courts’ and more significantly, vet their legal decisions since they lacked appellate powers. In other words, the courts presided by ‘native juriconsultants’ lost their independence to those presided by British judicial officers. Bang (2001:59-98) observes that ‘native courts’ were retained in the peripheries of the judiciary framework mainly to sanction and implement reforms initiated by the British administration and in the worst case scenario, interpret and apply Shari’a as understood in the British lenses. This led to the application of what Schacht (1982:94-96) describes as ‘Anglo-Mohammedan jurisprudence’ in the region.

The control of ‘native courts’ by the colonial government through foreign judicial principles adequately fits what Bourdieu (1985:16-71) regards as negotiations for the field – a ‘social space of objective relationships’ where infinite amount of daily life and interactions of social agents take place. In the case of the Protectorate, the judiciary became a field in which Muslims and the British colonial government contested access to control of economic and symbolic resources associated with the institution of *waqf*. *Kadhis*, the ‘*ulama*, *mutawallis*, and the British colonial officers, were merely agents in these struggles. On the other hand, close supervision of the judiciary by the British colonial government and insistence that it dispenses justice based on non-Islamic principles amounted to ‘symbolic violence’. This is the ‘gentle, invisible violence, unrecognized as such, chosen as much as undergone, that of trust, obligation, personal loyalty, hospitality, gifts, debts, piety, in a word, of all the virtues honored by the ethic of honor’ (Bourdieu 1990:127; Bourdieu & Wacquant 2004:272-274). In this context, Muslim *kadhis*, who were mainly Arabs neither adept in English judicial practices nor English language in which the foreign judicial guidelines were expressed, were obliged to comply with the new order as a matter of official code. This was a clear deficiency in ‘cultural capital’ on the part of the *kadhis* that the colonial government of the time exploited in their control of the judicial field, and by extension, the legislations on *waqfs*.

The Mohammedan Marriage Divorce and Succession Ordinance of 1897 was another statute that further restricted the jurisdiction of the Shari’a courts. This Ordinance limited the jurisdiction of the *kadhi* courts to matters of Muslim personal status law that was narrowly defined to mean marriage, divorce, and inheritance between Muslim litigants in which the value of the subject-matter in dispute did not exceed one thousand Kenya shillings (Hashim 2005:27-51; Anderson 2008). In its wider context, however, as summarized by

Stockreiter (2010:562), ‘personal status usually included marriage, divorce, inheritance [and] religious endowments (*waqf*)’. Therefore, narrowly interpreting Islamic personal status law was a conscious effort to transfer the jurisdiction of *waqfs* from *kadhi* courts to the new English judicial order. This is because, the development created a vacuum in the normative administration of *waqfs* leaving *mutawallis* and endowers without supervision necessitating the establishment of a state organ, the *Waqf* Commission of Kenya (WCK) in 1899, and a secular policy, the *Waqf* Commissioners ordinance (1900), to regulate the institution.

The establishment of the WCK was thus, in itself, a noble idea that could have streamlined the institution and improve efficiency. However, considering the political environment in which it was conceived and operated, it turned out to be an effective tool for checking the economic mainstay of the interlocutors of Islamic knowledge and authority and the various groups of beneficiaries against colonial hegemony. Moreover, regulating *waqfs* using secular policies and civil institutions helped in spearheading the capitalist economic ideals fronted by the British colonial government (Oberauer 2008; Kuran 2001; Fair 2001). Sections 12(1a) and (b) of the WCK ordinance particularly empowered the state agency to seize the administration of private *waqfs* whenever it ‘appears to the commissioners that there is no properly constituted trustee of a *waqf* or any trustee is acting in an improper or unauthorized manner’. True to the powers invested on the state agency, some *waqfs*, like the Wakilifi *masjid* at *mji wa kale* (Old town) in Mombasa were usurped³. This trend was replicated during the postcolonial times interfering with the socio-economic welfare of various groups of beneficiaries of *waqfs* as discussed elsewhere in this paper.

Control of the judiciary by the colonial government also led to ambiguous application of the Shari’a invalidating some *waqfs*. A suitable reference is the *waqf ahli* of Fatuma bint Mohamed bin Salim invalidated by the High Court in 1952 for allegedly including many beneficiaries making the charitable cause impossible. The High Court decision was informed by the doctrine of precedence in Common law where similar *waqfs* were invalidated by the Privy Council judgment in India (1894) and the High Court decision in Zanzibar (1946) (Anderson 2008:96-97; Schacht 1982; Banday 2013).

³ *Mombasa Times*, November 3 and 5, 1957; correspondence between WCK’s Advocate and Naam bin Ali, June, 1957, WCK archive, Mombasa.

Although the doctrine of precedence does not apply in Shari'a, it formed the basis for more legal petitions during the postcolonial period evident in Civil Suit no. 55 of 2011 in the High Court in the matter of *waqf ahli* of Said bin Rashid al-Mandhry⁴.

Apart from the *Waqf* Commissioners ordinance, the state agency was also subject to a variety of statutes that centralized the custody of *waqfs* hindering normative precepts (see below). As administration of *waqfs* became centralized, the colonial policy of divide-and-rule was applied in appointing commissioners among collaborating Muslims based on their socio-ethnic and regional affiliations to protect state interests rather than equitable representation of major stake holders. The net effect of this was the development of apathy from a cross section of Muslims whose interests were not catered for owing to lack of consultation and inclusion on the matters of the state agency. Clearly, secular policies that Muslims resented disregarded normative precepts on *waqfs*. This isolated a cross section of actors to accord the colonial government the power to define the 'official economic policy' where capitalism through house rents, land taxes, and paid labor, were favored over *waqfs* (Oberauer 2008; Fair 2001). Consequently, this caused resentment in the Muslim community forming the basis for ideological resistance against the state with a view to reverse the control of resources as argued in this article.

State Control of 'Economic Capital' in *Waqfs* through Civil Legislations since the Colonial Times

The place of land as a factor on production, both in the capitalist economy of the colonial government and in the Islamic institution of *waqf*, cannot be gainsaid. However, capitalist economy exclusively perceived land ownership from a private perspective defined by possession of a title deed as opposed to communal ownership manifested in the *waqfs* and other customary land rights among Muslims in the region. Consequently, from 1908, through the Land Titles Ordinance, huge tracts of land in the protectorate changed ownership

⁴ Amended originating summons, ground 2, Civil Suit no. 55 of 2011 in the High Court of Kenya; order of the High Court, September 2011, WCK archive, Mombasa. During research (2014 – 2017), the case was still pending in the courts.

from community or 'native reserves' to 'Crown Lands' despite widespread protests and claims of historical tenure from the locals (Hailey 1979:106-107; Anderson 2008).

The Ordinance further empowered the Governor to 'grant lease or alienate Crown lands for any purpose and on any terms and conditions as he may think fit' (quoted in Anderson 2008:91). This provision of the Ordinance was anchored on the 1894 Land Acquisition Act of India introduced in the Protectorate giving the colonial government the right to seize 'native lands' supposedly for public purposes (Carmichael 1997; Pouwels 1987; Ndzovu 2014). The net effect of these ordinances was to abrogate rights of customary land ownership by the locals, majority of who were incidentally Muslims, reducing them to squatters and disrupting their socio-economic well-being. Accordingly, this development formed the genesis of protracted tussles over land control and ownership in the region whose solutions have remained elusive since the colonial times.

Moreover, the statutes inhibited land transactions without first being confirmed as owned and sanctioned by the colonial government. The legislations were, therefore, a blow to claims of land ownership by the locals in the region since they lacked the titles to prove ownership (Berg-Schlosser 1984). Lack of titles of ownership also inhibited development of land *waqfs* and other properties as evident in Malindi area from 1911 to 1912 (Carmichael 1997). Thus the shift in the perception to land ownership impacted both on the already established *waqfs* from being developed as well as prohibiting further consecration of land-based *waqfs*. On the strength of the statutes, the colonial government also compulsorily acquired some land *waqfs* without compensation. This was true of a cemetery land at Changamwe, Mombasa on which a rail way line was built eliciting claims by affected beneficiaries that the trains were moving over their ancestors' dead bodies for free (Carmichael 1997). Shari'a requires that compulsory acquired *waqfs* be compensated so that replacements could be established to carry on the initial causes. Thus, lack of compensation suggests that establishment of substitute *waqfs* was not realized disrupting the socio-economic and cultural well-being of beneficiaries, as well as the spiritual aspirations of endowers.

This is, nonetheless, not to negate other *waqfs* acquired and compensated by the colonial state under similar circumstances during the same period. They include the *waqf* land of *shaykh* Mbaruk bin Rashid bin Salim el-Kehlany in Mombasa acquired in 1954 but compensated in cash after the

colonial government allegedly failed to acquire ‘suitable land at the coast which could be the subject of an exchange’⁵. Other *waqfs* are those that benefited *masjid* Mandhry and *masjid* Mwana Iki bint Suleiman in Mombasa for which the government also paid in cash. While the WCK records indicate that compensation for the later *waqf* was divided between the two holy *masjids* at Mecca and Medina as well as *masjid* Kikeshi following *shurut al-waqif* (conditions of the endower), that of the former was claimed to have been ‘added to other amounts from similar *waqfs* for the purchase of other properties’⁶. However, as late as 2010, no replacement *waqfs* had been established for *shaykh* Mbaruk.

Paradoxically, the WCK Act neither contemplates the compulsory acquisition of *waqfs* nor specifies how compensation could be handled. The statute, however, empowers commissioners to dispose of *waqfs* in selected instances:

If it appears to the *Waqf* Commissioners that in respect of any *waqf* the intentions of the maker cannot reasonably be carried into effect and that it is accordingly expedient that the property the subject of the *waqf* or any part thereof should be sold, the *Waqf* Commissioners may cause that property or part thereof to be sold, and shall apply the proceeds [...] in such manner as the *Waqf* Commissioners think fit for the benefit of the beneficiaries of the *waqf* (Sections 16(2) and 17).

The charter thus, opines Bang (2001:77), empowered WCK to disregard the conditions of endowers and ‘spend *waqf* revenues on causes other than those stipulated by the endower’ on the belief that the decisions would be to the best interests of the beneficiaries. This was, however, not always the case as evident in the laments by beneficiaries of the *waqf* of *shaykh* Mbaruk where the commissioners failed in establishing alternative *waqfs* despite receiving compensation for the liquidated property. Other beneficiaries disenfranchised

⁵ Compensation notice, March, 1955; correspondence between the government collector and the WCK, December, 1954; April, 1955, WCK archive, Mombasa.

⁶ Minute 2068 of April, 1957, WCK archive, Mombasa; Personal interview with Muhammad Shalli, Mombasa, December, 2014.

by the decisions of the WCK include those of the *waqfs* of Bamkele and Abdallah bin Khamis, both in Mombasa, and Suleiman bin Amour Gheith al-Darmacky in Malindi⁷. Disenfranchisement resulted in prolonged court battles where, though often unsuccessful, beneficiaries sought to rescind the decisions of the WCK.

Moreover, there were some regulations on immovable properties that impeded *waqf* practices by logically prohibiting endowing. The African Property Preservation Ordinance (1916) established that:

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

Arguably, prohibiting ‘pledge by any means whatsoever’ as envisaged in the legislation also included the consecration of properties as *waqfs*. This statute did not take cognizance of the fact that Muslim charity and *qurba* on which *waqf* is founded is not limited by race, ethnicity, or locality making it a misplaced legislation.

In a typical case of divide-and-rule policy by the colonial government, the WCK ordinance did not also recognize some Asians as Muslims⁸. This suggests that some Asian Muslims were prohibited from

⁷ Personal interviews with Mohammed Abdallah, Rahma Abdallah, and Ali bin Khamis, Mombasa, October, 2015; Ali Salim Bamkele, Abdurahman Bamkele, Ahmed Bahaidar Bamkele and Hamid Salim Bamkele, Mombasa, November, 2015; Said *sharif* Abdallah, Malindi, October, 2015. See also internal memo by the Secretary, WCK, to Commissioners, July, 2010; correspondence between Zubeda bint Salim bin Iddi Bamkele and the WCK, July, 1999, cc. the Chief *Kadhi*, the PC coast Province, and tenants of the contested *waqf*, WCK archive, Mombasa.

⁸ Section 2 of the WCK Act (1900) defines a Muslim as ‘[...] an Arab, a member of the Twelve tribes [*Thenashara Taifa*, i.e. Swahili Muslims confederation], a Baluchi, a Somali, a Comoro Islander, a Malagasy or a native

establishing new *waqfs* considering the limitations placed upon them by the statute. Asian Muslim immigrants constitute a sizeable community having settled along the East African coast from the 8th century as traders, guards, or religio-political refugees (Fairs 2001; McIntosh 2009; Nicolini 2014). Despite settling for long, however, they maintained social and spiritual attachments with their ancestral homes that they designated as beneficiaries evident in several *waqf* deeds. These include the *waqf ahli* of Gulamhussein Adamji whose residual beneficiaries are the pilgrims of Karbala in Iraq⁹; the *waqf ahli* of Haji Ismael Haji Adam whose residual beneficiaries are poor and beggars at the two holy *masjids* in Mecca and Medina as well as those of Baghdad¹⁰; and many other *waqfs* whose primary and residual beneficiaries are non-Africans¹¹. It is possible to argue that these legislations forced Asian Muslims to look for alternative means of practicing charity in the society and retain control of the resources and associated privileges as argued elsewhere in this paper.

With a hands-on approach to resource control, the colonial government also imposed compulsory registration of *waqfs*. *Mutawallis* who failed to comply with the registration requirement were ‘guilty of an offense and liable to a fine not exceeding two thousand Kenya shillings or to imprisonment for a term not exceeding six months’¹². Further, with collaborating commissioners and state officers seconded in the WCK, the colonial government influenced the decision making process regarding use of *waqf* revenues against designated causes. From 1911 to 1912 particularly, the government directed the WCK to use *waqf* funds in improving sanitation and public health in Malindi area apart from allocating undeveloped *waqf* lands to

of Africa of the Muslim faith’. See *Waqf Commissioners Act*, Cap 109, laws of Kenya.

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

¹⁰ See *waqf* deeds of Hajji Ismael Hajji Adam, fols. 51-52 on plot no. 5158; Hajji Ebrahim Adam, on plot no. 8173/5, fol. 67, WCK archive, Mombasa.

¹¹ See *waqf* deeds of Moosaji Issaji, fol. 120; Hajji Ismael Hajji Adam (above) for *waqf al- Haramayn* (Mecca and Medina); minute 2039 of 17/2/1956 on the compulsory acquisition of *waqf* of Mwanaiki bint Suleiman, WCK archive, Mombasa.

¹² See *Waqf Commissioners Act*, 1951, Cap 109, Section 10(4).

residents for farming (Carmichael 1997:301). It is a fact that the Shari'a allows *qabala* (also *mukhabara*, sharecropping) as a means of improving productivity of agricultural *waqf* lands (*Sahih al-Bukhari* 3:523, 532-537; Sanjuan 2007; Lahsasna 2014). Contrary to *qabala*, however, the argument of the colonial government implied opening the lands to private ownership. More importantly, the *waqf* lands in question had not become 'unproductive', but merely 'undeveloped', making the government directive on the *waqf* lands and their revenues as misplaced in view of the Shari'a for disregarding the wishes of the endowers.

On the same vein, from 1954 to 1955 the colonial government used the Preservation of Objects of Archaeological and Palaeontological Interest Ordinance, Cap 314, to convert the closed cemetery of the Mazrui and the ruined *Jamia masjid* of Wakilindini into national monuments¹³. The decision was, allegedly, in line with 'the policy of the city of London and most English cities for the last twenty years to convert closed cemeteries and ruined Churches into Public Gardens with flowers that is open to the public (sic)',¹⁴. Accordingly, WCK leased out the two *waqfs* to the Municipal council of Mombasa to restore and protect them 'as befitting the Mazrui family and also to maintain and beautify in the interest of Mombasa where it was seen by many visitors'¹⁵. This was despite protests by Muslims who also cited excerpts from the same statute that protect areas of worship from being used inconsistent with their character¹⁶.

During the postcolonial period, the scramble for control over resources, particularly land, was intensified in the Protectorate as virtually all statutes related to *waqf* remained unchanged. The 'Crown lands' were used to reward political loyalty and settle non-indigenous people from other parts of

¹³ The Ordinance is presently the National Museums and Heritage Act, Cap 216 [Revised 2012], Laws of Kenya.

¹⁴ Correspondence between J. S. Kirkman and the District Commissioner, Mombasa, January, 1955, WCK archive, Mombasa.

¹⁵ Minute 2 of the meeting held in the DC's Office, Mombasa, February, 1955, WCK archive, Mombasa.

¹⁶ Letter of reply by *shaykh* Mbarak Ali Hinawy, the *liwali* of the coast, to the Town Clerk, Mombasa Municipality and copied to the PC, coast; DC, Mombasa; Secretary for Education, Labor and Lands, Nairobi and Secretary for Forest Development, Game and Fisheries, Nairobi, January, 1955.

the country leaving the local population as permanent squatters (McIntosh 2009; Ndzovu 2014). Two incidents involving land *waqfs* are occasionally re-enacted to epitomize these perceived historical injustices in relation to economic exploitation and socio-cultural exclusion of the Muslim community in the region. The first involves *waqf khayri* of the Mazrui established in 1914 through the Mazrui Lands Trust Act, but invalidated through the Mazrui Land Trust (Repeal) of 1989 without compensation¹⁷. The *waqf* took more than two decades of protracted court battle to be re-instated¹⁸. Apart from stagnated development and inhibited spiritual benefits during the period of invalidation, a large section of the *waqf* land was occupied by squatters that remain unto this day due to lack of protection by the government¹⁹.

The second case involves the *waqf* of Salim Mbaruk bin Dahman at Kanamai, Kilifi district. In accordance with the *waqf* provision of ‘*ana*, the property comprising of a beach farm was leased to the National Council of Churches of Kenya (NCCCK) around 1962. The agreement was contingent on the payment of a monthly rent and was conditional on no coconut trees being cut or a Church being established on the *waqf* land²⁰. The NCCCK, however, reneged in the agreement leading to a legal battle that spanned over a

¹⁷ The Land Acquisition Act (1983), Section 5 on compensation provides ‘[...] as soon as practicable after entry has been made, the Commissioner shall make good or pay full compensation for any damage resulting from the entry’. See also Section 75(1), Constitution of Kenya (1963) and Article 40(3), Constitution of Kenya (2010) on compulsory acquisition of land.

¹⁸ The land was registered as private under certificate of ownership number 409, of April, 1914, issued under the Land Titles Act (Cap 282) Laws of Kenya to *shaykh* Ali b. Salim. This contrasts with the southern Mazrui land reserves (Gazi) under Salim b. Mbaruk b. Rashid el-Mazrui composed of 3000 acres out of which 2000 were consecrated as *waqf*. See KNA/PC/Coast/1/11/41, Kenya National Archives, Nairobi.

¹⁹ Personal interview with Rashid Muhammad Salim al-Mazrui, October 2015. See also judgment of the High Court of July 2012 on Civil Suit No. 185 of 1991, WCK archive, Mombasa; section 8, Land Acquisition Act, Cap 295 Laws of Kenya.

²⁰ Transfer of lease from Goolshan Ladies Wear Ltd to the NCCCK, July, 1962, WCK archive, Mombasa.

decade²¹. While launching the Christian center it had established on the *waqf* land in 1972, the NCKK petitioned the President (*Mzee* Jomo Kenyatta) to have the WCK terminate its claim on the *waqf*. Subsequently, opines al-Mazrui (2004:7), ‘with a view of not embarrassing the President’, the WCK was forced to accept a three-bedroom Swahili house in waiver of the beach farm²².

As argued in the above cases, therefore, both colonial and postcolonial governments appropriated legislative instruments and civil institutions to control the cultural and economic spaces in the Protectorate even where it involved disregard to religious feelings of the community. As illustrated in some instances, either the government took away *waqfs* without compensation or used its power to inhibit utility of the compensation funds. This inhibited execution of socio-cultural and economic causes of the *waqfs* subordinating the Muslim community. Accordingly, state policies on control of resources interfered with practices of *waqf* in the region partly setting ground for the economic, social, and cultural under-development of the Muslim community.

Symbolic Resistance: Covert Protests by Muslims against State Control of *Waqfs*

Control of resources by the colonial and postcolonial governments negated the perception to life as one totality among Muslims in the Protectorate. Majority of Muslims in the region perceive Islam not merely as a religion but a complete

²¹ Minutes of the WCK meeting of September, 1970; minutes of the meeting of January, 1972; correspondences between the WCK, the NCKK, Commissioner of Lands, and the PC coast province, October - September, 1972, WCK archive, Mombasa.

²² See also minutes of the WCK meeting of December, 1973; minute 143 of special meeting of the WCK and the NCKK, July, 1974; minute 26/76(1) of WCK meeting, July, 1976; the NCKK’s correspondence to the PC coast province, September, 1972; PC’s correspondence to the WCK, October, 1973; correspondence between the NCKK and the WCK, January – July, 1974; correspondence between the NCKK and the WCK, July - August, 1974, WCK archive, Mombasa.

way of life such that attempts to undermine a single aspect would have ripple effect on the entire system of life. In the case of *waqfs*, state control clearly interfered with a wide array of aspects from spiritual to social; legal to legislative; economic to symbolic. This went as far as questioning the institution of *waqf* altogether by invalidating what would have been valid *waqfs* under Shari'a during both the colonial and postcolonial periods evident in the invocation of the doctrine of precedence in Common law²³. Consequently, the positions of *mutawalli*, *'ulama* and *kadhi* were rendered redundant contributing to their alienation and loss of social, economic, spiritual and symbolic significance in the community in contrast to the sharp rising influence of the state.

The control of *waqfs* by the government, for instance, interfered with the economic mainstay of the Muslim education institutions like the *madrasas* (Quranic schools), *duksis* (elementary schools) and orphanages as revenues were used against designated causes denying them support²⁴. The impact was, arguably, felt since the colonial times when the government entrusted the introduction and provision of formal education to Christian missionaries who pegged admission into the mission schools on baptism (Mwakimako 2007a; Loimeire 2007). This admission requirement kept Muslim children out of the Christian-based institutions missing out on formal education as the state dragged its feet in establishing limited, ill-equipped, racially based formal schools for Muslims²⁵. The inadequate provision of formal education for

²³ *Waqfs* were also invalidated during the postcolonial period as a consequence of legal clashes between the Shari'a and Common Law. They include the *waqfs* of Rukiyabhai, Civil Suit no. 60 of 2006 in the High Court; Said bin Rashid al-Mandhry, Civil Suit no. 55 of 2011 in the High Court; and Athman bin Kombo bin Hassan, Civil Appeal no. 17 of 2014 in the High Court, WCK archive, Mombasa.

²⁴ Among *waqfs* designated for Muslim educational causes include those of Salim Mbaruk bin Dahman, (Takaungu, unmarked); Latifa bint Saleh bin Awadh, fols. 100-101; Rehema bint Ali, fol. 254; Ali bin Salim, fols. 94-95; Amria bint Ali bin Khamis, fol. 36; Seif bin Salim bin Khalfan el-Bu Sai'di, fols. 20-21, WCK archive, Mombasa.

²⁵ Among the few colonial government-sponsored racially-based schools were the Arab girls' school (currently Serani Secondary, Mombasa); the Arab boys' school (currently Khamis Secondary, Mombasa); the Indian school (currently

Muslims during the colonial period effectively set ground for their economic backwardness and political exclusion in the postcolonial times as they could not compete favorably against their compatriots in national politics, job placements and civil service appointments (McIntosh 2009; Ndzovu 2014).

On the other hand, the change of perception to land ownership from 'native reserves' to 'Crown lands', and the compulsory acquisition of land *wagfs* without compensation or misuse of their compensation bread a large population of squatters faced with dwindling socio-economic fortunes. This population of squatters rose sharply in the early 20th century following abolition of slavery by the colonial government without contingent plans like repatriation or resettlement (McIntosh 2009:28, 55-58; Patridge & Gillard 1995; Mwinyihaji 2014). Manumitted slaves were joined by the Swahili, a distinct Muslim Arabo-African progeny of the slaves and Arab merchants making a large indigenous population jobless, economically insecure, and without permanent residence.

With the apparent failure by postcolonial regimes to establish policies to help the indigenous population catch up with the rest of the upcountry in development as aptly illustrated in the National Housing and Population Census (2009)²⁶, locals were (still are) a disenfranchised lot suffering prolonged periods of political marginalization, economic exclusion, and exploitation. As Cooper (1980:293) observes, this made the predominantly Muslim indigenous population in the region 'less independent, less secure, and more exposed to the vagaries of markets and politics... [where] food shortages have become chronic ... [and] wage labor is more often a necessity' (quoted in McIntosh 2009:29).

Owing to the imperial authority of the colonial government, however, the indigenous population could not question the secular policies that put them into subordination. Nonetheless, their efforts to reverse the situation and regain

Aldina Visram, Mombasa) and the African school (currently Ronald Ngala, Mombasa). Personal interview with *mua'lim* Yussuf Bakari Mwamzandi, Msambweni, November -December, 2014.

²⁶ See Kenya National Bureau of Statistics (KNB), National Population and Housing Census (2009), vol. 2. Available at: file:///C:/Users/USER/Downloads/Volume%202-Population%20and%20Household%20Distribution%20by%20Socio-Economic%20Characteristics%20(1).pdf. (Accessed April, 2016).

control and ownership of resources could aptly be described using the prism of 'symbolic (also ideological) resistance'. Scott (2009:34) explains symbolic resistance as 'the ordinary means of class struggle [and] techniques of first-resort in the common historical circumstances in which open defiance was impossible and entailed mortal danger'. To avoid notice and detection that could result into direct confrontation with authorities, subordinate communities often employ a wide range of '*infrapolitics*' like sabotage, desertion, withdrawal, and feigned ignorance to official demands (Scott 1985; 2009).

In the case of *waqfs*, symbolic resistance involved non-compliance with the imposed compulsory registration rule evident in the decline of number of registered *waqfs* in the WCK registry. Only seven *waqfs* (6.7%) were registered from 1940 to 1960, two decades before the end of colonial rule. Compared with 74 *waqfs* (71.2%) registered from 1910 to 1930 upon establishment of the WCK, this translates to 54.8% decline over an equal length of time²⁷. Non-compliance with the compulsory registration rule as shown in the figures was, however, neither coordinated nor declared in the conventional sense of a resistance movement in the Muslim community. It became a conspicuous but effective means through which the community expressed its dissatisfaction with the state interference with *waqfs*, and more importantly reverse control and ownership of resources.

With the lack of political will during the postcolonial period to redress the colonial policies of subjugation, non-compliance with the compulsory registration rule went on unabated. Only 13 *waqfs* (12.5%) were registered from 1970s to 2000s. Moreover, from the 1980s following the expansion of the democratic space in the country, Muslims 'exited' from state controlled *waqfs* to uncontrolled charitable alternatives like *sadaqa*, *zakat*, private trusts and community based associations including Non-governmental organizations (NGOs). The Mazrui land *waqf* above that was revoked through government legislation but later restored by the court correctly fits this scenario. Upon restoration of the *waqf* land in 2012, the beneficiaries established a Mazrui community land trust 'for the sake of preservation into perpetuity of the assets and properties comprised in the 2, 716 acres of land in Takaungu'²⁸. As

²⁷ Statistics drawn from 104 sampled *waqf* deeds during research, WCK archive, Mombasa.

²⁸ Clause 3 of the trust deed of the Mazrui Community Land Trust, WCK archive, Mombasa.

contained in the spirit of the trust deed, the Mazrui trust is a non-labelled *waqf* since it provides for administration of the property ‘according to Islamic Shari’a law [and the] *waqf* land cannot be sold, but the benefit accruing thereof may be enjoyed, leased, transmitted and/or passed on to the next generation’²⁹. However, by being designated as a ‘trust’, it technically became independent from the rigours of the WCK and, by extension, the political manoeuvring and direct control of the government.

The ‘Trust of the Mosque of Msalani’, established in 2011 by a self-appointed executive committee in defiance of the WCK, provides another illustration of Muslims’ symbolic resistance to state control of *waqfs*. As legal administrators of the *masjid* upon inquiry and takeover, allegedly owing to lack of an established *mutawalli*, the WCK appointed a caretaker who was opposed by the executive committee, that defiantly established the ‘Trust of the Mosque of Msalani’ instead³⁰. Were it not for the land title deed that the WCK used to petition the Registrar of Titles and the Land Registry not to recognize the mosque committee, this would have taken the *waqf* out of the mandate of the WCK. This is not to forget the innumerable orphanages, *masjids*, integrated schools, and *madrasas*, as well as health centers run by local committees and registered under various bodies (see also Mwakimako 2007b). The majority, if not all of these alternative charities, have capitalized on the principles of *waqf* to harness resources for the socio-cultural welfare of the Muslim community outside the purview of the WCK.

The Muslim Education and Welfare Association (MEWA) of Mombasa and Tawfiq Hospital in Malindi would suffice as further illustrations of charitable institutions that have benefited from the ideals of *waqf*. MEWA was founded in 1985 as a local initiative in response to the falling standards of formal education for Muslims in the town. The community pulled resources

²⁹ Clause 2(a) of the trust deed of the Mazrui Community Land Trust, WCK archive, Mombasa.

³⁰ The ‘executive committee’, led by Salim Awadh, wanted to be recognized as trustees instead of Khamis Omar Khamis (Shaibo) who had usurped the role of imam since the demise of the initial *mutawalli*. See copy of inquiry, March, 1976; Shaibo’s correspondence with the WCK, March, 2000; WCK’s letter of appointment to Shaibo, July, 2000; Awadh’s correspondence with the WCK, May-July, 2001; the WCK’s correspondence with the Registrar of Titles, January, 2003, WCK archive, Mombasa.

together to provide bursaries, educational materials, and partial scholarships for advancing students. In 1993, the project was registered as an NGO. It currently runs one of the most prestigious hospitals in the region offering health care at subsidized rates. It also offers educational services in the range of library facilities, career training, and Ramadan *iftar* portions to poor Muslims³¹.

Tawfiq Hospital in Malindi, a brainchild of two local groups, Tawfiq Muslim Youths and Muslim Education and Development Association (MEDA) of Malindi, was similarly established in the 1990s to provide subsidized health care in an area long neglected by the government. The hospital currently operates with support from the local community, volunteers and a plethora of well wishers, both local and international including the Islamic Development Bank (IDB), World Assembly of Muslim Youths (WAMY), the International Islamic Relief Organization (IIRO), and the Islamic Foundation (Saudi Arabia). The hospital also runs a Ramadan *iftar* programme, *zakat al-fitr*, and organizes funerals for the poor, care for the elderly and orphans, and *da'wa* (Islamic proselytization) through a well established *masjid* within the hospital. Support from international bodies for these initiatives often comes in the name of Muslim charity and also caters for orphanages, integrated schools, mosques, and *madrasas*³².

Clearly, Muslims were disenfranchised by the state interference of *waqfs* and their withdrawal to uncontrolled alternatives corroborates this narrative. The proliferation of private trusts among Muslims in Kenya, and their preference for un-controlled and decentralized charitable initiatives such as *sadaqa* and community associations that operate within *waqf* principles are forms of symbolic resistance to state interference with the institution of *waqf*. This should be understood from the point of view of the subordinate community as valuable but inconspicuous means to express dissatisfaction with secular state policies that seek to reverse control and ownership of economic, symbolic, and social privileges.

³¹ Personal interviews with Muhammad Shalli, Mombasa, November 2015; Zubeir Hussein Noor, Mombasa, November, 2015. See also <https://www.betterplace.org/en/organisations/10087-mewa-muslim-education-and-welfare-association>. (Accessed July, 2017).

³² Personal interviews with Ahmed Aboud Hadi, Malindi, November, 2015; Hamdoun, WCK agent, Malindi, November, 2015.

In the same vein, the proliferation of non-labelled *waqfs* could be viewed through the lenses of Islamic ‘discursive tradition’ – ‘a tradition of Muslim discourse that addresses itself to conceptions of the Islamic past and future, with reference to a particular Islamic practice in the present’ (Asad 2009:20). This concept seeks to explain Muslim institutions as lived and negotiated across the global ‘*umma* (community of believers), not as a fossilized set of rules unrelated to the beliefs and practices of the faithful and incompatible with contemporary realities, but as a progressive discourse that relates to the past and the future through a present. It is a fact that *waqfs* are not textually enshrined in the Qur’an. The institution is, however, attributed to some *hadiths* of the Prophet during the seventh century, (*i.e. past*) and grew progressively through assumed rigid legal forms before reaching its peak in the thirteenth century (Hennigan 2004). During the last decades of the twentieth century, *waqfs* adopted internal regulation mechanisms against earlier operational and jurisprudential rigidity transforming to a modern institution capable of responding to challenges and demands in relation to charity and wealth distribution in the society (Kuran 2001), (*i.e. present*), and more significantly, as a religious practice meant for the attainment of *sawab* for the spiritual afterlife (*i.e. future*).

True to this point of view, the development of *waqfs* since inception in the seventh century assumed different faces at various epochs in response to local customs and needs, causing it to be lived and mediated in varied ways across the Muslim world. After suffering setbacks and near collapse between the eighteenth and nineteenth centuries, several Muslim communities have, since the last decades of the twentieth century, established new policies and institutions to reinvigorate *waqfs* (Kahf 2003; Siraj & Hilary 2006; Dafterdar & Cizakca 2013). Transnational organizations inspired by the rise of civil society in Islam, including the subsidiaries of the IDB - the World *Waqf* Foundation [WWF] and the *Awqaf* Properties Investment Fund [APIF], IIRO, Islamic Relief (IR, UK), and WAMY, are at the forefront in re-inventing *waqfs* within corporate frameworks and re-interpreting theological principles that arguably held back the growth of the institution in the past. This explains their involvement in international socio-cultural welfare in the name of Muslim charities. These organizations encourage Muslims to make voluntary contributions towards specific initiatives in the form of *waqf* shares and certificates, which are pooled together and channeled to particular areas of need in the global Muslim *umma*. All these could readily find parallel in the

uncontrolled alternative charities among Muslims in Kenya as discussed above. The resultant effect is the according of a measure of independence and control of resources and the practice of a religious institution by the Muslim community in a secular state milieu.

In conclusion, the proliferation of charitable trusts; preference to uncontrolled and uncoordinated charitable initiatives like *sadaqa*, *zakat*; community associations evident in the cases of MEWA and Tawfiq Hospitals, and non-compliance with compulsory registration rule on *waqfs* should be understood within the lenses of symbolic resistance against state control of the institution in Kenya. These were (still are) valuable but inconspicuous means of expressing dissatisfaction with secular state policies on *waqfs* seeking to re-establish control over economic, symbolic, and social capital. As observed by Scott (2012:7-8), 'such petty acts of insubordination typically make no headlines. But as just millions of entozoan polyps create, willy-nilly, a coral reef, so do thousands acts of insubordination and evasion creates an economic or political barrier reef of their own'. In the same way, non-registration of *waqfs* with the WCK and preference to uncontrolled and uncoordinated charitable initiatives by the Muslim community in the country ordinarily pass unnoticed to deny the secular state the much needed control of the socio-economic and symbolic power espoused by *waqfs*.

Conclusion

Waqf is one of the oldest institutions with wide impact in the socio-economic and cultural fabric of a community in Islam. Establishing *waqf* is a religious undertaking involving the endower's demonstration of piety to the creator while at the same time showing responsibility to the community. It takes cognizance of the beneficiaries' role in appreciating the endower for understanding their socio-economic plight; the place of the '*ulama* in interpreting and guiding the endower in living to the Shari'a of consecration to the later; the position of the *mutawalli* in helping the endower fulfill the designated causes; and the political leader, if necessary, not only to establish *waqf* as part of his show of piety and social responsibility, but also to provide a conducive environment where endowers would fulfill their spiritual and social wishes. This is a complex socio-cultural mosaic that touches every aspect of the community, particularly where life is perceived as one in totality.

However, majority of political establishments, as evident in the colonial and postcolonial regimes in Kenya, did not acknowledge the complexity of *waqfs* choosing to perceive the institution exclusively in economic terms. Regulating the institution, especially using secular policies and civil institutions for political and economic expedience, therefore, disregards the various facets causing disequilibrium in the socio-economic and cultural well-being of the society. It is this disenfranchisement that occasionally pushes beneficiaries to seek for alternatives within the confines of Shari'a, not only to reverse control and ownership of resources, but also fulfill the religious requirement of charity. This is more pronounced, especially where Muslims constitute a minority marginalized population with religious institutions subjected to secular policies and civil institutions.

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