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## Al-Marsad Right as a Mechanism for Developing and Investing in Urban Waqf Properties in Algerian Legislation

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## Al-Marsad Right as a Mechanism for Developing and Investing in Urban Waqf Properties in Algerian Legislation

### Abstract

The Al-Marsad (observatory) contract holds significant importance as a means for developing and investing in urban Waqf (endowment) lands. It serves as an exception when the endowment lacks the resources to independently develop the land. Under this right, private capital can be utilized, with the proceeds from construction benefiting the Waqf. The observatory owner can recover their construction expenses along with profits. Importantly, the investment value remains a debt secured by the Waqf. Unlike direct ownership, the observatory right is not a real property right stemming from Waqf ownership. Instead, it is a unique personal right that allows the owner to exploit the building, transfer it to others, and pass it on to heirs within the bounds of creditor rights. Although it intersects with provisions related to newly established exploitation contracts, its distinct nature makes it an effective method for developing and investing in Waqf properties. In this study, we defined and control its provisions in accordance with the principles established by existing jurisprudential studies. This serves as a framework and a contribution to legislative efforts aimed at regulating the provisions of AL-Marsad right.

**Keywords:** Waqf exploitation, the Right of Al- Marsad, the Trustee of the Waqf, the Owner of the Right of Al-Marsad.

## Al-Marsad Hakkı: Cezayir Mevzuatında Kentsel Vakıf Mülklerinin Geliştirilmesi ve Yatırımı İçin Bir Mekanizma

### Özet

Al-Marsad (gözlem) sözleşmesi, kentsel vakıf arazilerinin geliştirilmesi ve yatırım yapılması açısından büyük bir öneme sahiptir. Vakfın, araziye bağımsız olarak geliştirebilecek kaynaklardan yoksun olduğu durumlarda bir istisna olarak kabul edilir. Bu hak sayesinde özel sermaye kullanılabilir ve inşaattan elde edilen gelirler vakfa fayda sağlar. Gözlem sahibi, inşaat masraflarını ve kârını geri alabilir. Önemli olan, yatırım değerinin vakıf tarafından güvence altına alınmış bir borç olarak kalmasıdır. Al-Marsad hakkı, doğrudan mülkiyet hakkı değildir ve vakıf mülkiyetinden kaynaklanan bir aynı hak olarak kabul edilmez. Bunun yerine, sahibine yapıyı kullanma, başkalarına devretme ve miras yoluyla geçirme hakkı tanıyan özel bir şahsi haktır. Bu hak, alacak hakkı sınırları içinde varlığını sürdürebilir. Yeni kurulan istismar sözleşmeleriyle kesişmesine rağmen, kendine özgü yapısı onu vakıf mülklerinin geliştirilmesi ve yatırım yapılması için etkili bir yöntem haline getirir. Bu çalışmada, mevcut fıkıh çalışmaları tarafından belirlenen ilkelere uygun olarak hükümlerini tanımlayıp kontrol altına alacağız. Bu, Al-Marsad hakkının hükümlerini düzenlemeye yönelik yasal çabalara çerçeve ve katkı sağlamayı amaçlamaktadır.

**Anahtar Kelimeler:** Vakıf, Vakıf İstismarı, Marsad Hakkı, Vakıf Mütevellisi, Marsad Hakkı Sahibi.

### Introduction

The Waqf Foundation possesses a substantial real estate portfolio comprising diverse agricultural and urban properties, as well as various buildings. This extensive portfolio positions

the foundation to play a pivotal role within the national economic system. Consequently, legislators have endeavored to regulate the Waqf Foundation through legal frameworks since the early 1990s. However, despite these efforts, a significant qualitative transformation remains elusive. Several factors—ranging from regulatory challenges to legislative and political considerations—may contribute to this situation.

One notable legal mechanism introduced by the legislature to facilitate the development and investment of urban or urbanized land is the “right of observatory.” Although this concept has historical roots in Islamic jurisprudence and is well-established in many Islamic countries, it represents a novel addition to Algerian legislation. The 2001 amendment to the Waqf Law explicitly acknowledges this innovative approach.

The right of Al-Marsad (Observatory) is one of the rights that pertain to waqf (endowment) property ownership. There has been disagreement regarding its legal characterization: whether it is a real right derived from ownership rights, or a personal right related to the funds allocated to the waqf's liability. Al-Marsad is distinguished by its exclusive association with waqf, as opposed to other forms of property. It is a long-term contract with obligations that are executed over time.

Referring to the Waqf Law, we find that the right of Al-Marsad is mentioned as a model for developing and exploiting lands designated for urbanization, where the waqf lacks the funding to construct facilities for investment purposes. The legislator has not regulated its detailed terms and conditions, leaving this to the second source of legislation, which is Islamic Sharia.

Given the limited legislative familiarity with this concept and its scarce practical applications, the importance of our study is highlighted. It aims to identify issues that accurately delineate its provisions, drawing inspiration from its source rooted in Islamic Sharia.

Upon reviewing the scientific literature on the topic, we discovered that several prior studies had been conducted. These included a PhD thesis by Saleh bin Suleiman bin Hamad Al-Huwais of Um Al-Qura University, titled "The provisions of the monopoly contract in Islamic jurisprudence," which mentioned Al-Marsad (the observatory's right) in two paragraphs without going into detail about it as a contract, and two master's dissertations, one by researcher Khairiddine Mcharen entitled "Endowment management in Algerian law" and the other by researcher Abdelali Hazel, which did not discuss the specifics of Al-Marsad right. However, they were aware of it as a contract similar to the others, whereby the endowment properties expand without specific terms being stated.

As a result, the focus of these studies was primarily legal in nature, they did not treat the provisions of the Al-Marsad contract as a separate contract from the other endowment property investment contracts, nor did they deal with the subject in depth or examine it from all angles.

Our study of this topic differs from previous studies in what we aim to achieve the study's objectives, which include defining Al-Marsad right, determining its pillars and conditions, the modalities of its convening, and the mechanisms of its expiry. We do this by combining the sparseness of legislation with the wealth of jurisprudence in this field. Additionally, we try to apply comparative law, as established by Islamic jurisprudence texts, and we further solidified it by comparing this right with similar other means of exploiting and investing the endowment.

To fully grasp the concept of this right, its regulations, and to unveil its details, we have posed the following problematic question: **To what extent has the Algerian legislator regulated the provisions of Al-Marsad right as a mechanism for developing and investing in waqf (endowment) lands?**

In order to address this problem, we employed both the analytical and descriptive approaches. We organized our research paper into three sections: the first section dealt with the concept of the Al-Marsad right by outlining its terms and qualities and setting it apart from other rights of a similar nature; the second section addressed the pillars of the Al-Marsad contract by emphasizing the aspect of satisfaction, place, reason, formality, and duration as a time contract; and the final section addressed the ways in which this right may expire and their consequences, drawing conclusions and suggestions.

### **1. The Concept of Al-Marsad Right**

Al-Marsad right is considered one of the legal mechanisms for developing and investing in waqf (endowment) lands designated for urban development or with urban potential. It is a contract introduced by the legislator under Article 26 bis 5 of Law 01/07, which amended Law No. 91/10 concerning waqf.<sup>1</sup>

To study Al-Marsad right in terms of its definition, characteristics, and how it differs from similar concepts, we have divided this section into four subsections, which we will explain as follows:

#### **1.1. Definition of Al-Marsad Right**

To fully understand the definition of Al-Marsad right, we must address its linguistic and terminological meanings as follows:

##### **1.1.1. Etymological Definition of Al-Marsad:**

Etymologically, the term "Al-Marsad " means "the path" or "the way," as evidenced in the Quranic verse from Surah At-Tawbah, verse 5: " and lie in wait for them in every stratagem (of war)." Here, it implies watching or waiting for them on every path.

<sup>1</sup> concerning Waqf, *Official Gazette* 21 (08 May 1991), Legal Code no. 91-10 dated 27/04/1991, amended and supplemented by *Official Gazette* 29 (23 May 2001), Legal Code no. 01-07 dated 22/05/2001, and by *Official Gazette* 83 (15 December 2002) Legal Code no. 02-10 dated 14/12/2002.

The word "Al-Marsad " is derived from "Al-Mirsaad," which refers to a place where an enemy is observed. It may also signify preparation. The phrase "arsada al-amr" means "to prepare something." The term "Al-Marsad " comes from the root "rasada" and "a'adda," as in "I set aside and prepared my financial savings to be spent in a particular direction."

The etymological meaning that aligns with the term "Al-Marsad " as a contract applicable to waqf lands implies preparing these lands for the waqf to bear a debt on its liability, with the land being designated for debt repayment as long as it exists.

#### **1.1.2. Definition of Al-Marsad:**

To precisely define the term "Al-Marsad right," we must address its origins and then its definitions in jurisprudence and law as follows:

##### **1.1.2.1 Origins of Al-Marsad Right:**

Al-Marsad right is a jurisprudential term known to later scholars of the Hanafi and Hanbali schools of Islamic law, who derived and permitted it. It essentially involves borrowing on behalf of the waqf and for its legitimate benefit, such as in credit purchases or borrowing money for the waqf.<sup>2</sup>

Al-Marsad can only be established through a judicial ruling that confirms its validity and authorizes the waqf trustee to undertake necessary construction. It became prominent under Ottoman rule in the Levant and was also well-known in Egypt.<sup>3</sup>

Some researchers have criticized Al-Marsad, viewing it as a cause for the loss of waqf assets through seizure and sale by tenants under the guise of Al-Marsad right. These criticisms are similar to those directed at the Hikr right for the same reason, The same goes for the Ghouta of Damascus<sup>4</sup> However, it remains a contract type used for developing and investing in waqf lands within the framework of urban projects that can benefit the waqf property.

The Algerian legislator introduced Al-Marsad in the Waqf Law in 2001 through Law 01/07, which amended Law 91/10 concerning waqf.

##### **1.1.2.2. Jurisprudential Definition of Al-Marsad Right:**

Al-Marsad right is defined in Islamic jurisprudence as a debt on the waqf, spent by the tenant from their own funds with the permission of the waqf trustee for necessary construction

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<sup>2</sup> Saleh bin Sulaiman bin Hamad Al-Huwais, *Provisions of the Hikr Contract in Islamic Jurisprudence* (Mecca: Umm Al-Qura University, Faculty of Sharia and Islamic Studies, Doctoral Thesis in Jurisprudence, 1427/1428 AH), 60.

<sup>3</sup> Al-Huwais, *Provisions of the Hikr Contract in Islamic Jurisprudence*, 62.

<sup>4</sup> Shaker Hanbali, *Summary of Endowments Rules*, 122.

or renovation of the waqf property. The amount spent is to be deducted from the fixed annual rent, while the improvements remain the property of the waqf.

To enter into an Al-Marsad contract, certain conditions must be met:

- The waqf property must be in a state of disrepair.
- There must be insufficient revenue from the waqf to finance the necessary repairs.
- There should be no one willing to rent the property for an advance payment.<sup>5</sup>

Al-Marsad is also defined as: "A debt on the waqf, spent by the tenant from their own funds with the permission of the supervisor for necessary construction or renovation of the waqf property".

This term was used by Hanbali and Hanafi jurists. It refers to a debt owed to a tenant of a property that is established against the waqf, with the permission of the trustee. The property is rented at a reduced rate until the tenant recovers their debt. The ownership of the construction remains with the waqf.

The jurist Ibn Abidin defined Al-Marsad as "a debt on the waqf spent by the tenant for the construction of the house due to the absence of available funds for the waqf"<sup>6</sup>

In jurisprudential terms, it is also defined as "an agreement between the waqf supervisor and the tenant of the property who undertakes to repair and construct it, with their expenses becoming a debt established against the waqf. What the tenant spends comes from their own funds, in cases where the waqf has no revenue to fund the construction. It must be proven that this construction is necessary, and there is no desire to rent the property [in its current state]".<sup>7</sup>

Professor Zuhdi Yakan defined Al-Marsad right as one of the long-term lease contracts applicable to waqf properties. He described it as:

"A fixed debt owed to the tenant of a waqf property who has been authorized by the trustee to spend on necessary construction or renovation of that property. This occurs when the waqf lacks revenue to fund such construction. The tenant can reclaim from the waqf what they have spent from their own funds, after it has been established in the presence of the supervisor, provided that the construction is necessary for the waqf."<sup>8</sup>

Murshid Al-Hayran, in Article 599 of his book, defined Al-Marsad as: "A fixed debt on the waqf entity owed to the tenant who has, from their own funds, undertaken necessary construction

<sup>5</sup> Muhammad Abu Zahra, *Lectures on Waqf* (Cairo: Dar Al-Fikr Al-Arabi, 1971), 30.

<sup>6</sup> Manajli Ahmed Amin, "Leasing Waqf Real Estate in Algerian Legislation", *Journal of Human Sciences* 5/1, (June 2018), 58.

<sup>7</sup> Khair Eddine Moussa Fantazi, *Donation Contracts on Real Estate Property - Waqf* (Amman: Dar Zahran, 2011), 212.

<sup>8</sup> Zuhdi Yakan, *Ahkam al-Waqf (Provisions of Waqf)* (Lebanon: Al-Asriya Press, n.d.), 178.

on a waqf investment property with the permission of its supervisor, when there are no available waqf funds and no one willing to rent it for an advance payment sufficient for its construction."<sup>9</sup>

### 1.1.2.3 Legal Definition of Al-Marsad Right:

The Algerian legislator only addressed Al-Marsad contract relatively late through an amendment to the Waqf Law by Law No. 01/07 dated 22/05/2001. This amendment introduced Article 26 bis, which included mechanisms for developing, exploiting, and investing waqf properties.

Article 26 bis 5 states: "Waqf land may be exploited, invested, and developed through an Al-Marsad contract, which allows the tenant of the land to construct buildings on it in exchange for exploiting the revenues of the building. The tenant has the right to assign this right by prior agreement throughout the period of amortization of the investment value, subject to the provisions of Article 25 of Law No. 91/10 dated 27/04/1991."<sup>10</sup>

We observed that the legislator has limited the subject of Al-Marsad contract to land, excluding other built properties. This land must be of an urban nature intended for construction, which excludes from the scope of this contract:

- Existing waqf buildings, for which other exploitation formulas have been specified, such as the construction and renovation contract and the contracting agreement.

- Agricultural lands or those with agricultural potential, for which other development and exploitation formulas have been specified, including Muzara'a and Musaqat contracts for agricultural lands, and the Hikr contract for uncultivated, idle lands.

The legislator has allowed the beneficiary of the waqf land (Al-Marsud lahu) to build on it and recoup their construction expenses from the revenues generated after the completion of Al-Marsad project and its entry into operation. The duration of Al-Marsad is determined by the annual revenue of the waqf property, calculated through an estimated and proportional calculation of construction costs divided by the annual revenue. Thus, the duration of Al-Marsad can be considerable and relatively long.

The waqf may expedite the collection of some financial benefits from Al-Marsad right by agreeing with the operator (Al-Marsud lahu) to pay an annual rent deducted from the building's revenues, which is paid to the waqf's account.

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<sup>9</sup> Muhammad Qadri Pasha, *Murshid Al-Hayran ila Ma'rifat Ahwal Al-Insan* (Egypt: The Grand Amiri Press, Second Edition, 1981), 98.

<sup>10</sup> Refer to the text of Article 26 bis 5 of Law 91-10 concerning waqf, as amended and supplemented, mentioned above.

The legislator allows the beneficiary (Al-Marsud lahu) to transfer their right in Al-Marsad to another person, subject to prior permission from the waqf trustee. This permission may be stipulated in the contract's terms or in a subsequent agreement. The transfer is limited to the remaining unconsumed value of the construction through exploitation.

In this context, a question arises about the nature of Al-Marsad right: Is it a personal (nominal) right or a real right? This will be addressed in a later section of this research paper.

The permitted transfer must comply with Article 25 of Law 91/10, which stipulates that all structures built on the waqf property are annexed to the waqf. This means that the ownership of these structures belongs exclusively to the waqf, as is the case with the land ownership, and the right of the beneficiary (Al-Marsud lahu) is limited to usufruct only.

To establish an Al-Marsad right, several conditions must be met collectively to allow the waqf supervisor to conclude the contract. These conditions will be discussed as follows:

## **1.2. Distinguishing Al-Marsad Right from Similar Concepts**

The concept of Al-Marsad right overlaps with some other contracts applicable to waqf properties, including Hikr right, Qarar right, and Khuluw contract. We will attempt to clearly differentiate between Al-Marsad and these contracts as follows:

### **1.2.1. Distinguishing Al-Marsad Right from Hikr Right:**

Al-Marsad and Hikr are similar in that both apply only to waqf properties and involve annual rent payments. However, in Al-Marsad, the rent is deducted from the debt value, while in Hikr, it's paid periodically. Both are relatively long-term contracts. They differ in the following aspects:

- Al-Marsad applies to lands or properties of an urban nature, while Hikr may apply to lands that could become agricultural after reclamation through Hikr<sup>11</sup>.

- Hikr allows the right holder to own the structures on the land according to jurists' opinions, while in Al-Marsad, the structures belong to the waqf.<sup>12</sup> Al-Marsad beneficiary only has a personal right as a creditor. In this regard, the legislator has contradicted the juristic doctrine that allows Hikr right holders to own buildings or plantations on Hikr waqf land. This is done by implementing Article 25 of Law 91/10 (as amended), which states: "Any change occurring through building or planting is annexed to the waqf property, and the waqf remains legally valid regardless of the type of change." This text implies that both the land and structures above it belongs to the waqf, and both the Hikr and Al-Marsad beneficiaries only have usufruct rights.

<sup>11</sup> Ibn Abidin Muhammad Amin Omar, *Radd al-Muhtar ala al-Durr al-Mukhtar*, (Riyadh: Dar al-Kutub al-Ilmiyyah Publishing House, 1966), 22.

<sup>12</sup> Al-Huwais, *Provisions of the Hikr Contract in Islamic Jurisprudence*, 62.



- In Hikr contracts, the rent can be raised to match market rates if the latter increase. In Al-Marsad, the rent remains constant until the beneficiary recovers their debt through deductions from exploitation revenues. However, upon the expiration of Al-Marsad, if the former beneficiary remains as a new tenant, the rent is increased to match current market rates.

#### **1.2.2. Distinguishing Al-Marsad Right from Qarar Right:**

Qarar right (Decision Right) is defined as a right applicable to waqf properties in specific ways, allowing the tenant to dispose of buildings or plantations on the property subject to the Qarar contract, similar to the Hikr contract. The Qarar right holder has priority in renting, whether for a defined or indefinite period.<sup>13</sup> The distinctions between Qarar right and Al-Marsad right are:

- Al-Marsad grants the holder the right of settlement until they recover their debt, while the Qarar right holder is not a creditor of the waqf but rather a debtor for the rent.
- The rent in a Qarar contract is similar to Hikr, while in Al-Marsad, it's deducted from the debt value.

#### **1.2.3. Distinguishing Al-Marsad Right from Exploitation Right:**

The Qarar right is defined as a right that applies to waqf properties in specific ways. It allows the tenant to have disposal rights over buildings or plantations on the property subject to the Qarar contract, similar to the Hikr contract. The holder of the Qarar right has priority in renting the property, whether for a defined or indefinite period.

### **1.3. Conditions for Resorting to Al-Marsad Contract**

Despite Al-Marsad being a legal mechanism for developing and investing in waqf lands, it's also considered a debt encumbering the waqf. Due to its potential risks to the waqf, jurists have stipulated that Al-Marsad can only be concluded if certain preconditions are met:

#### **1.3.1. The Waqf Land Must Be Designated for Construction:**

According to Article 26 bis 5 of Law 91/10 (as amended), Al-Marsad applies only to lands intended for construction or suitable for urbanization. This excludes:

- Built properties, for which other legal mechanisms like construction or renovation contracts are specified (Article 26 bis 7).
- Agricultural lands, for which Muzara'a and Musaqat contracts are specified (Article 26 bis1).
- Idle or uncultivated lands, for which Hikr contracts are specified (Article 26 bis 2).

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<sup>13</sup> Al-Huwais, *Provisions of the Hikr Contract in Islamic Jurisprudence*, 62.

- The waqf land must be either:
  - Developed land within the current urban area as defined by Article 20 of Law 90/29 on Urban Planning and Development.
  - Land suitable for urbanization as defined by Article 21 of the same law.
  - Agricultural waqf lands near population centers integrated into urban areas, as per Article 26 bis of the Waqf Law and Law 90/29.

If the waqf, as a legal entity with financial liability, has funds to exploit the waqf land directly or through other exploitation methods, it may still choose Al-Marsad contract for development and exploitation, subject to other conditions mentioned.

### **1.3.2. Lack of Financial Resources in the Waqf to Develop the Land:**

If the waqf, as a legal entity with financial liability, lacks funds to exploit the waqf land directly or through other exploitation methods, this necessitates the consideration of Al-Marsad contract for developing and exploiting the waqf land. This is subject to other conditions mentioned below.

### **1.3.3. Absence of Possibility to Rent the Waqf for Advance Payment:**

This condition is crucial. If someone is willing to rent the waqf land for an advance payment that allows for its development<sup>14</sup>, meaning the tenant pays the waqf rent for the lease period that enables the waqf to develop the land by spending on the leased property, then this condition is not met. Only when there's no one willing to rent the land for advance payment does it become a reason to resort to Al-Marsad contract due to the aforementioned necessity.

In this regard, it's important to note how to justify the fulfillment of this condition. The burden of proof lies with the waqf supervisor, who must provide all evidence of the lack of interest in renting for advance payment. This may include:

- The ineffectiveness of official advertisements, at least twice, attempting to lease through public auction, which is the general rule adopted for leasing waqf properties.
- The property remaining unexploited for a justified certain period.
- Other valid excuses.

## **1.4. The Legal Nature of Al-Marsad Right**

The characterization of the nature of Al-Marsad right is shrouded in considerable ambiguity. Can it be classified as a nominal (personal) right or a real right that applies to the waqf

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<sup>14</sup> Yakan, *Provisions of Waqf*, 179.

property, specifically to the structures erected by the holder of Al-Marsad, right? Is it subject to registration or not? We can analyze this situation from two perspectives as follows:

#### 1.4.1. Does it confer a Personal or Real Right to its Holder?

It is established in general jurisprudence that Al-Marsad right is a nominal right that confers upon its holder a personal right over the value of funds expended in developing the waqf land subject to Al-Marsad development contract. According to juristic opinion, Al-Marsad contract encompasses two contracts in one:

- The first contract is the debt established against the waqf's liability, equivalent to what Al-Marsad holder has spent on development works.
- The second contract is the lease agreement that takes effect immediately upon completion of construction and commencement of the project's operation. This allows Al-Marsad holder, as the lessee, to benefit from the revenues, from which they pay the agreed-upon rent to the waqf trustee.

However, this personal right<sup>15</sup> was not clearly manifested in the legal definition of Al-Marsad within the text of Article 26 bis 5 of the Waqf Law, which did not focus, even implicitly, on the debt allocated to the waqf. Instead, it focused on enabling the beneficiary of Al-Marsad to build on the waqf land, thereby clarifying the subject matter of the contract as the land itself. The article also emphasized the transferability of Al-Marsad to third parties with the permission of the trustee, as well as its inheritability by general successors. All of this may suggest to researchers a resemblance to the rights in rem established in similar contracts, such as the right of hikr (long-term lease) and the right of usufruct in civil law, as well as the right of concession in civil law.

Given the legislator's incomplete grasp of all aspects of Al-Marsad, we can only rely on the elements of the jurisprudential definition of the right of Al-Marsad, which primarily focuses on the debt allocated to the waqf. This debt is the basis for consumption and deduction from the agreed-upon rental value. Upon full repayment of the debt, the right of Al-Marsad is extinguished through fulfillment.

Accordingly, the right of Al-Marsad is categorized among personal rights rather than rights in rem that are associated with waqf property subject to exploitation through this type of contract. Nevertheless, it remains a lease contract of a special nature due to its long duration and the rights it confers upon the holder of Al-Marsad, which are uncommon in standard leases, such as the right to transfer Al-Marsad and its inheritability<sup>16</sup>.

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<sup>15</sup> Fantazi, *Donation Contracts*, 210.

<sup>16</sup> Fantazi, *Donation Contracts*, 56.

The transfer of the right of Al-Marsad, being a personal right, takes the form of an assignment of the right arising from the obligation between the debtor (the waqf) and its creditor (the beneficiary of Al-Marsad). This assignment of right is a contract or agreement between the creditor, known as the assignor, which entails the transfer or conveyance of their right of Al-Marsad from their debtor (the waqf), termed the assignee, to another person called the transferee (the new beneficiary of Al-Marsad). Consequently, the latter becomes a creditor to the waqf for the remaining value of the debt allocated to the waqf's liability.

This contract requires its essential elements and conditions, as with other contracts, including consent, subject matter, cause, formality, and prior permission from the waqf authority. The waqf authority may exercise this right itself through pre-emption by settling the remaining debt and liberating the waqf property from the encumbrance of the allocated debt<sup>17</sup>.

#### **1.4.2. Subjection of the Contract to Registration and Publication:**

Considering that this right (Al-Marsad) is among long-term leases applicable to developed or developable waqf lands, and given that it grants the beneficiary the right to transfer it to others and bequeath it to general successors, as well as its establishment for specific successors as part of the assets and components of the deceased beneficiary's estate, the preservation of all these rights necessarily requires formality in Al-Marsad contract and its publication in the real estate registry. This ensures that all parties with rights related to the waqf property are protected. The legislator did not address this provision in Law 91/10, as amended and supplemented, considering that only a single article regulates it.

It is worth noting that contracts pertaining to real estate must be subject to formality, officiality, and real estate publicity procedures, which is applicable to this right.<sup>18</sup> Referring to general rules, leases exceeding 12 years must be publicized, as stipulated in Article 89 of Ordinance No. 74/75 dated 14/11/1974 concerning the preparation of general land survey and establishment of the real estate registry, which states: "Leases for a period of 12 years shall have no effect between parties and cannot be invoked against third parties if not publicized...".<sup>19</sup> Therefore, based on the foregoing, we can highlight some characteristics of the right of Al-Marsad .

#### **1.4.3. Characteristics of the Right of Al-Marsad:**

<sup>17</sup> In this regard, review the text of Article 26 bis 5 of the Endowments Law No. 91/10, amended and supplemented.

<sup>18</sup> Abdel-Ali Lahzil, *Mechanisms for Protecting Waqf Properties in Algerian Legislation* (el-Oued: El-Oued University, Faculty of Law and Political Sciences, Master's Thesis in Law, 2014/2015), 93.

<sup>19</sup> concerning the preparation of general land survey and establishment of the real estate registry, Official Gazette No. 52 (28/06/1974), Ordinance No. 74/75 dated 12/11/1974, as amended and supplemented, particularly by Official Gazette No. 78 (31/12/2014), Law No. 14/10 dated 30/12/2014, relating to the Finance Law for 2015, Official Gazette No. 76 (28/12/2017), and Law 17/11 dated 30/12/2017 relating to the Finance Law for 2018.

The right of Al-Marsad is characterized by the following features:

- The source of the right of Al-Marsad is Islamic jurisprudence (fiqh), and it has found its way into modern legislation regulating public waqf.
- The right of Al-Marsad applies only to developed waqf lands or those suitable for development.
- The purpose of concluding an Al-Marsad contract is to develop waqf land in cases where there are no available funds for its development.
- The duration of Al-Marsad is typically long-term, considering the investments made by the beneficiary on the waqf property, which requires extended periods for recouping through rent.
- The right of Al-Marsad is a personal right that entitles its holder to exploit the developed property until the debt is fully recovered.
- The right of Al-Marsad is transferable to third parties and inheritable.
- Al-Marsad contract is a formal contract subject to real estate publicity procedures.<sup>20</sup>

## 2. Elements of Al-Marsad Contract

Al-Marsad contract is one of the administrative contracts that require mutual consent between the two parties. On one side, there is the endowment (waqf) represented by the custodian of endowment properties, and on the other side, there is Al-Marsad (the investor). Additionally, Al-Marsad contract has a specific purpose and subject matter, and it is subject to formal requirements. Furthermore, its duration must be explicitly defined as a temporal contract. Moreover, Al-Marsad contract includes compensation, which is also considered a form of long-term lease for endowment lands.

### 2.1. The Consent Requirement in Al-Marsad Contract

For Al-Marsad contract to be valid, it necessitates a positive response from the custodian of endowments. The endowment institution announces its intention to develop the endowment land for construction purposes. This announcement is made publicly, allowing interested parties to compete for the contract. Acceptance only occurs after the tender process has been awarded to the best offer.

Al-Marsad contract is then drafted by the endowment custodian, who acts as both the drafter and a party to the contract. The Al-Marsad, chosen from among competing offers, becomes the rightful holder of Al-Marsad rights.

#### 2.1.1. The Custodian of Waqf (Endowments):

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<sup>20</sup> Yakan, *Provisions of Waqf*, 179. Fantazi, *Donation Contracts*, 211.

In this context, the Custodian represents the religious affairs and endowments director for the province where the property is located within their regional jurisdiction. This understanding is derived from the provisions of Executive Decree No. 2000/200, which outlines the regulations governing the administration of religious affairs and endowments in the province(wilaya).<sup>21</sup> Notably, Article 3 of decree No. 2000/200 specifies that one of the duties of the religious affairs and endowments director is to negotiate lease contracts for endowment properties and manage their investments.

Furthermore, Article 5 of Executive Decree No. 18/218, which establishes conditions and procedures for utilizing endowment properties for investment projects,<sup>22</sup> stipulates that the utilization of waqf (endowment) properties intended for investment must occur through a contract between the religious affairs and waqf (endowments) director and the observatory (investor). In such cases, the Minister of Religious Affairs and Endowments may oversee the preparatory steps for these contracts in certain national-interest situations, after which the provincial director finalizes the contract, registers it, and ensures its legal validity.<sup>23</sup>

### **2.1.2. The Holder of the Right of Al-Marsad:**

Natural or juridical persons of Algerian nationality<sup>24</sup> seeking to exploit buildable waqf land may obtain the right of Al-Marsad, provided they are legally competent to ensure their actions are legally valid. For natural persons, this means reaching the age of majority and not being subject to any incapacity such as insanity or dementia, as stipulated in Article 42 of the Civil Code.<sup>25</sup> For juridical persons, they must possess legal capacity and be permitted by their bylaws to enter into such contracts, on the condition that they are subject to Algerian law.

<sup>21</sup> This decree establishes the regulations governing the administration of religious affairs and endowments within the province. It was issued under Official Journal number 47 (02/08/200), Executive Decree No. 2000/200 dated 26/07/2000.

<sup>22</sup> This decree outlines the conditions and procedures for utilizing endowment properties specifically for investment projects. It was issued under, Official Journal number 52 (29/08/2018), Executive Decree No. 13/218 dated 20/08/2018.

<sup>23</sup> The authority to enter into these contracts lies with the provincial director of religious affairs and endowments, as stipulated in Article 11 of Executive Decree No. 18/213 mentioned above. Additionally, Article 8 of the specified terms and conditions for granting public endowment properties for investment projects through mutual agreement, which is attached to the same executive decree, reinforces this authority. Notably, upon reviewing Article 3 of the aforementioned Executive Decree No. 00/2000, we find no provision that grants an exception to the minister, allowing them to prepare, sign, register, and validate contracts. Therefore, it is the provincial director who executes these contracts within their regional jurisdiction on behalf of the minister

<sup>24</sup> The condition of Algerian nationality for natural persons is stipulated in Article 6 of the specifications annexed to the aforementioned decree concerning the submission of offers. The legislator should have explicitly included this in Article 6 of Executive Decree No. 13/213 mentioned earlier.

<sup>25</sup> containing the Civil Code, Official Journal No. 78 (30/09/1975), Official Journal No. 31 (13/05/2007) Ordinance No. 75/58 dated 26/09/1975, as amended and supplemented by Official Journal No. 31 (13/05/2007), Law No. 07/05 dated 13/05/2007.

### 2.1.3. Procedures for Concluding an Al-Marsad Contract:

Article 22 of Executive Decree No. 98/381, which determines the conditions and modalities for managing, operating, and protecting waqf properties<sup>26</sup>, states that "Waqf property, whether a building, vacant land, agricultural land, or planted land, shall be leased through auction, with the minimum price set at the fair market rent..." Therefore, as a general rule, the leasing of waqf properties can only be done through auction. However, this rule has an exception as stipulated in Article 25 of the same decree: if the waqf property is intended for the dissemination of knowledge, promotion of research, or charitable purposes, it may be leased by mutual agreement after obtaining authorization from the Minister of Religious Affairs.

Article 20 of the aforementioned Executive Decree No. 18/213 also stipulates that waqf property may be leased by mutual agreement in the following cases:

- After two unsuccessful attempts to solicit offers.
- If the investment project is of significant importance to the waqf or of national significance, or if it includes high added value in the social aspect.
- If the project benefits young people with scientific or professional qualifications within the framework of micro-investment projects.<sup>27</sup>

The method of tendering through offers or public auction allows for achieving consent free from defects due to the nature of the preliminary legal procedures. Additionally, achieving mutual agreement in exceptional cases is ensured by the administrative procedures followed in this regard.

### 2.2. The Element of Subject Matter in Al-Marsad contract

Al-Marsad contract has a subject matter, which is the thing that one party in the contract commits to in relation to the other party. For the beneficiary of Al-Marsad, the subject matter is the right of credence established against the waqf. This is why this contract is called Al-Marsad, meaning a debt allocated to the waqf's liability that the waqf administrator is obligated to fulfill by granting exploitation rights to the holder of Al-Marsad right on the building constructed on waqf land. This is the subject matter of the contract for the opposite party, which is the waqf, as it will own the contracted building. The parties may agree that the holder of Al-Marsad right pays rent to the waqf to expedite the fruits of the building while simultaneously exploiting it and

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<sup>26</sup> which determines the conditions and modalities for managing, operating, and protecting waqf properties, Official Journal No. 90 (02/12/1998). Executive Decree No. 98/381 dated 01/12/1998.

<sup>27</sup> Jamal Bouchenafa - Yacine Laamiri, "The Legal Nature of the Contract for Exploiting Waqf Real Estate Intended for Investment", *Journal of Legal and Political Sciences* 10/2 (2019), 1487.

deducting their debt from it. In this case, the subject matter of the contract also includes the entitlement to that rent for the waqf party.<sup>28</sup>

The legislator has stipulated that the subject matter of Al-Marsad contract must be buildable waqf land for which the waqf does not have funds to invest in it, as stated in Al-Marsad specifications that must be attached to the contract.

### **2.3. The Element of Cause in Al-Marsad contract**

The element of cause in Al-Marsad contract is the purpose that the waqf institution aims to achieve through entering into this contract. Here, the cause is to invest in the waqf property by constructing a profitable project that generates future income, particularly when the waqf lacks sufficient revenue or funds to develop the land itself.<sup>29</sup>

For the holder of Al-Marsad right, the cause is the desire to generate profits from investments by building on waqf land, thereby achieving the desired benefit. The motivation for such a contract may include both financial and moral aspects through the intention to contribute to the development of waqf property with the incentive of spiritual reward.

### **2.4. The Element of Formality in Al-Marsad contract**

We have previously established the nature of this contract as a personal right (credence), allowing its holder to exploit the subject of the contract - in relation to the waqf - for a certain period that enables the recovery of construction expenses along with profits. From this perspective, it will be relatively long-term, at least making this contract one of the formal contracts subject to a legally defined form and subject to publication in accordance with Article 89 of Ordinance No. 74/75 related to land survey preparation and establishment of the real estate registry, mentioned earlier. Although formality in lease contracts is established by Article 467 bis of the Civil Code, which stipulates that a lease must be in writing and have a fixed date, otherwise it is void, this transaction must be formalized. However, due to its nature, it is subject to registration and real estate publicity as we have mentioned, this is stipulated as well in Article 16 of Ordinance No. 74/75 dated 12/11/1974 about the preparation of general land survey and establishment of the real estate register.

### **2.5. Duration of Al-Marsad Contract**

The legislator has not specified the duration of Al-Marsad right nor its minimum and maximum limits. Therefore, we will attempt to justify the long duration that responds to the nature of Al-Marsad through its provisions as understood by jurists and by comparing it to similar long-term leases.

<sup>28</sup> Bouchenafa and Laamiri, *The Legal Nature of the Contract for Exploiting Waqf*, 1492.

<sup>29</sup> Ferdi Karima, "The Hikr Contract as a Mechanism to Activate the Valorization of Idle Waqf Real Estate", *Journal of Judicial Ijtihad* 12/1 (2020), 428.



### 2.5.1. Duration of Lease in Islamic Jurisprudence:

Al-Shawkani argues that restricting leases to a short period of three years is unjustified if there is benefit in continuing and extending the lease term, and that this should not be interrupted. Hanafi jurists, however, view long-term leases as invalid except in cases of necessity<sup>30</sup>, to prevent claims of ownership that might accompany prolonged leases. They also invalidate consecutive contracts designed to circumvent this, as mentioned in Ibn Abidin's annotation. Ibn al-Qayyim concurred with this view unless it achieves the waqf's interest<sup>31</sup>.

Article 577 of Murshid Al-Hayran limits the lease of houses, shops, and land to three years, but allows exceeding this period when necessary to the extent required for developing the land.<sup>32</sup> From this, we can justify long-term leases on waqf properties.

### 2.5.2. Duration of Lease in Law

Referring to legal and regulatory texts governing waqf, particularly Law 91/10 or Executive Decree 98/381, we find there is no specified lease duration. However, Article 27 of the mentioned decree stipulates that waqf property cannot be leased for an indefinite period.

Article 6 of Executive Decree No. 14/70, which determines the conditions and modalities for leasing waqf agricultural lands,<sup>33</sup> states that waqf agricultural lands are leased for a defined period determined by the nature of agricultural exploitation. Article 26 of the same decree also allows leasing recovered waqf agricultural lands from the state for a renewable forty-year period, in continuity with the provisions of concession on state-owned agricultural enterprises under Law 10/03, which determines the conditions and modalities for exploiting agricultural lands belonging to the state's private property.<sup>34</sup>

We find that the contract for exploiting waqf properties stipulated in Executive Decree No. 18/213, mentioned earlier, sets its duration between a minimum of fifteen years and a maximum of thirty years, as stated in Article 8 of this decree. The exploitation contract shares with Al-Marsad the characteristic of involving the exploitation and investment of urban waqf lands, which, in our view, makes this duration applicable to Al-Marsad contract as well.

## 3. Effects of Al-Marsad contract

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<sup>30</sup> Faraj Abdul Munim Al-Sadda, *Original Real Rights, A Study in Lebanese and Egyptian Law*, (Beirut: Dar Al-Nahda Al-Arabiya, 1982), 485.

<sup>31</sup> Ibn Abidin, *Radd al-Muhtar ala al-Durr al-Mukhtar*, 5/18.

<sup>32</sup> Muhammad Qadri Pasha, *Murshid Al-Hayran*, 94.

<sup>33</sup> which determines the conditions and modalities for leasing waqf lands designated for agriculture, Official Journal No. 09 (20/02/2014), Executive Decree No.14/70 dated 10/02/2014.

<sup>34</sup> Which determines the conditions and modalities for exploiting agricultural lands belonging to the state's private property, Official Journal No. 46 (18/08/2010), Law 10/03 dated 15/08/2010.

For Al-Marsad contract to produce its legal effects between parties, it must be validly formed, fulfilling its essential elements and both substantive and formal conditions. The legal effect is summarized in the rights and obligations of each party towards the other. We will attempt to detail this as follows:

### **3.1. Rights and Obligations of the Holder of Al-Marsad right**

The holder of Al-Marsad right in the contract is the investor who contracts with the waqf to construct and erect a building on the waqf land designated exclusively for development. This type of contract only applies to this category of waqf property, aiming to develop and fructify the land to generate returns for the waqf, as stipulated in Article 26 bis 5 of the amended and supplemented Waqf Law 91/10. Consequently, the holder of Al-Marsad right acquires rights and assumes obligations within the contractual relationship arising from Al-Marsad contract, which we can clarify as follows:

#### **3.1.1. Rights of the Holder of Al-Marsad right:**

Several rights arise for the holder, including:

##### **3.1.1.1. Exploitation of the Constructed Building:**

Al-Marsad contract, being a debt allocated to the waqf's liability, allows the holder to occupy, use, exploit, and collect income from the building they have constructed. The holder deducts from the value of their expenditure the agreed rent throughout the contract period, in accordance with Al-Marsad specifications mandatorily attached to the contract. The exploitation must conform to the purpose for which the property was constructed and must not contravene public order and morals.

Explanation of Ibn Abidin Al-Dimashqi Al-Hanafi annotation mentions that one form of Al-Marsad is when someone leases a waqf property needing essential development, and the waqf administrator permits them to develop it with immediate funds called "Khidma," intending to deduct it from the annual rent or reclaim it from the waqf when funds become available. This development remains the property of the waqf.<sup>35</sup>

This right is stipulated in Article 26 bis 5 of Law 91/10 on Awqaf, as amended and supplemented, which states: "Waqf land may be exploited, invested, and developed through an Al-Marsad contract, which allows the lessee of the land to build on it in exchange for exploiting the building's revenues, with the right to assign it by prior agreement throughout the period of amortizing the investment value..."

Here, occupation may extend to several forms, including the right of use stipulated in the Civil Code under Article 855, which states that the scope of the right of use and right of habitation is determined by the needs of the right holder and their immediate family without prejudice to

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<sup>35</sup> Ibn Abidin, *Radd al-Muhtar ala al-Durr al-Mukhtar*, 16.

what is decided by the deed establishing the right. It also includes the right of usufruct, i.e., the exploitation of the constructed building by the holder of Al-Marsad right personally or by leasing it to others.<sup>36</sup>

#### **3.1.1.2. Assignment of Al-Marsad Right:**

This contract allows the holder to assign their right to a third party. This assignment is limited to the right to exploit the building's revenues, meaning the long-term lease can be transferred to others. This right is legally stipulated in Article 26 bis 5<sup>37</sup>, as mentioned earlier, making it different from ordinary leases, which are considered personal rights and do not allow such procedure unless explicitly stated in the contract, as per Article 469 of the Civil Code.

This right is transferable from the original lessee to another lessee who takes their place. The transfer of this right is, of course, for consideration, but it applies to the remaining allocated debt that allows for the exploitation of the building's revenues for the remaining period until the debt value is fully amortized.<sup>38</sup> The building itself is owned by the waqf and follows the waqf land as per Article 25 of the amended Waqf Law. The assignment of this right must be with the permission and knowledge of the waqf administrator, as per Article 26 bis 5 mentioned above.

#### **3.1.1.3. Transfer of Al-Marsad Right to Successors:**

Article 26 bis 5 also stipulates that Al-Marsad right is transferred to heirs upon the death of the right holder, as it is considered a financial right among the components of the deceased's estate<sup>39</sup>, This distinguishes Al-Marsad right from ordinary leases, which terminate upon the lessee's death as a personal right that does not transfer to heirs, according to Article 469 bis 2. However, Al-Marsad right is governed by a special rule, Article 26 bis 5, and in this case, we say that the special rule restricts the general rule. On the other hand, as we said earlier, it is a personal right.

#### **3.1.1.4. Right of Lease Priority:**

The legislator did not address in the legislative and regulatory texts of waqf the issue of priority in lease entitlement after the expiration of Al-Marsad contract. In this case, all legal effects of Al-Marsad would have expired and been settled between the parties. If the waqf

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<sup>36</sup> Khair al-Din Meshernin, *Waqf Management in Algerian Law* (Tlemcen: Abu Bakr Belkaid University, Faculty of Law and Political Sciences, Master's Thesis in Local Administration Law, 2011/2012), 214.

<sup>37</sup> Article 26 bis 5 of Law 91/10 relating to Endowments, mentioned previously.

<sup>38</sup> Khair Al-Din Meshernin, *Waqf Management in Algerian Law* (Tlemcen: Abu Bakr Belkaid University, Faculty of Law and Political, Master's Thesis in Local Administration Law, 2011/2012), 214

<sup>39</sup> Article 26 bis 5 of Law 91/10 relating to Endowments, mentioned previously.

institution wants to offer it for lease again, some argue for the priority of the previous Al-Marsad holder who constructed the building<sup>40</sup>.

This priority view conflicts procedurally with the method of leasing waqf properties through public auction, which does not allow preferring one bidder over another. Consequently, the lease auction will be awarded to the highest bidder, who may or may not be the previous Al-Marsad holder. Even if some researchers suggest including this preference as a feature in the auction specifications, achieving this would be difficult in reality except perhaps in case of equal bids. Otherwise, we see it as impractical given the mandatory auction process for leasing waqf land developed under Al-Marsad right after its expiration.<sup>41</sup>

### **3.1.2. Obligations of the Holder of Al-Marsad Right:**

The holder of Al-Marsad right has three main obligations towards the waqf institution, which can be explained as follows:

#### **3.1.2.1. Constructing and Financing the Agreed Building:**

This obligation is the subject matter of the contract for the waqf. The completion of the agreed building is the objective of the Religious Affairs Administration in concluding Al-Marsad contract. The waqf land must be of a nature suitable for urban development and construction of the agreed project, within the timeframe specified in the contract specifications. The project must then obtain a certificate of conformity to enter into operation. Thereafter, Al-Marsad holder is considered a tenant, deducting the rent from the value spent on construction. The agreement between the parties may divide the rent into two parts: one part paid and another deducted<sup>42</sup>.

#### **3.1.2.2. Paying the Agreed Rent:**

As mentioned, the contracting parties may agree on advancing some rent to be paid by Al-Marsad holder to the waqf from the beginning of the project's operation, with the remainder deducted from the value of their debt allocated to the waqf. This rent is not reviewed or increased according to market requirements, unlike in the hikr contract where rent increases if land prices increase. In Al-Marsad, the rent does not change until the contract expires, at which point the property's rental value is reassessed, whether the previous Al-Marsad holder remains as a regular tenant or a new tenant enters.<sup>43</sup>

#### **3.1.2.3. Returning the Property to the Waqf upon Expiration of Al-Marsad:**

<sup>40</sup> Al-Huwais, *Provisions of the Hikr Contract in Islamic Jurisprudence*, 62.

<sup>41</sup> Khair al-Din Mashranan, *Waqf Management in Algerian Law*, 214.

<sup>42</sup> Fouad Abdullah Al-Omar, *Investing Endowed Funds - Economic Conditions and Development Necessities*, (Kuwait: s.l. 2007), 77.

<sup>43</sup> Al-Huwais, *Provisions of the Hikr Contract in Islamic Jurisprudence*, 62.

If Al-Marsad contract expires for any reason, most importantly the expiration of its term with the holder's debt being fully amortized, or if the waqf pays off the remaining debt, for example, Al-Marsad right holder must return the property in the best condition without neglecting its maintenance and care, as a diligent person would care for another's property. They may return to it after delivery as a regular tenant.

#### **3.1.2.4. Allocating a Security Deposit:**

Al-Marsad holder must allocate the agreed security deposit with the waqf administration. This forms a guarantee to be used in case the holder breaches their obligations, especially those related to construction and maintenance. The waqf then has the right to deduct directly from it in case of default by Al-Marsad holder, where the waqf can step in to complete the required work at the expense of the holder, deducted from the security deposit value.<sup>44</sup>

### **3.2. Rights and Obligations of the Waqf Institution**

Al-Marsad right establishes rights for the waqf institution and imposes obligations on it towards the holder of Al-Marsad right, the second party in the contract<sup>45</sup>. We will detail this as follows:

#### **3.2.1. Obligations of the Waqf Authority:**

The right of Al-Marsad imposes obligations on the Waqf authority that must be fulfilled for the holder of Al-Marsad right, namely:

##### **3.2.1.1. Delivering the endowed land to Al-Marsad holder:**

Upon the valid establishment of Al-Marsad, the Waqf property management must deliver the land subject to Al-Marsad to the holder so that they can proceed with its preparation and construction. Delay in delivery is considered a form of procrastination that harms the weaker party in the contract and delays the development of the Waqf land. Therefore, neither party may violate the previously agreed terms. The delivery should be made pursuant to a handover report prepared at or after the contracting procedures. The latter also constitutes an obligation, as the Waqf administration must expedite the registration and publication of Al-Marsad contract without delay<sup>46</sup>.

##### **3.2.1.2. Refraining from personal interference and addressing third-party interference:**

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<sup>44</sup> Hussein Hamed Hassan, *Real Estate Usufruct Rights: Forms and Provisions*, research paper presented at the Fifth Shura Fiqh Conference, Kuwait, 16-17/12/2013, 110.

<sup>45</sup> Al-Huwais, *Provisions of the Hikr Contract in Islamic Jurisprudence*, 66.

<sup>46</sup> Hassan, *Real Estate Usufruct Rights: Forms and Provisions*, 110.

The Waqf authority must refrain from any action that would constitute personal interference with Al-Marsad holder, as this would inevitably affect the implementation of the agreed project. However, certain procedures taken within the Waqf administration's authority, such as monitoring, guidance, notices, and the like, are not considered personal interference.

The Waqf administration is also obligated to prevent third-party interference with Al-Marsad holder or that which arises from the Waqf's exercise of property rights and associated powers, including claims of entitlement. In such cases, the intervention of the Waqf administration is necessary to prevent third-party interference with Al-Marsad holder.<sup>47</sup>

### **3.2.2. Rights of the Waqf Authority:**

When Al-Marsad is validly established, it confers rights to the Waqf authority, including:

#### **3.2.2.1. Completion of Al-Marsad Project and its Entry into Operation:**

The Waqf has the right to have Al-Marsad holder complete the agreed-upon construction according to the terms specified in the conditions' booklet attached to Al-Marsad contract. The construction should comply with urbanization rules and building permits, and Al-Marsad holder should seek to obtain a certificate of building conformity within the specified deadlines. This allows Al-Marsad holder to begin exploitation and deduct the debt through the annual rent determined between the parties, some of which may be expedited if the Waqf seeks to collect some fruits early, as previously mentioned<sup>48</sup>.

#### **3.2.2.2. Right to Continuous Supervision:**

The Waqf authority has the right to monitor Al-Marsad project from the commencement date of construction until the project becomes operational, and thereafter until the termination of Al-Marsad contract for any reason. The Waqf may monitor the construction methods at all stages, beginning with Al-Marsad holder obtaining building permits, then the various stages of construction, followed by the methods of exploitation according to the designated use of the built property, and finally the periodic maintenance required for the building. This ensures that the property is returned to the Waqf in the best condition possible upon contract termination. Al-Marsad holder must cooperate with the Waqf authority in all stages and types of continuous monitoring mentioned above<sup>49</sup>.

#### **3.2.2.3. Collection of Advance Rent:**

<sup>47</sup> Hassan, *Real Estate Usufruct Rights: Forms and Provisions*, 112.

<sup>48</sup> Mehda Djelloul, "Provisions on the Monopolization of Endowment Lands in Algerian Legislation and Comparative Law", *Journal Al-Shehab Magazine* 10/2 (2024), 335.

<sup>49</sup> Mehda, *Provisions on the Monopolization of Endowment Lands*, 345.

The Waqf is entitled to a portion of the rent if the parties agree to divide it between a part paid to the Waqf as advance civil fruits and a part not paid immediately but deducted from the value of Al-Marsad debt until it is extinguished during Al-Marsad period. This is because Al-Marsad holder is considered a tenant paying rent for the endowed property, including the land and the completed building<sup>50</sup>.

#### **3.2.2.4. Right to Deduct from the Allocated Guarantee Value:**

As mentioned earlier regarding the obligations of Al-Marsad holder, the Waqf has the right to deduct the value of works it undertakes in place of Al-Marsad holder or in case of compensation for damage to the Waqf building within the contractual relationship of Al-Marsad.

#### **3.2.2.5. Right to Receive the Property upon Termination of Al-Marsad:**

There is no justification for Al-Marsad holder to retain the property subject to Al-Marsad upon contract termination. The Waqf authority has the right to reclaim the property for direct exploitation or re-leasing. Therefore, the Waqf should use all means to regain possession of the Waqf property within the specified deadlines.

#### **3.2.2.6. Right to Terminate the Contract:**

The Waqf has the right to terminate Al-Marsad contract if it deems that Al-Marsad holder has breached the obligations agreed upon in the condition's booklet attached to Al-Marsad contract. This right is also granted to Al-Marsad right holder, who may request contract termination by mutual agreement or through litigation<sup>51</sup>.

### **3.3. Termination of Al-Marsad Rights**

Al-Marsad is a temporal contract that fulfills its mutual obligations between the parties throughout its duration. It terminates upon the expiration of its term. Additionally, it may terminate for other reasons in accordance with the general rules governing contract termination. We will elaborate on this below:

#### **3.3.1. Termination due to the Al-Marsad 's duration:**

The Al-Marsad 's duration ends when the debt value from the agreed-upon rent between Al-Marsad owner and the endowment authority is fully consumed. With the deduction of the last rent payment, the debt is settled, and Al-Marsad right ceases. Regarding the precise duration in Al-Marsad contract, should it remain open-ended or be determined based on construction

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<sup>50</sup> Ashraf Muhammad Al-Dawaba, *Investment Funds in Islamic Banks between Theory and Practice*, (Egypt: s.l., 2004), 19.

<sup>51</sup> Majid Ragheb Al-Helou, *Al-Uqood Al-Idariyya (Administrative Contracts)*, (Alexandria: Dar Al-Jamia Al-Jadida, 2010), 161.

revenues and the investor's ability to recover expenses? To address this issue, we assert that at the outset of the contract, within its terms and conditions, the parties should specify the total project value. Consequently, Al-Marsad debt becomes known, and the investor's obligation is solely related to construction expenses. Alternatively, they may agree on construction fees upon entering service. Alternatively, the precise determination of the project value may occur after its completion, considering that certain expenses cannot be fully assessed until the implementation period has passed. Similarly, the fair market rent value may only be accurately determined after the completion of construction. Thus, in both scenarios, Al-Marsad debt is precisely known, equivalent to the actual rent value, which is established in similar rental markets. Consequently, the debt consumption period aligns with the Al-Marsad's duration, culminating in the termination of Al-Marsad contract<sup>52</sup>.

### 3.3.2. Death of Al-Marsad owner before or after construction commencement:

If Al-Marsad owner passes away before construction begins, the debt is not realized against the endowment, resulting in the absence of a personal right of a specific nature on the endowment's part. In this case, Al-Marsad right (the owner's right) terminates upon death, based on this condition. However, if Al-Marsad owner passes away after the Al-Marsad's initiation, some debt may be incurred against the endowment. Consequently, the heirs have a choice: either continue with the Al-Marsad, complete the construction, and utilize it for the specified duration, or claim reimbursement for their expenses and withdraw from fulfilling the contract. The heirs' withdrawal constitutes a reason for Al-Marsad right's termination in this scenario. Conversely, if they choose to proceed with the contract, Al-Marsad will continue as agreed upon with the heirs, and they will retain only a personal right, as previously mentioned<sup>53</sup>.

### 3.3.3. Fulfillment of Debt:

When the endowment authority settles the value of Al-Marsad debt, this action leads to Al-Marsad contract's termination for the same reason. Regardless of the method of fulfillment—whether through regular payment of the debt value, compensation, or set-off—the debt is considered settled. This includes the concept of “union of obligations” and the waiver of debt.<sup>54</sup>

### 3.3.4. Impossibility of Execution:

If executing Al-Marsad contract becomes impossible at any stage before its duration expires—for instance, due to circumstances preventing either party from fulfilling their

<sup>52</sup> Muhammad Al-Saleh Boukhroua, *Legal Mechanisms for Managing Endowment wakf in Algerian Legislation* (Ouargla: University of Ouargla, Faculty of Law, 2010), 95.

<sup>53</sup> Boukhroua, *Legal Mechanisms for Managing Endowment wakf in Algerian Legislation*, 98.

<sup>54</sup> Abderrazak Ahmed Al-Sanhouri, *Al-Wasit fi Sharh al-Qanun al-Madani al-Jadid*, (Beirut: Al-Halabi Legal Publications, 1998), 1491-1492.



obligations (such as a dispute over the endowment land)—Al-Marsad terminates, and its effects are determined based on the conditions specified in the terms and the nature of the impossibility, along with any resulting guarantees.<sup>55</sup>

### 3.3.5. Termination of Al-Marsad Contract:

Termination (or dissolution) is a general principle applicable to all contracts. Article 119 of civil law states that if one of the contracting parties fails to fulfill their obligations, the other party may request either contract performance or termination after notifying the debtor. Termination serves as a consequence for a party's breach of contractual obligations. It has a retroactive effect, returning the parties to their pre-contractual state.<sup>56</sup> The endowment authority may seek termination if Al-Marsad breaches its contractual obligations. Let's consider two scenarios:

- If Al-Marsad fails to commence project execution within six months of completing the contractual procedures, the endowment administration may terminate Al-Marsad contract.

- If construction progress stalls beyond the agreed-upon deadline, the endowment authority has the right to terminate Al-Marsad contract.

- If Al-Marsad owner delays or refuses to pay the agreed-upon accelerated rent, and this non-payment persists for three consecutive years, the endowment authority may request contract termination.

- In cases of severe neglect by Al-Marsad owner in carrying out construction, the endowment authority can request termination. Usually, administrative termination of Al-Marsad contract lies with the endowment authority. However, if the other party believes they have been treated unfairly, they can seek legal recourse after being informed of the termination. The termination can also be mutual, as specified in the terms and conditions.

The national legislator has not explicitly defined the procedure for terminating an Al-Marsad contract. Administrative courts handle Al-Marsad contract disputes based on the organic standards outlined in Articles 800 and 801 of Law 08/09 concerning civil and administrative procedures. Regionally, the competent court is the administrative court within the jurisdiction where the property is located, as per Article 40 of the same law.

### Conclusion:

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<sup>55</sup> Khadija Ghazi, *Investment Contracts of Waqf Properties in Algerian Legislation* (Blida: Saad Dahlab University, Faculty of Law, Master's thesis, Real Estate Law specialization, 2013), 115.

<sup>56</sup> Al-Helou, *Administrative Contracts*, 161.

According to what we have presented above, the right of Al-Marsad is one of the contracts in which endowment lands of an urban nature are developed and invested when the endowment lacks a resource for their reconstruction.

This right is distinguished by its own terms and conditions and contractual effects that distinguish it from other contracts such as the right of monopoly, usufruct, and others.

However, all of its rules are still inherited from Islamic law and did not find legislative detail in the Awqaf Law, where it was sufficient to stipulate it as a mechanism for the exploitation of endowment lands in one article, We reached at the following conclusions from the aforementioned study, leaving Sharia as the primary reserve source of national legislation, from which the Awqaf Law is derived:

- The Al-Marsad right is regarded as a long-term lease that may only be used on urban endowment lands.

- The Islamic jurisprudence is the source of the Al-Marsad right provisions, and its jurists have diligently endeavoured to acknowledge the comprehensive analysis as a contract that advances and invests in endowment properties.

- The right of Al-Marsad is an efficient legal tool for developing endowment properties that ought to be restored and rebuilt by building for the endowment's benefit is

- Al-Marsad right is a long-term time contract in which the contractual obligations between the parties to the endowment contract on the one hand and Al-Marsad on the other meet, as well as a personal right that can be transferred between persons and passed down through inheritance, making provisional control an absolute necessity.

- Al-Marsad right to is one of the contracts contained in Islamic jurisprudence that develop and invest in urban endowment properties, which requires activating it as a mechanism of investment, and this requires taking note of regulatory provisions of a legislative nature within Arab and Islamic legislation.

**In light of the above, I propose the following recommendations:**

- Legislative efforts should focus on regulating Al-Marsad contracts specifically within endowment law. Consider incorporating provisions related to Al-Marsad contracts in Law 91/10 concerning endowments or Executive Decree 98/381, which outlines conditions and management procedures for endowment properties.

- Set a maximum duration (e.g., fifteen years) for Al-Marsad rights, similar to the minimum duration for exploiting endowment properties. This ensures that endowments can benefit from completed Al-Marsad investments.

- Define a period (e.g., six months to one year) after property delivery during which Al-Marsad must be put into use and swiftly address cases of investment delays.

- Specify the process for voluntary termination (mutual agreement) of Al-Marsad contract at any stage of execution. Judicial termination should be considered if Al-Marsad breaches its obligations.
- Clearly outline compensation procedures resulting from termination and recognize that Al-Marsad rights are crucial for endowment development and financial sustainability.
- Al-Marsad right is one of the contracts contained in Islamic jurisprudence that develops and invests in urban endowment properties, which necessitates activating it as an investment mechanism and taking note of legislative provisions within Arab and Islamic legislation.

## References

- Abu Zahra, Muhammad. *Lectures on Waqf*. Cairo: Dar Al-Fikr Al-Arabi, 1971.
- Al-Dawaba, Ashraf Muhammad. *Investment Funds in Islamic Banks between Theory and Practice*. Egypt: Dar es-Salaam, 2004.
- Al-Helou, Majid Ragheb. *Al-Uqood Al-Idariyya (Administrative Contracts)*. Alexandria: Dar Al-Jamia Al-Jadida, 2010.
- Al-Huwais, Saleh bin Sulaiman bin Hamad. *Provisions of the Hikr Contract in Islamic Jurisprudence*, Macca: Umm Al-Qura University, Faculty of Sharia and Islamic Studies, Doctoral Thesis in Jurisprudence, 1427/1428.
- Al-Omar, Fouad Abdullah. *Investing Endowed Funds - Economic Conditions and Development Necessities*. Kuwait: Al-Amanah General Endowments, 2007.
- Al-Sadda, Faraj Abdul Munim. *Original Real Rights, A Study in Lebanese and Egyptian Law*. Beirut: Dar Al-Nahda Al-Arabiya, 1982.
- Al-Sanhouri, Abderrazak Ahmed. *Al-Wasit fi Sharh al-Qanun al-Madani al-Jadid [Intermediary in the Explanation of the New Civil Code]*. 6 Volumes. Beirut: Al-Halabi Legal Publications, 3rd Edition, 1998.
- Amin, Manajli Ahmed. "Leasing Waqf Real Estate in Algerian Legislation". *Journal of Human Sciences* 5/1 (2018), 51-66, <https://www.univ-ueb.dz/JHS/docs/n9/4.pdf>.
- Bouchenafa, Jamal - Yacine Laamiri, "The Legal Nature of the Contract for Exploiting Waqf Real Estate Intended for Investment". *Journal of Legal and Political Sciences* 10/2 (2019), 1484-1513, <https://asjp.cerist.dz/en/article/101720>.
- Boukhloua, Muhammad Al-Saleh. *Legal Mechanisms for Managing Endowment wakf in Algerian Legislation*. Algeria: University of Ouargla. Faculty of Law, 2010, <https://search.mandumah.com/Record/1007419>.
- CC, containing the Civil Code, (Ordinance No.75/58 dated 26/09/1975), Official Journal No. 78 (30/09/1975), as amended and supplemented by Law No. 07/05 dated 13/05/2007, Official Journal No. 31 (13/05/2007), <https://www.joradp.dz/FTP/jo-arabe/2007/A2007031.pdf>
- CPGER, concerning the preparation of general land survey and establishment of the real estate registry, (Ordinance No. 74/75 dated 12/11/1974), Official Journal No. 52 (28/06/1974), as amended and supplemented, particularly by, relating to the Finance Law for 2015 (Law No. 14/10 dated 30/12/2014), Official Journal No. 78 (31/12/2014), and relating to the Finance Law for 2018, (Law 17/11 dated 30/12/2017), Official Journal No. 76 (28/12/2017), <https://www.joradp.dz/HAR/Index.htm>
- CW, concerning Waqf, (Law No. 91-10 dated 27/04/1991), Official Journal No. 21 (08/05/1991), amended and supplemented by Law No. 01-07 dated 22/05/2001, Official Gazette No. 29

- (23/05/2001), and by Law No. 02-10 dated 14/12/2002, (Official Journal No. 83 (15/12/2002). <https://www.joradp.dz/HAR/Index.htm>.
- DCMA, which determines the conditions and modalities for exploiting agricultural lands belonging to the state's private property, (Law 10/03 dated 15/08/2010), Official Journal No. 46 (18/08/2010). <https://www.joradp.dz/FTP/jo-arabe/2010/A2010046.pdf>
- DCMW; which determines the conditions and modalities for managing, operating, and protecting waqf properties, (Executive Decree No. 98/381 dated 01/12/1998), Official Journal No. 90 (02/12/1998), <https://www.joradp.dz/HAR/Index.htm>.
- DCPW, This decree outlines the conditions and procedures for utilizing endowment properties specifically for investment projects. It was issued under Official, (Executive Decree No. 13/218), Official Journal N. 52 (29/08/2018), <https://www.joradp.dz/FTP/JO-ARABE/2018/A2018052.pdf>.
- DERG, This decree establishes the regulations governing the administration of religious affairs and endowments within the province. It was issued under, (Executive Decree No. 2000/200 dated 26/07/200), Official Journal, No. 47 (02/08/200). <https://www.joradp.dz/HAR/Index.htm>.
- Djelloul, Mehda. "Provisions on the Monopolization of Endowment Lands in Algerian Legislation and Comparative Law" *Journal Al-Shehab Magazine*, 10/2 (2024), 327-358, <https://asjp.cerist.dz/en/article/251788>.
- Fantazi, Khair Eddine Moussa. *Donation Contracts on Real Estate Ownership - Waqf*, Jordan: Dar Zahran Amman, 2011.
- Ghazi, Khadija. *Investment Contracts of Waqf Properties in Algerian Legislation*, Algeria: Saad Dahlab University, Faculty of Law, Master's thesis, Real Estate Law specialization, 2013, <https://di.univ-blida.dz/jspui/handle/123456789/8924>.
- Hassan, Hussein Hamed. "Real Estate Usufruct Rights: Forms and Provisions," research paper presented at the Fifth Shura Fiqh Conference, Kuwait, 16-17/12/2013, <https://shura.com.kw/conferenceDesc.asp?pageID=21&confID>.
- Ibn Abidin, Muhammad Amin bin Omar al-Dimashqi al-Hanafi. *Radd al-Muhtar ala al-Durr al-Mukhtar*. Five Volumes, Riyadh: Dar Alam al-Kutub, 2003.
- Karima, Ferdi. "The Hikr Contract as a Mechanism to Activate the Valorization of Idle Waqf Real Estate". *Journal of Judicial Ijtihad* 12/1, (2020), 421-436, <https://asjp.cerist.dz/en/article/112260>.
- Lahzil, Abdel-Ali. *Mechanisms for Protecting Waqf Properties in Algerian Legislation*. El-Oued: Master's Thesis in Law, El-Oued University, Faculty of Law and Political Sciences, 2014/2015, <https://old.univ-eloued.dz/images/pdf>.

LF, which determines the conditions and modalities for leasing waqf lands designated for agriculture, (Executive Decree No. 14/70 dated 10/02/2014), Official Journal No. 09 (20/02/2014). <https://www.joradp.dz/FTP/JO-ARABE/2014/A2014009.pdf>.

Meshernin, Khair Al-Din. *Waqf Management in Algerian Law*, Tlemcen: Abu Bakr Belkaid University, Faculty of Law and Political, Master's Thesis in Local Administration Law, Sciences, 2011/2012. <https://elmouhami.com/wp-content/uploads/2016/04/benmcharnene.pdf>.

Qadri Pasha, Muhammad. *Murshid Al-Hayran ila Ma'rifat Ahwal Al-Insan [Guide of the Perplexed to Knowledge of Human Conditions]*. Egypt: The Grand Amiri Press, Second Edition, 1891.

Yakan, Zuhdi. *Ahkam al-Waqf (Provisions of Waqf)*. Beirut: Al-Asriya Press, First Edition, n.d.