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THE ISLAMIC WAQF IN JERUSALEM

Status, Legal Challenges, and Possibilities for Revival

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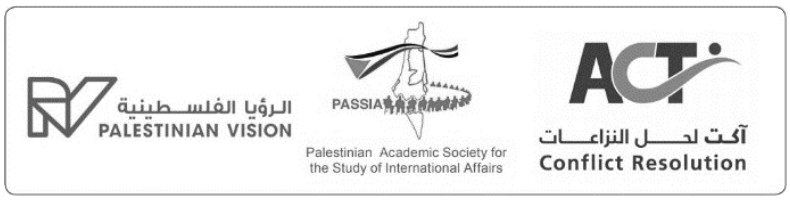

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Abbreviations:

CCS	Centre for Contemporary Studies
HCJ	High Court of Justice (Israeli)
ILA	Israel Land Administration
JNF	Jewish National Fund
P(N)A	Palestinian National Authority
PLO	Palestine Liberation Organization
SMC	Supreme Muslim Council

Glossary:

arkan	essential components of a valid *waqf*
asl	principal (of a revenue-producing property)
awqaf	plural of waqf
Bait Al-Mal	literally 'House of Money', i.e., Treasury House where public fund is kept
daruriyyat	"necessities" - the five essentials of life in Islamic law
fatwa	legal ruling on a point of Islamic law
fideicommissum	type of bequest in which the beneficiary is encumbered to convey parts of the decedent's estate to someone else.
fiqh	Islamic jurisprudence
fiqh al-muamalat	jurisprudence that governs Islamic waqf or the law of civil/legal obligations
fuqahaa	jurist, legal scholar, or expert in Islamic law
habs	detention
hadith	record of the words, actions, and the silent approval of the Prophet Muhammad as transmitted through narrators
Hekdesh	consecrated property, equivalent to *waqf* (Hebrew)
hikr	lease contract or deed
ijaraten	long lease
Ijitihad	interpretation/ independent reasoning
imaret	inn or hostel for pilgrims, also name for public soup kitchens
madrasa	school
istibdal	conversion of a type of waqf into another type; sale or exchange of *waqf* assets
kuttab	small school teaching reading, writing, *Qur'an*, and maths
madaris	Islamic schools of law
madhhab	doctrinal view
marsoom qadai	legal decree
mastaba	bench
mihrab	niche in the wall of a mosque or religious school

miri	form of land ownership (agricultural land leased from the government on condition of use)
mu'abbad	perpetuity
Mufti	Islamic jurist qualified to issue a nonbinding opinion (fatwa)
mukataa	short lease which permits the leasee to build on the *waqf* land, without giving him ownership of the land *waqf* itself
mulk	land held in complete ownership by an individual or group
mundrasa	abandoned
mustahiq/mustahiqeen	beneficiaries of a *waqf*
mushtarak	joint *waqf*
Mutawalli	Manager or administrator of a *waqf*
Qadi	a Muslim judge who renders decisions according to *Shari'a* (Islamic law).
qiyas	concerned with deriving a particular ruling from general statements; or adopting a specific interpretation
qurba,	performance of a work pleasing to God
rakaba	ultimate ownership
sabeel	public water fountain
sadaqa	charity
sadaqa jariya	sustainable giving
salmannus	person trusted to transfer the property to a designated beneficiary upon the death of the original transferor
Shari'a	Islamic law
sijill	document, scroll
Sunnah	the sayings, acts and conducts of Prophet Mohammad that also constitute a practical application of the Qur'anic principles
Tabu	authenticated land registry deed
tahrir	record
Wali	fiduciary of a *waqf*
Waqf	endowment holding a certain property and preserving it for the sole benefit of a certain philanthropy and prohibiting any other use or disposition of it.
waqf ahli	family endowment
waqf dhurri	private/family endowment made for someone's next of kin such as children, grandchildren
waqf khayri	charitable endowment
waqf mulhaq	private/family endowment
waqf sahih	true endowment
waqf ghayr sahih	untrue endowment
Waqfiya	the trust document
Waqif	founder/settler of a *waqf*
wilaya ama	the general supervisor of the administration of a *waqf*
zakat	alms
zawiya	Islamic institution usually a Sufi lodge

CHAPTER 1

WAQF IN JERUSALEM: A SPECIAL CASE?

1.1 Introduction

Recent revisionist academic lawyers and historians have relocated the Israeli national story within a colonial and post-colonial narrative.[1] Current academic work in post-colonial legal geography has also been re-appraising how differentiated territorial jurisdictions marginalize 'unwanted' social groups.[2] Indigenous groups dispossessed from their communal and ancestral lands are increasingly re-asserting claims to that land through legal and human rights challenges. This study explores the conflict over land in Israel/Palestine within a context of post-colonial legal pluralism. One of the aims of post-colonial theory has been to deconstruct the source of Western epistemologies and reconstruct new meanings through discourse and dialogue. Decolonization does not lead to a return to a pre-colonial state, but rather to a transition to a "post-colonial" state, where the effects of colonialism have become an inseparable part of the legal, educational, institutional, and political culture, and where the colonial state remains a point of reference in the local discourse.

This study is not concerned with the essence of the criticism of post-colonial legal theory, as much as it focuses on the effects of this theory on a specific area, which is Jerusalem, and within the framework of a specific topic, which is *waqf* properties. Jerusalem *waqf* (endowment) properties involve a complicated legal complex composed of several legal references that need to be chosen between as well as disputes over jurisdiction. This situation is also extremely complex due to the consequences of post-colonial legal theory. So, we must question concepts that are taken as unquestionable, such as the concept of the nation-state, the rule of law, post-colonial legal theory and finally legal orientalism. It should be noted, however, that post-colonial theory has attracted negative comments with respect to its apparent narcissism. It has been perceived by some as yet another way in which high European theory continues its dialogue with itself to explain the Other. Therefore, this study urges legal scholars to employ more vigorously legal orientalism as a post-colonial discourse. Its critical methodology provides a pioneering way of thinking about the current structures of laws. This is important, as law has in many ways essentially remained a 'Eurocentric enterprise.'[3] Israel/Palestine has inherited several legal traditions, often offering conflicting sources of legitimacy: Islamic, as applied by the Ottoman Empire until 1918; British colonial, from the League of Nations Mandate (1923-48); Jordanian in

[1] See Morris, B. (2000) *Righteous Victims: A History of the Zionist-Arab Conflict 1881-1999*, John Murray; Said, E. (1993) *Culture and Imperialism.* London: Chatto & Windus; Segev, T. (2000) *One Palestine, Complete: Jews and Arabs under the British Mandate*. London: Abacus; Shamir, R. (2000) *The Colonies of Law: Colonialism, Zionism and Law in Early Mandate Palestine.* Cambridge: Cambridge University Press.

[2] See Blomley, N., D. Delaney, et al. (2001) *The Legal Geographies Reader*. Oxford: Blackwell; Jacobs, J. M. (1996) *Edge of Empire: Post-colonialism and the City*. London: Routledge.

[3] Nunn, K.B. (1997) "Law as a Eurocentric Enterprise," *Law and Inequality,* 15, No. 2, p. 323.

the West Bank and Egyptian in Gaza after 1948; and Israeli, from after 1948 with borrowings from US and European jurisdictions.

Land and property constitute an important element in the formation of the existential entity of the Palestinian people living in Jerusalem. Since the establishment of the State of Israel in 1948, these lands have undergone a large-scale appropriation process and much of it has been transferred to Jewish control. The role of successive Absentee Property laws in this confiscation is derived from the Ottoman Land Acquisition Law, as amended during the British Mandate of Palestine.

The Israeli legal system has devised and used various methods and mechanisms to confiscate Palestinian lands in general and more specifically property in Jerusalem. For example, in the case of a complaint regarding the ownership of *awqaf*, Jerusalemites must go "legal forum shopping" to search for the most appropriate court – from civil courts to Israeli *Shari'a* law courts to Palestinian *Shari'a* courts to the new legal structures that put Palestinians in Jerusalem without legal authority – in order to obtain a positive and enforceable judgment. Confiscation and appropriation, in its legal context, is practiced as "legitimizing the illegal," "property laundering," and "legal fiction." This practice is imposed on any person who leaves his or her property for more than two years: they *de facto* lose it, as there is also a ban on movement under the laws of military emergency. Therefore, the property is controlled by law.

In the context of the problematic state of the rule of law, Italian thinker Giorgio Agamben has introduced the concept of the "state of exception," which lies on the boundary between politics and law, and hence is difficult to define. It applies in cases of civil war or uprising and resistance. In such a "state of exception," it is easy to "justify" any actions taken by the sovereign, who possesses absolute (almost divine) authority to preserve the legal order, as if he is suspending the law for the sake of the law. The legislation of the principles of the Jewishness of the state and the Nation-State Law, recently enacted by Israel, and the relentless attempt to implement these laws by the legislative, executive, and judicial authorities, are modern, continuous attempts to "legitimate the illegitimate." Indeed, the High Court of Justice (HCJ) also plays a role in legitimizing Israel's illegal actions through the veneer of legal judgments conferring 'legality' upon illegal Israeli practices. The HCJ has to interpret laws, to establish the boundaries of its authority, and to determine the legality of a policy it has chosen – often widening the borders of its authority and legitimizing its decisions.

Vivid examples of this continuous policy are the confiscation of several Islamic cemeteries in Palestine in general and in Jerusalem in particular. In the Palestinian 1948 lands, the Ijzm and Al-Birwa cemeteries, and in Jerusalem the Mamilla (Ma'mun Allah in Arabic), Yusufiya and Bab Al-Rahma cemeteries all ended up in the hands of Israel through laws which have been ratified by Israeli courts and the HJC.

The Islamic legal system has been, from the outset, concerned with the basic requirements of the human being, asserting the supremacy of the value of justice and the

principle of human dignity. It has laid down a number of principles which constitute the heart and the basis of that legal system. One of the "necessities" (*daruriyyat* – the five essentials of life) in Islamic law is the right to property. The influential and significant institution called a *waqf* (unincorporated charitable trust) exists to provide the Muslim community with extensive social, educational and economic services.

Waqf in Arabic means "hold, confinement or prohibition." A *waqf* is established under Islamic *Shari'a* law by a living man or woman, the *waqif* (founder/settler), who holds a certain property which makes up the *asl* (principal) of a revenue-producing property, inalienable in perpetuity.[4] This preserves it for the confined benefit of certain philanthropic objectives and prohibits any use or disposition of it outside of those specific objectives. The property is therefore placed under the possession of a fiduciary (*wali* or *mutawalli*) who assures that the confined *waqf* reaches the hands of the right *mustahiqeen* (beneficiaries). It is also prohibited from sale, gift and inheritance. Zarqa (1998), Kuran (2001), and Sait & Lim (2006) pointed out that the Islamic *waqf* has been an important tool of institutionalized sustainable giving, that has been able to achieve development and provide services to all strata of society almost in every aspect of life without relying on governmental or foreign funds.[5] Baskan (2002) found, through the great variety of recipients and players, that the *waqf* system "succeeded for centuries in Islamic lands in redistribution of wealth, as a product of state-individual cooperation."[6] The *awqaf* supported so many economic sectors that the evolution of Islamic civilization is incomprehensible without taking them into account. Kuran (2001) and Hodgson (1974) commented that the *waqf* system eventually became the primary "vehicle for financing Islam as a society."[7] Fyzee (1974) also claimed that *waqf* is the most important branch of *Muhammadan* law, for it is interwoven with the entire religious life and social economy of Muslims.[8]

The *waqf* itself is a 'juristic person,' as is the modern corporation; such concept is acknowledged in Islamic law, called *thema.* The concept of *waqf* points towards an Islamic system that recognizes the significance of the non-profit sector: a 'third sector' in social and economic development. The *fiqh* (Islamic jurisprudence) on *waqf* through

[4] Suleiman, H. (2016) "The Islamic trust waqf: a stagnant or reviving legal institution?" *Electronic Journal of Islamic and Middle Eastern Law (EJIMEL)*, 4(23):27-43.

[5] Zarka, M. (1998) *Ahkam Al-Awqaf* [Awqaf Rulings], Syrian University Press, Damascus [in Arabic]; Sait, Siraj & Hilary Lim (2006), *Land, Law & Islam: Property and Human Rights in the Muslim World.* London: Zed Books; Kuran, T. (2001) "The Provision of Public Goods under Islamic Law: Origins, Impact, and Limitation of the Waqf System," *Law and Society Review,* 35, 4.

[6] Baskan, B. (2002) "Waqf System as a Redistribution Mechanism in Ottoman Empire," Paper presented at 17th Middle East History and Theory Conference, May 10-11, 2002, Center for Middle Eastern Studies, University of Chicago, p. 22.

[7] Hodgson, M. (1974) *The Venture of Islam: Conscience and History in a World Civilisation,* University of Chicago Press, Vol. 2, p. 124; Kuran, T. (2001) "The Provision of Public Goods under Islamic Law," *op. cit.*, p. 841-898.

[8] Fyzee, A. (1974) *Outlines of Muhammedan Law*, New Delhi: Oxford University Press, p. 274.

Shari'a law also offers the required legal and institutional protection for this sector to function isolated from self-interest motives and the power of government.[9]

Due to several factors, practices, limitations and challenges, the *waqf* system in the Islamic world has failed to meet the objectives for which it was originally intended, and has declined to the extent that it has failed to provide the minimal services it offered in the past.[10] Researchers have explored the possibility of revival, examining, for example, the social and historical perspectives of *waqf*. This study also sought to investigate the possibilities for revival of the *waqf* system. It explores whether the legal process itself permits adaptation in response to inevitably changing conditions and needs. This study examines the impact of Islamic countries' secular law upon the *waqf*, taking the *waqf* in Jerusalem as a particular case study. The *waqf* in Palestine experienced decline similar to elsewhere in the Islamic world but has faced different challenges and a different fate. Today, the legal system that governs the *waqf* in Palestine notably has been influenced by the powers who have ruled Palestine in the last two centuries, as well as by the challenges of the political situation on the ground.

This study, therefore, demonstrates the reasons why the position of the *waqf* in Palestine, and more specifically in Jerusalem, is distinctive and different from other Islamic countries (including non-Islamic countries with substantial Muslim population). Through empirical work, the nature of the specific decline of this institution in Palestine/Israel and its more general deterioration in the Islamic world is considered and assessed, highlighting similarities and differences regarding the roots of its decline.

This study found that the main reasons behind the decline of the *waqf* in Palestine are politically grounded, influenced by the control and land acquisitions undertaken by the Israeli government. My research argues that Israel considers the historic role of the *waqf* to be a threat to its physical integrity. This is despite the physical occupation of the Palestinian community and its administrative and legal system. Examples include recent confiscations by the Israeli state, such as of Mamilla cemetery, which will be discussed as a case study. There are varying degrees of control exerted by Israel that have significantly affected the performance of *waqf*. Controlling *awqafs'* internal administration as well as monitoring and hindering the establishment of new *awqaf* are common practices by the Israeli government. State interference contradicts the independence and autonomy that are foundational aspects of the *waqf*. Moreover, Israel transferred the ownership of *waqf* from Muslim hands to the Custodian of Absentee Property (through the Absentee Property Law 1950) who on behalf of the state and through "legal fiction" has conveyed *waqf* properties into Jewish hands, disregarding *Shari'a* law. This study shows that these laws were directed towards diminishing the social, economic and political status of the Palestinian communities in Israel.

[9] Kahf, M. (1999) "Towards the Revival of Awqaf: A Few Fiqhi Issues to Reconsider," Paper presented at the Harvard Forum on Islamic Finance and Economics, October 1, 1999.
[10] Sait & Lim (2006), *op. cit.*

Reforms in Arab and Muslim countries with respect to *waqf* have mainly abolished the *ahli waqf* (family *waqf*) and incorporated *waqf khayri* (charitable *waqf*) into the state's structure, in several occasions benefitting the Muslim community. In contrast, the Israeli government neither redistributed the *waqf* lands to benefit the Palestinian community, nor did it incorporate *waqf khayri* into its state structure as other Arab countries have done. Rather, Israel confiscated and administered these *awqafs,* restricting Muslim jurisdiction over them and depriving the Muslim community of benefiting from them, which is the principal purpose of their establishment.

1.2 Orientalism and Post-Colonial Theory and Its Impact on the Waqf in Jerusalem

Today, a modern, nationalist "state of the rule of law" follows a single legal theory: "liberal legal positivism." We thus must discuss concepts that are taken for granted in the mechanism and system of government, such as the concept of the nation state, the rule of law state, the post-colonial legal theory and, finally, legal Orientalism. Post-colonial theory, which is also called colonial discourse, is concerned with studying the effects of colonialism and European imperial expansion on colonized societies in all aspects: political, economic, social and legal alike. This theory is based on the proposition that the West has become the center of the world, after development, scientific progress, and the Industrial Revolution, when the West became the central factor that worked to design and crystallize modern awareness in various fields, including in the important field of law. With the end of colonialism in its classical and physical form and the emergence of new countries, a legal vacuum formed in those countries, which had no choice but to resort to adopting the laws of the colonizer country until this legal vacuum could be filled. With the passage of time, these laws crystallized and became taken for granted.[11]

Orientalism is closely related to colonialism and its aftermath, as it greatly helped the colonizer states to control and dominate the colonized states and subjugate them. It is the study of the Orient in all its social, cultural and religious aspects from a Western point of view. It expresses the Orient in a strange and exaggerated view, because it constitutes a challenge to the West. Such studies are not objective but are used by the West to help extend its influence in the East. Edward Said considered Orientalism to be a persistent and cunning bias of the countries of the center of Europe towards the peoples of the East, especially Arabs and Muslims. Orientalism is a prelude to colonialism in all its forms and is also one of the main factors that helped in the survival of colonialism to this day: not in its traditional military form, but in its cultural and intellectual form, which in turn affects the crystallization of many matters, including, the law.

Post-colonialism is now the main approach in which the West's relationship to the "other" is critically discussed, and the law is at the forefront of this relationship. Post-colonial legal studies have been described as a practice that focuses on law as a "tool of colonialism." Scholars point out that the Western legal project, embedded in its

[11] Said, E. W. (1978). *Orientalism*. New York: Pantheon Books.

liberal positivist tradition, has generally excluded (or not recognized) other forms of law. This biased and racialized legal system excludes the possibility of a law outside its ''private' borders and territory. Therefore, it excludes from its thought or the concept of law any law that does not conform to the Western model. These Western theories are considered (but are not limited to) positivist legal theory, feminist legal theory, critical racial theory, critical legal theory, and legal realism. One of the goals of post-colonial theory is to dismantle the source of these Western theories, and to reconstruct new meanings in discourse and dialogue.

It should be noted, however, that post-colonial theory has been negatively criticized for its apparent narcissism: it has been seen by some as yet another way in which "superior" European theory continues its dialogue (with itself) to explain the other. It is by no means a monolithic and unitary theory. According to Michel Foucault's definition of the universal limits of the theory, post-colonial theory developed through a range of "conceptual sources," without a unified methodology.[12] Furthermore, post-colonial theory relies on a wide (and often contested) range of theories and practices in order to develop its own epistemology.[13] Decolonization does not lead to a return to a pre-colonial state, but rather to an understanding of a "post-colonial" state, in which the effects of colonialism have become an inextricable part of legal, educational, institutional and political culture, and where the colonial state continues to serve as a point of reference in domestic discourse. This study is not concerned with the critique of post-colonial legal theory, as much as it focuses on the effects of this theory on a specific region, which is Palestine. In the case of Israel/Palestine, we face a complicated legal apparatus. Israel, as the heir of the earlier colonizer, applies laws consisting of several legal references, which has led to "legal pluralism." A choice must then be made between the various legal references, which occurs alongside jurisdictional disputes.

This research discusses the legacy and history of the current laws that resulted in a state of governance applied through the modern nation-state, which has adopted the "state of exception" as a permanent state. Giorgio Agamben argues that a "state of exception" facilitates the "justification" of any action by the sovereign, who has absolute (almost divine) power, to preserve the legal order: as a suspension of law for law's sake. In this context, Agamben defines modern totalitarianism as:

> "The process of establishing legal civil war through the application of the 'state of exception,' allowing the possibility of physical liquidation not only of political opponents, but of entire segments of citizens whom the authority considers, for one reason or another, incapable of integrating into the political system." [14]

[12] Foucault, Michel (1972), *The Archaeology of Knowledge and the Discourse on Language,* Tavistock Publications Limited, p. 114.
[13] Young, Robert J.C. (2001), *Post Colonialism: An Historical Introduction*, Wiley-Blackwell, p. 64.
[14] Agamben, G. & Attell K. (2005) *State of Exception*, University of Chicago Press, p. 44.

There are clear indications that the state of exception is a permanent and continuous state even in democratic countries. If it is correct to frame the "state of exception" within a theoretical definition, then it is that "liquid" state in which the substance of the law dissolves with its suspension or absence, using unusual security and policing tools, to eventually produce an oppressive reality that seems completely legitimate.

What about the legal instruments Israel employs in Jerusalem to establish control through the rule of law? Agamben draws attention to the fact that the nature of the state of exception presents itself as a model for governance. It is taken as a rule, not an exceptional measure, and aspires to become the rule and the ideal model for governance through the remarkable dissolution of the various authorities. Therefore, the "state of exception" – a state in which the distinction between states of peace and states of war, between contingency and duration, between exception and rule, between necessity and prudence, becomes difficult. No one knows when "states of exception" disappear and when they arise, but everyone is completely naked before the machinery of repressive power and stripped of any legal identity for the sake of these administrative procedures that Israel applies to Jerusalemites according to the various laws within the emergency regulations.

1.3 Aims and Research Questions

The main purpose of this research is as follows:

- To discuss the conflict of laws and legal pluralism that emerged from the post-colonial theory;
- To investigate the influence and impact of Israeli laws (including the judiciary) on the performance of *waqf* in Jerusalem;
- To determine how the Israeli legal system was/is treating the *waqf* in Jerusalem;
- To investigate how the dominant Israeli laws affecting the *waqf,* can (if at all) be challenged;
- To examine what caused the decline of the *waqf* and determine how reform can be achieved;
- To explore how autonomy and independence can be brought to the *waqf* system.

The research therefore will answer the following key questions:

- Is the *waqf* in Jerusalem able to adapt to modern structural state changes?
- Can its decline be attributed to inefficiencies related to the *waqf's* legal doctrine?
- Are there similarities or differences between the reasons for the decline of the *waqf* in Palestine/Jerusalem and those more generally prevalent in the Muslim world?

1.4 Geographical Scope of Research

The conflict over the land in Palestine/Jerusalem has become a complex legal dispute. The legal influence must be attributed to the conflict "in general" over land in the Middle East. The literature indicates that lands and properties in general have been affected by various means, mechanisms and laws from those who have ruled Palestine over the last two centuries.[15] Therefore, before moving on to discuss the laws related to property in Jerusalem, it is necessary to first understand the history of the legal system in Palestine, followed by a discussion of the land laws in Palestine, as this will help explain the legal issues related to *waqf* property law.

The legal situation in Palestine is one of the most complex and rare cases. The legal system emerged in precarious circumstances due to the many powers that have ruled Palestine throughout history. The partition of Palestine in 1948 created complex and differing legal systems in the West Bank, Gaza Strip, Jerusalem, and the parts of the country that became Israel in 1948. Following the 1948 Arab-Israeli War, Israel took control of the western part of Jerusalem, while Jordan controlled the eastern part, including the Old City with its important Muslim and Christian religious sites. As a result of the 1949 armistice agreements that separated the new state of Israel from other parts of Mandate Palestine, the West Bank and the Gaza Strip became distinct geographical entities. From 1948 to 1967, the West Bank, including East Jerusalem, was ruled by Jordan, while the Gaza Strip was under Egyptian military administration.

The geographical areas of this research are those currently under the control of the Israeli law. This includes Israel, West Jerusalem, and East Jerusalem. The *awqaf* in the West Bank and Gaza were not considered, though the position of the *waqf* in Gaza has been examined by Dumper.[16]

The research focuses on two case studies, Bir Al-Saba' Mosque in Bir Al-Saba' and Mamilla/Ma'mun Allah cemetery located in West Jerusalem. These examples help evaluate, in practice, the impact and influence of Israeli law on the *waqf* in Jerusalem.

1.5 Literature Review

This research investigates the decline of *waqf* status according to the restrictions imposed by the various civil authorities. Gaudiosi notes that recent research into the *waqf* is based on a relatively small number of documents.[17] There are few existing studies on the Jerusalem *waqf*, and contemporary studies of *awqaf* are often inconsistent or specific to individual institutions. Although there has been extensive re-

[15] Suleiman, Haitam (2015). "Conflict over *Waqf* property in Jerusalem: Disputed jurisdictions between civil and Shari'a courts," *Electronic Journal of Islamic and Middle Eastern Law (EJIMEL)*, 3(18): 97-110.
[16] Dumper, M. (1993) "Forty Years without slumbering: Waqf Policies and Administration in Gaza Strip 1948-1947," *British Journal of Middle Eastern Studies*, Vol. 20 (2), pp. 174-190.
[17] Gaudiosi, M. (1988) "The influence of the Islamic Law of Waqf on the Development of the Trust in England," *University of Pennsylvania, Law Review,* 136, pp. 1231-61.

search on the *waqf* from different perspectives and frameworks, there has been little focus on the socio-legal aspect of the *waqf* in Jerusalem.

The main study of the Palestinian *waqf* comes from British researcher Michael Dumper.[18] However, it is a study from historical and political perspectives, and is relatively old. The work of the Israeli writer Yitzhak Reiter is also important.[19] This book will highlight some of the biases of those studies as well as focus specifically on Jerusalem. No previous study has dealt with the legal status of the *waqf* in Palestine, particularly in Jerusalem.

The research focuses on the era from 1800 AD to the present: through Ottoman land legislation, British Mandate laws, and Israeli and Palestinian laws. It is based on field work conducted in Arabic, English and Hebrew in Jerusalem through interviews with scholars, specialists, and current waqf institutions.

1.6 Methodology

Using a semi-structured interview style, 20 different specialists were interviewed, including officials from the Palestinian Ministry of Awqaf and Religious Affairs, lawyers, *Shari'a* court *qadis*, and specialists in the *waqf* administration. To reinforce the study, interviews were also conducted with Muslim scholars who provided a *fiqh* perspective. Face-to-face interviews were undertaken, and additional questions were sent to knowledgeable Muslim scholars across the Muslim world. As the interview questions targeted different categories of specialists, diverse results were collected, in contrast with research conducted by past scholars.

This study also incorporates archival documents and court records from the British National Archive, the British Library, the School of Oriental and African Studies, and Islamic and Israeli libraries. Classical and modern books (in Arabic) of Islamic jurisprudence *(fiqh)* were also considered. Some of the documentation reviewed included legislation, Israeli, British and Ottoman land policies, parliamentary debate records, and reports from the Israel Land Administration. This study also proposes strategies and mechanisms for reforming and reviving the *waqf* institution in Jerusalem. Extensive archival work included analyzing sources from the following institutions as well:

- PASSIA archives and library.
- *Mu'assasat Al-Aqsa,* an institution that monitors all *waqf* properties in Israel.
- *Markaz Al-Dirasat Al-Muʿaseara* (Centre for Contemporary Studies, CCS, Umm Al-Fahm).

[18] Dumper, M. (1994) *Islam and Israel: Muslim Religious Endowments and the Jewish State*, Washington, DC: Institute for Palestine Studies.

[19] Reiter, Y. (1986) "The Waqf Institution in Acre" (unpublished MA thesis), Jerusalem: The Hebrew University [in Hebrew]; Reiter, Y. (1996) *Islamic Endowments in Jerusalem under British Mandate,* London: Frank Cass*;* Reiter, Y. (1997) *Islamic Institutions in Jerusalem: Palestinian Muslim Organization under Jordanian and Israeli Rule,* Jerusalem: Kluwer Law International and Jerusalem Institute for Israel Studies.

- *Shari'a* court *sijill* in Jerusalem.
- The *sijill* in Abu Dis (information and documents on the entire *waqf* in Palestine).

Both Muslim and non-Muslim scholars have written about *awqaf*. However, while Muslim writers generally focused on aspects of the *waqf's* jurisprudence, management, development and socioeconomic roles, non-Muslim writers (particularly Israeli) often approached material on *awqaf* in Palestine/Jerusalem maliciously. For example, in an interview with Qadi Natour, he revealed that Berkovits, an Israeli legal scholar, interviewed him for only 10 minutes but then "wrote a hundred of pages about this interview." In his study, Berkovits discussed and debated some complicated issues in Islamic law.[20] However, according to Qadi Natour, Berkovits has no knowledge of the Arabic language, an essential element to understanding Islamic law. Even native Arabic speakers often need to consult Muslim scholars in order to understand certain complex or intricate issues of the Islamic law.

Knowledge of the three key languages – Arabic, Hebrew, and English – has allowed this author to access courts *sijills* and records and to translate summaries of numerous court cases. Three case studies in particular, Bir Al-Saba', Ijzim and Ma'mun Allah/ Mamilla were fully translated from Arabic or Hebrew to English. Moreover, the Absentee Property Law (1965 amendment) was translated from Hebrew to English.

To our knowledge, the present research on *awqaf* is the only research to be completed in English by a Palestinian Arab living in Israel. Being a Palestinian Arab living in Israel has considerable advantages in terms of language knowledge (Hebrew and Arabic) and other kinds of language (body language, nuances in voice, etc.) which may only be understood by someone trusted by the interviewee and of the same or similar cultural background. Different languages and socio-cultural distance might prevent effective communication between researcher and the respondent.

But being on the 'inside' is always a double-edged sword for a researcher. One of the dangers always in any kind of face-to-face interviews is that the respondents may pick up subtle nuances themselves as to how the researcher wants them to respond and respond accordingly. Previous researchers were unable (due to lack of cultural background, the necessary languages and other related issues) to build the necessary contacts to gain access and, therefore, failed to meet with key specialists and institutions such as Al-Aqsa and CCS located in Umm Al-Fahm. Moreover, PASSIA helped much in the collection and discussion of the research questions.

1.6.1 Developing a Semi-Structured Interview

In the qualitative stage, 20 participants were interviewed in Arabic using a semi-structured interview. The interview questions were also translated into English. Interviews

[20] Berkovits, S. (2006) *"How dreadful is this Place!" Holiness, Politics and Justice in Jerusalem and the Holy Places in Israel*, Jerusalem: Carta [in Hebrew].

were analyzed using a Thematic Content Analysis (TCA) based on Braun and Clarke (2006). The interview questions were as follows:

- What are the reasons for the success of the *waqf* throughout Islamic history?
- Can we apply these grounds or some of them today?
- The *waqf* in Jerusalem has clearly experienced a decline, what are the reasons??
- How can such a decline can be countered?
- Historically, how have the laws and mechanisms (including Ottoman, British, and Israeli) imposed on the *waqf* affected its performance??
- How, if at all, can these laws be challenged?
- To what extent does the *Shari'a* court implement or/and enforce its *waqf* decisions?
- What flexibility does Islamic *fiqh* offer to circumvent the strict state rules?
- How can *waqf* reform be achieved?
- How can a reform be compatible and effective, considering the current powers that control the *waqf*?
- What resources (e.g., research, state powers, materials, finances, etc.) do you think are needed to make such improvements and reforms?

The interviewer gave the participants detailed information about the project before data was collected and assured them that all information received would be treated confidential. Once the interviewer was certain all information was understood, written consent was obtained. While most of the interviewees requested their names to be kept confidential, the list of names can be obtained from the author if necessary.

Most of the interviews took place at the interviewee's workplace, although some were conducted in the interviewee's homes. Interviews lasted between 45 to 120 minutes and were completed over a period of six months. Consent was also obtained to record the interviews. All participants agreed, with one exception who refused to sign until he was shown what was written about him. The interviewer took detailed written notes during this particular interview. The recorded interviews were transcribed in Arabic and then translated into English. The interviewees were mostly from Mu'assasat Al-Aqsa, Markaz Al-Derasat Al-Muʿaseara, the Shari'a court and the Ministry of Awqaf of the Palestinian Authority.

The fieldwork consisted of two parts; Part 1 included interviews with *waqf* institutions (management perspective) and aimed to explore the reasons for the weakness and decline of the *waqf* system. Based on the findings of this first stage, interviews were conducted in Part 2 with legal specialists (i.e., lawyers, *qadis*) and Muslim *fiqh* scholars to whom the results from Part 1 were presented so that they could decide, using *Ijtihad*, where reform should take place of *waqf fiqh*. *Ijtihad* is an Islamic legal term meaning "independent reasoning" specifically by an expert in Islamic law.

1.7 Research Challenges

The *waqf* issue and the issue of land in general is perhaps the most sensitive and complicated issue in the Palestinian-Israeli conflict. Many obstacles were encountered in the preparation of this study. While land issues are widely discussed in general political terms, English language literature addressing *waqf* law and the extent of *waqf* ownership in Palestine is limited. In addition, many rulings of the Israeli courts with respect to *waqf* property in Jerusalem are unpublished, not translated into English, and inaccessible.

The present study, therefore, had several limitations. Since the subject is relatively new, there was a lack of reference materials on law in Arabic, Hebrew and English. Moreover, the researcher faced considerable difficulties in collecting the data because the records are not well developed and not stored electronically. Many materials and documents are still kept in their old manuscript form, so it took a long time to read and analyze them.

Furthermore, as the topic involved dealing with government officials, it was not easy to get the required information, especially since some of it was confidential. These issues posed a real challenge to reaching an accurate conclusion. However, some precautionary steps were taken to overcome these limitations. For example, library research work was conducted in the very early stages in order to find the most relevant resources that would enrich the literature review. As for meeting with officials, it was necessary to carefully construct the interview questions in order to obtain the most relevant information from the interviewees.

The fieldwork was also repeatedly interrupted by the conflict. Moreover, there were some potential difficulties due to the method of interviewing people. Respondents sometimes did not provide truthful information or intentionally misled the interviewer. In addition, because the questions dealt with controversial and sensitive issues, getting interviewees, such as government officials, to disclose the required information was not an easy task.

1.8 Structure of the Book

The book is organized as follows:

Chapter 1 sets the scene by explaining the methodologies and approaches undertaken to complete the study. It also discusses the quality of resources and the importance of fieldwork. Moreover, it explains how the data was analyzed.

Chapter 2 presents a general overview of the *waqf.* It explains and discusses its basic issues, including its origin, its forms, its role in development, its characteristics, and its current legal framework. It also discusses the value and potential of reviving the *waqf,* as well as existing theory on its decline.

Chapter 3 looks at the history and origin of the Palestinian legal system. It examines the laws affecting Palestinian land ownership and reviews the legal *waqf* position during the Ottoman, British Mandate and Jordanian periods, showing how the impact of these laws has had significant implications for the current *waqf*.

Chapter 4 examines the Israeli land laws and background of the Palestinian legal system to understand the impact and implications of these issues on *waqf*. It also discusses in detail the position of the mosque and graveyard *awqaf* as remaining 'sacred' *awqaf* that have, so far, escaped the Israeli confiscation policies. It takes the *waqf* of the Great Mosque in Bir Al-Saba' as a case study.

Chapter 5 discusses how the Jerusalem *waqf* in particular differs from other *awqaf* and investigates the influence of the Israeli rules upon it.

Chapter 6 is a case study of Mamilla cemetery. It discusses the conflict between Israeli civil courts and the *Shari'a* court, which has resulted in legal pluralism and a conflict of jurisdictions and laws.

Chapter 7 discusses the results of the fieldwork and draws conclusions from the research.

CHAPTER 2

CHARACTERISTICS OF THE WAQF, ITS DECLINE, AND THE POSSIBILITY OF ITS REVIVAL

2.1 Philosophy of the Islamic Legal System

To achieve the purpose of the study it is necessary first to understand the socio-economic contribution of *waqf* in general and its developmental role in Islamic society. Then, in order to analyze and explore the possibilities and opportunities for reviving and enhancing the role of *waqf* in Jerusalem as a socio-economic institution, it is necessary to review its origins, history, economic performance, capabilities and decline. This chapter therefore tries to present a general overview of the *waqf* by analyzing and discussing basic issues, including its meaning, forms, role in development, characteristics, and current legal framework. Moreover, this chapter discusses the value and potential of *waqf* revival.

First, it is essential to discuss the Islamic legal system in general and, more specifically, its land policies. Islamic law has two primary sources; firstly, the *Qur'an* which was revealed by God to the prophet (Mohammad), and secondly, the *Sunnah*, which are the sayings, acts and the conducts of the prophet that also constitute a practical application of the *Qur'anic* principles. This divine feature is a distinctive one. It implies that God is the only lawmaker. The foundation of the Islamic legal system on religious beliefs means that "the law is perfect but humans are not."[21]

Islamic law, through Islamic jurisprudence, also provides much room for jurists to interpret the primary sources of the *Qur'an* and the *Sunnah* using methods such as *ijtihad* (in which a text is interpreted in such a way that its legal implications become apparent) and comparative *qiyas* (which deal with deriving a particular ruling from general statements or adopting a specific interpretation). These methods eventually came to be known as secondary sources of Islamic law, which are applied to new areas of law where there is no applicable text in the *Qur'an* or the *Sunnah* that pertains to the area in question. These secondary sources added the feature of flexibility that makes *Shari'a* law adaptable to new social developments. As Bowen (2003) comments:

> "Far from being an immutable set of rules, Islamic jurisprudence (*fiqh*) is best characterized as a human effort to resolve disputes by drawing on scripture, logic, the public interest, local custom, and the consensus of the community. In other words, it is imbricated with social and cultural life as is Anglo-American law."[22]

Moreover, Sait & Lim observe that Islamic law "was not born in a vacuum or constructed out of current needs and priorities. Rather it is the product of centuries of

[21] Vogel, Frank, *Islamic Law and Legal System: Studies of Saudi Arabia*, Boston 2000, p. 3-4.
[22] Bowen, J. (2003) *Islam, Law and Equality in Indonesia*, Cambridge: Cambridge University Press, p. 9.

legal thought and experiences."[23] Schacht further notes that Islamic law represents an extreme case of a "jurist's law" as it was created and further developed by private specialists.[24]

Where the Islamic legal system fundamentally differs from other systems is that it aims to only adopt God's Laws, while other systems adopt man-made laws. The Islamic legal system is meant to present a complete, ideal system which comprehensively governs every aspect of life. This system provides a path for people to follow, which should lead to an environment of perfect social justice. This represents a crucial difference between Western philosophical beliefs based primarily on common law and the separation or reduced role of religion in the legal system. This foundational understanding is a critical component to understanding the Islamic legal system and its implications for *waqf*.

The majority of Muslims are Sunnis who follow one of the four Sunni Orthodox law schools: Hanbali, Shafi'i, Maliki, or Hanafi. Each school has a different *madhhab*, or doctrinal view, and all differ in their interpretation of the law (Murad, 1995). The four schools of law still exist and are known as 'personal schools,' that is, 'groups designated as followers of a leading jurisconsult.' Such schools are considered equally orthodox. Each school has benefited from the flexibility feature of Islamic law, using *ijtihad* and other Islamic instruments to develop their own views and thoughts on debated legal issues.

The law of *waqf* was quite similar among the schools. However, there are some noted differences. For example, the Maliki school allows the establishment of temporary *waqf*. (The different point of view of each *madhhab* in relation to *waqf* is discussed in detail below). The jurisprudence that governs Islamic *waqf* is called *fiqh al-muamalat*, or the law of civil/legal obligations, which has extensive room for the use of *ijtihad*.

2.2 The Origins of the Waqf

Though *waqf* was not specifically articulated in the *Qur'an*, there are verses that contain repeated urgency to believers that they be charitable, that they donate more than just the alms *(zakat)* which are the specific obligation of all Muslims.[25] An example of one such insistence is the following verse: "whatsoever ye spend for good, He replaceth it" (34:39). Another is: "O ye who believe! When ye hold conference with the messenger, offer alms before your conference" (58:12).

The main foundational aspects of *waqf* emerged from *Sunnah*. The first *waqf* originated from the *Sunnah* of the Prophet Mohammad, who encouraged *waqf* as a form of a sustainable giving, or *sadaqa jariya*, that benefits the poor and the needy in a

[23] Sait & Lim (2006), *op. cit.,* 35.
[24] Schacht, J. (1964) 'an introduction to Islam law', *Oxford, Clarendon Press.*
[25] Singer, A. (2000) "A Note on Land and Identity: From Zeamet to Waqf," Owen, R. (ed.) *New Perspectives on Property and Land in the Middle East*, Cambridge Mass.: Harvard University Press, p. 4.

sustainable way. One of Prophet Mohammad's sayings that encouraged the *waqf* is "If the son of Adam dies, his work stops except for three; a *sadaqa jariya*, a useful science, and a good son who prays for him."

The origin of *waqf* in Islam can be attributed to a specific incident that occurred with the second caliph, Omar Ibn Al-Khattab. He was granted a plot of land after opening Khaybar and he consulted the Prophet about the best way to make the poor benefit from this land. The actual account of this first waqf is set forth by the *Hadith* scholar Imam Bukhari as follows:

> "Ibn Omar reported, Omar Ibn Al-Khattab got land in Khaybar; so, he came to the Prophet, peace and blessings of Allah be on him, to consult him about it. He said: 'O Messenger of Allah! I have got land in Khaybar than which I have never obtained more valuable property; what dost thou advise about it?' He said: 'If thou likest, make the property itself to remain inalienable, and give (the profit from) it in charity."[26]

So Omar made it a charity on the condition that it shall not be sold, or given away as a gift, or inherited, and made it a charity among the needy and the relatives and to set free slaves, and in the way of Allah and for the travelers and to entertain guests; there being no blame on him who managed it if he ate out of it and made (others) eat, not accumulating wealth thereby.

Therefore, the Prophet Mohammad advised him to eternally withhold the land and spend its revenue on the poor without being subject to sale, nor donated nor inherited by anybody. Since this incident, *waqf* has been spread among Muslims at the time of the prophet and continued after him for long centuries.

Another *hadith* put forth that a Jew who had converted to Islam bequeathed his wealth to the Prophet to use it for charity. The Prophet then proceeds to establish the very first *waqf*.

The juridical form of the *waqf* took shape beginning around the year 755, during the second and third Islamic centuries.[27] Yediyıldız suggests that the reasons why the *waqf* expanded as an institution in the 8th Century but played no formal role in the original Islamic economic system or in the first Islamic community of Western Arabia was because the state itself could provide public goods when the community was relatively small and homogeneous enough to make basic needs apparent and a centralized delivery system efficient.[28] The expansion of *waqf* followed the growth of the community into a bigger and more compound society in which not everyone knew each other,

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[26] Quoted in: Fyzee, A. A. (1974) *Outlines of Muhammedan Law, op. cit.*

[27] Hennigan, P. C. (2004) *The Birth of a Legal Institution: The Formation of the Waqf in Third-Century A.H. Hanafi Legal Discourse,* London: Brill.

[28] Yediyıldız, B. (1990) "Institution du vaqf au XVIIIe siècle en Turquie," *Etude Socio Historique.* Ankara, Turkey: Editions Ministere de la Culture.

no one could be aware of all the distribution of needs, and the state's constituency was massive and the geographic extent of its responsibilities vast such that the state could not meet every odd need through available technologies. Yediyıldız indicated that the proliferation of *awqaf* accompanied the establishment and development of successive Muslim-ruled states.[29]

The legal doctrines related to *waqf* were instigated by jurist Abu Yusuf (d. 798 AD). He ascertained the fundamental principle that a *waqf* could be regarded as a valid one if it were irrevocable and made in perpetuity. He also initiated the legal precedent that allowed the foundation of the *waqf ahli* (family *waqf*) in addition to the *waqf khayri* (charitable *waqf*). The distinction between the two is that the charitable *waqf* immediately benefits religious institutions or pious causes such as providing food to orphans, whereas a family *waqf* allows the donor to receive the income of the endowment during his lifetime and his heirs after his death. Once there are no more heirs of the donor to claim an income from the *waqf*, the revenues generated by the property revert to the religious or charitable causes the donor stipulated (Zarqa, 1998).

The family *waqf* also allows the donor to name himself the administrator *(mutawalli*) of his *waqf*, giving him control over the endowment. The motive to a person giving *waqf* is '*qurba*,*'* the performance of a work pleasing to God. Therefore, even a family *waqf* would ultimately devolve to a charitable purpose, though not until some precondition was fulfilled, i.e., the passing of a certain number of generations or the extinction of the family line. Though the *waqf ahli* is not intended for charitable purposes, still the *waqf* is considered spiritually rewarding. The Prophet is reported to have said: "when a Muslim bestows on his family and kindred, hoping for reward in the next world, it becomes alms, although he has not given to the poor, but to his family and children." The *waqf* was generally used to endow mosques, colleges, hospitals, and other charitable institutions. For instance, it is said "the shop is withheld for orphan children," which means that the revenue of the rent of the shop is withheld to spend on orphans. This means that *waqf* withholds money or property, either in the form of a commercial shop or a house or any other form, to spend on whoever needs support, like orphans, students, needy and poor people, etc.

After the first three centuries of Islam, Muslim jurists established the legal institution known as the *waqf*, which is an 'unincorporated charitable trust'. A complex body of law emerged to oversee the creation and administration of these trusts (Gaudiosi, 1988). The *waqf*, as a legal doctrine, was developed by jurists through the Islamic jurisprudence (*fiqh*). The *waqf* as an institution evolved more systematically from the seventh to eighth centuries,[30] becoming a key public institution in Ottoman cities and providing their main services. Popular *awqaf* included the *imaret* (soup kitchen), *madrasa* (school), mosques, orphanages, shelters, and hospitals.[31]

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[29] Yediyıldız, B. (1990), *op. cit.* pp. 35-39.

[30] Çizakça, M. (2000) *A History of Philanthropic Foundations: The Islamic World from the Seventh Century to the Present,* Istanbul: Bogazici University.

[31] Stillman, N. (1975) "Charity and Social Service in Medieval Islam," *Societas,* 5, pp. 105-115.

2.3 Characteristics of *Waqf*

There are differences between the *waqf* and the *sadaqa* (charity) that should be highlighted first:

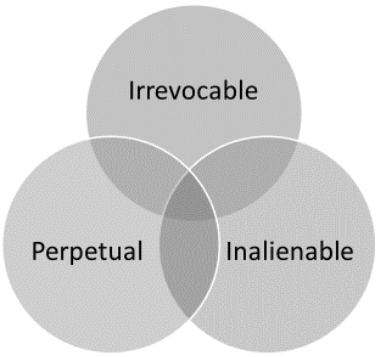
1. *Sadaqa* ought to reach only the poor and the needy whereas *waqf* can be directed to both the poor and the rich, although the poor have first priority.
2. *Sadaqa* may be owned, sold, or granted, while the *waqf* has to be everlastingly kept without any intervention in its ownership.
3. *Sadaqa* could be in the form of any useful thing, like food or clothes, but *waqf* is only confined to fixed properties or to things that have revenues and can be sustained and withheld.

There are also generally three basic forms of *waqf*:

1. The *waqf khayri* (charitable *waqf*) withholds one's property and directs its revenues towards philanthropic goals.
2. The *waqf ahli* (family *waqf*) withholds one's property to the benefit of the members of the family, such as the spouse, the children, and the relatives.
3. The *waqf mushtarak* (joint *waqf*) channels part of the withheld property towards philanthropy and the other part towards the family.

The three basic principles governing a *waqf* – that the trust has to be irrevocable, perpetual, and inalienable – are overlapping to some extent (see Figure 1 below). Once property was declared *waqf* by its owner, the trust thereby created was 'irrevocable.' The owner, known as the *waqf* founder, could retain certain rights as to its administration, but the endowment itself was invalid unless irrevocable and the *waqf* was bound by the terms of the *waqf* document. Similarly, the formation of the *waqf* could not be made dependent on the actions of any third party. The *waqf* must also be 'perpetual,' although the specific object of the trust is not required to be permanent.

Figure 1: Features of the Waqf



To a certain extent, the requirement of perpetuity referred to the dedication of the income of the *waqf* to charitable purposes. When the particular rationale for which the trust was created ceases to exist, the *waqf* income is then shifted and applied to a similar charitable purpose.

The Maliki school of law permitted the creation of a *waqf* limited as to time, such as to a lifespan or series of lives, and at the termination, full ownership of the property reverted to the founder or the founder's heirs. This, however, was the exception to the generally accepted rule of perpetuity (Sait & Lim, 2006). Moreover, w*aqf* is inalienable, whatsoever the grounds, it could not be subject to any sale, disposition, mortgage, gift, inheritance, attachment, or alienation. However, under certain circumstances Islamic jurists have shown some flexibility in this regard. For example, the property could be exchanged for equivalent property if the *waqif* (founder) reserved the right to do so, or if the original *waqf* property is in danger of ruin and ceased to produce income. The property could even be sold, provided that the price received was reinvested in another property. It should be borne in mind, however, that the power to sell or exchange was very rigorously exercised and *waqf* property could not, as a rule, be sold in exchange for another property simply because the consequential increase in the corpus would be beneficial to the *waqf* (Gaudiosi, 1988). The right of sale purely for profit has been approved by several jurists. However, the traditional theory clearly disapproves of this practice. Where new property is acquired in an exchange or in the course of investment through the proceeds of the sale of the original property, all the elements of the original *waqf* should be attached to the new property which will then be subject to the same conditions as the original property.

Other conditions governed the creation of the *waqf* as well. For example, the *waqif* was required to be in full possession of his physical and mental faculties, be of age and be a free man. Therefore, the *waqf* differs from trusts and foundations found in Western legal systems because of the perpetuity element.

2.4 Legal Conditions of *Waqf*

The essential components (*arkan*) of a valid *waqf* include a founder, a declaration, and a specific property. The property constituting the trust must itself be tangible, immobile and yield income. Real, physical property was therefore the property most generally recognized. Islamic law did not specify a form to create a *waqf*. It basically required the *waqif* (founder) to indicate clearly his intention to create the *waqf* and to specify the charitable purpose to which it would be dedicated. The *waqif* could choose to declare it either orally or in writing. The *waqif* is not required, however, to pass on the property to its designated *mutawalli* (trustee) for the *waqf* to be valid.[32] The *qadi* (judge) holds the *waqf* and is considered the *wilaya ama* (the general supervisor) of the administration of the *waqf*. The *waqif* has considerable room in setting forth the terms and conditions of the operation of the trust. These terms could in-

[32] Zarqa, Mustafa. *Ahkam Alwaqf,* Syrian University Press, Damascus, 1998.

clude, but were not limited to, stipulations governing the appointment of the *mutawalli*, the selection of beneficiaries, and the distribution of *waqf* income. The *waqif* could appoint himself *mutawalli* or reserve to himself the power to appoint and/or dismiss (Hennigan, 2004). The *waqif* could also retain the right to modify the terms of the *waqf* continually, if desired. In most cases, the wishes of the *waqif* were carried out in perpetuity with a force equal to that of a legal performance. However, the terms set forth by the *waqif* should not violate any of the tenets of Islam. Thus, a *waqf* for the construction of a public house or inn serving alcohol is invalid.

A *waqf* is also void without an ultimate charitable object, as the motive for the creation of a *waqf* was to perform good works and please God. Only this declared motive was relevant to its validity. As the only form of perpetuity in Islam, however, founders used the law of *waqf* for a variety of unprofessed, non-religious purposes, such as avoidance of property confiscation by rulers, and control over an heir's excesses.[33]

Therefore, *waqf* creation requires certain conditions, the most important of which are the following:

1. The *waqf* must be a property or a thing which has some meaning of perpetuity. Muslims have created *awqaf* of land, cattle, jewelry, swords and other weapons, books, agricultural tools, etc.
2. The property should be given on a permanent basis. However, some jurists, for instance from the Maliki school, approve temporary *waqf*.
3. The *waqf* founder should be legally fit and apt to take such an action (i.e., a child, an insane person, or one who does not own the property cannot make *waqf*). Also, in order to prevent the establishment of *waqf* merely as a way of avoiding debts, a *waqif* was required to be financially solvent.
4. The beneficiaries, person(s) or purpose(s), must be alive and legitimate. *Waqf* for the benefit of the dead is not permissible.

2.5 Participants in the *Waqf*

The *waqif* (founder), the *mutawalli* (trustee), the *qadi* (judge/overseer), and the *mustahiqeen* (beneficiaries) are the primary individuals involved in the creation and/or administration of the *waqf* [for a summary see Figure 2].

2.5.1 The Mutawalli

The *waqf* manager is usually called *mutawalli* or *wali* and it is essential that the *waqf* has one, which is why it is the first the *waqif* typically appoints in the *waqf* document. The *mutawalli's* most important task is to implement the wishes of the *waqif* as expressed in the *waqf* instrument.

[33] *Ibid.*

The selection of subsequent *mutawallis* occurs in the manner prescribed by the *waqif* in that document; in case no provision is made, the *qadi* would make an appointment. In general, a *mutawalli* is required to be Muslim (man or woman), legally responsible, and able to carry out his tasks with knowledge and experience. If a *mutawalli* is found to be morally weak, a strong, experienced person could be appointed to assist him.

Muslim jurists established a number of principal duties of the trustee, i.e., preservation of the *waqf*, collection of *waqf* income, distribution of that income to the appropriate beneficiaries, hiring and firing of subordinates, and resolution of disputes. While carrying out his duties, the trustee can hire assistants and assign certain tasks to them. Even where the *mutawalli* is given full discretion in his administration of the *waqf* he is required to operate within the boundaries of Islamic law, and any decisions regarding the *waqf* has to be made for the benefit of the *waqf*. Subsequently, the *waqf* founder determines the type of management of his/her *waqf*. The *mutawalli's* responsibility is to administer the *waqf* property to the best interest of the beneficiaries, thus his principal obligation is to preserve the property to maximize the revenues of the beneficiaries. The *waqfiyya* normally affirms how the *mutawalli* is compensated for his effort and if the deed does not mention a compensation for the *mutawalli*, he/she either volunteers the work or seeks assignment of compensation from the court. The judicial system, i.e., the *Shari'a* court, is the authority of reference with regard to all matters and disputes related to *waqf*.

2.5.2 The Mustahiqeen

The Islamic term for beneficiary is *mustahiq* (pl. *mustahiqeen*). The beneficiaries are mostly identified by their titles or positions within the *waqf*. In an academic institution, such positions would include professors, scholars, and prayer leaders. The beneficiaries moreover have some rights, including the right to notification of their duties and "to be as informed as the *mutawalli*" regarding the provisions of the *waqf* document. Furthermore, they could request a copy of the *waqfiyya*.

2.5.3 The Qadi

The *qadi,* in addition to his supervisory power, is considered as general manager of *awqaf*, which shall extend, as indicated above, to the discretion to appoint a trustee in cases where the *waqif* neither designated a *mutawalli* nor set forth criteria for his appointment. In some situations, the *qadi* himself sits as the manager of the endowment. If he is included in the board of trustees, the *qadi* is obliged to respect the *mutawallis'* rights with regard to the day-to-day administration of the *waqf*. In general, the main responsibility of the *qadi* is resolving all disputes concerning *waqf* matters in which he is not personally involved, and his decision in that regard is final. Where the *qadi* has the right to dismiss a trustee appointed by the founder only for cause, the *qadi* can dismiss his own appointee even without cause. "Cause" includes misappropriation or breach of trust, or simply neglect of duty.[34]

[34] *Ibid*.

Figure 2: Waqf Management and Ownership

Title	Description
Waqif	The *waqif* is the founder. His *waqf* is irrevocable and cannot be returned, as the founder is no longer the owner
Mutawalli	The *mutawalli* is the trustee. The *waqf* is perpetual and cannot be sold by him.
Mustahiqeen	The *mustahiqeen* are the beneficiaries. This is in perpetuity. They are not the owners.
Qadi	A *qadi* is a judge. He supervises the waqf to assure it is inalienable.

2.6 Fiqh of Waqf in the Four Schools of Islam

Under Maliki law, the *waqif* cannot serve as trustee for his own *waqf*. This feature may have been the primary reason for the relative scarcity of Maliki *awqaf* and the general decline of the Maliki school in the major regions of the Islamic Empire. Due to the Maliki restriction on the role of the *waqif*, fewer trusts were established under Maliki law. Such trusts were the primary source of support for *madaris,* Islamic colleges of law.[35]

Some jurists considered *waqf* to be illegal in the Islamic *Shari'a* and regard it as contradictory to its basic principles except where it concerns a mosque. But this view has been abandoned by all the schools of *fiqh*. All schools, except the Maliki, also concur that a *waqf* is valid only when the *waqif* intends the *waqf* to be perpetual and continuous, and therefore it is considered a lasting charity. Hence if the *waqif* limits its period of operation (such as when he makes *waqf* for 10 years or until an unspecified time when he would revoke it at his own pleasure, or for as long as he or his children are not in need of it, etc.) it will not be considered a *waqf* in its true sense. Many jurists hold that such a condition nullifies the *waqf*, though it will be considered as valid *habs* (detention) if the owner of the property intends *habs*. But if he intended it to be a *waqf*, it will be void both as *waqf* as well as *habs*. A valid *habs* is when the usufruct donated by the owner for a particular object will be so applied during the period mentioned and return to him after the expiration of that period. As this is not something which contradicts the provisions of perpetuity and continuity in *waqf*, some jurists did not appreciate the difference between *waqf* and *habs*. Consequently, they have ascribed to them the view that perpetual and temporary *waqf* are both valid. This is not accurate in the eyes of most jurists, though, because according to the *fiqh* of *waqf,* it can only be perpetual.

However, each different *madhhab* approaches the issue differently. The Malikis hold that perpetuity is not necessary in *waqf* and it is valid and binding even if its duration

[35] Makdisi, J. (1981) *The Rise of Colleges: Institutions of Learning in Islam and the West*, Edinburgh: Edinburgh University Press, pp. 36-38.

is fixed, and after the expiration of the stipulated period the property will return to the owner. Similarly, if the *waqif* makes a provision entitling himself or the beneficiary to sell the *waqf* property, the *waqf* is valid and the provision will be acted upon. If a *waqf* is made for an object which is liable to expiry (such as a *waqf* made for one's living children or others who are bound to pass away), the question arises of whether it will be valid and to whom it would devolve after the expiry of its object. The Hanafis observe that such a *waqf* is valid and it will be applied after the expiry of its original object to the benefit of the poor. On the other hand, the Hanbalis say: It is valid and will thereafter be spent for the benefit of the nearest relation of the *waqif*. This is also one of two opinions of the Shafi'is. The Maliki are of the opinion that it is valid and will devolve on the nearest poor relation of the *waqif*, and if all of them are wealthy, then on their poor relatives.[36]

2.6.1 Delivery of Possession

Delivery of possession implies the owner's relinquishment of his authority over the property and its transfer to the purpose for which it has been donated. According to many scholars, delivery is a necessary condition for the deed of *waqf* to become binding, though not for its validity. Therefore, if a *waqif* dedicates his property by way of *waqf* without delivering possession, he is entitled to revoke it. If a *waqif* makes a *waqf* for public benefit (e.g., a mosque or a shrine for the poor), the *waqf* will not become binding until the *mutawalli* or the *qadi* takes possession of the donated property, or until someone is buried in the donated plot of land, in the case of a graveyard, or prayers are offered in it, if it is a mosque, or until a poor person uses it with the permission of the *waqif* in a *waqf* for the benefit of the poor.

If delivery is not affected in any of the abovementioned forms, it is valid for a *waqif* to revoke the *waqf*. If a *waqf* is made for a private purpose, such as for the benefit of the *waqif's* children, if the children have attained majority, it will not become binding unless they take possession of it with his permission. If they are minors, the need for giving permission does not arise because the *waqif's* possession of it as their guardian amounts to their having taken possession. If the *waqif* dies before possession has been taken, the *waqf* becomes void and the property assigned for *waqf* will be considered his heritage. For example, if he makes the charitable *waqf* of a shop and dies while it is still in his use, it will return to the heirs. The Maliki school says that sole taking of possession does not suffice and it is necessary that the donated property remain in the possession of the beneficiary or the *mutawalli* for one complete year. Only after the completion of one year will the waqf become binding and incapable of being annulled in any manner. Hanbali, in one of his opinions, states: A *waqf* is completed even without delivering possession; rather, the ownership of the *waqif* will cease on the pronouncement of *waqf*.[37]

[36] Zarqa, M. *Ahkam Alwaqf, op. cit.*

[37] Abu Zahra, Mohammad (1971). *Lectures in the Endowment*. Cairo: Arab Thought House, 2nd ed.

2.6.2 Ownership of Waqf Property

Whereas ownership of *waqf* property is surrendered by the *waqif*, it is not acquired by any other person; rather, it is 'arrested' or 'detained.' With regards to the *waqf* ownership, Muslim jurist have different opinions and who legally owns the *waqfiyya* (the trust document) is also a debated area. Some jurists say the ownership belongs to Allah, some refer it to the beneficiary who owns it, but not as an absolute ownership as, for instance, he is not permitted to sell it. There is no doubt that prior to donation the *waqf* property is owned by the *waqif*, because a person cannot make *waqf* of a property that he does not own. The question is whether, after the completion of the *waqf*, the ownership of the property remains with the *waqif*, with the difference that his control over its usufruct will cease, whether it is transferred to the beneficiaries, or whether the property is released from ownership.

The *fuqahaa* of the four *madhahib* hold different opinions in this regard. The Maliki school considers it to remain in the ownership of the *waqif*, though he is prohibited from using it. The Hanafis observe: a *waqf* property has no owner at all. This is the more reliable opinion according to the Shafi'i school. The Hanbalis say: the ownership of the *waqf* property will be transferred to the beneficiaries.

According to most jurists, the ownership of the *waqif* ceases when *waqf* is completed. This is the preponderant view. Though all or most of jurists concur that the ownership of the *waqif* ceases, they differ as to whether the *waqf* property totally loses the characteristic of being owned (in a manner that it is neither the property of the *waqif*, nor of the beneficiaries, and, as the jurists would say, is released from ownership) or if it is transferred from the *waqif* to the beneficiaries. A group among them differentiate between a public *waqf* (e.g., mosques, schools, sanatoriums, etc.) and a private *waqf* (e.g., a *waqf* for the benefit of one's descendants). The former is considered as involving a release from ownership and the latter a transfer of ownership from the *waqif* to the beneficiary. The difference of opinion regarding the ownership of *waqf* property has practical significance in determining whether the sale of such property is valid or not, and in the case where a *waqf* is made for a limited period or for a terminable purpose. According to the Maliki view that the *waqf* remains the *waqif's* property, its sale is valid, and the corpus will return to the *waqif* on expiry of the period of the *waqf* or when the object for which the *waqf* was made terminates. But according to the view which totally negates the ownership of *waqf* property, its sale will not be valid, because only owned property can be sold, and a *waqf* for a limited period will also be invalid. According to the view which considers the ownership of *waqf* property as transferred to the beneficiaries, the property will not return to the *waqif*.

It is necessary to understand this divergence of viewpoints because it affects many issues of *waqf*. The consequences of these differences will be more obvious in the context of the discussion below.

2.7 The Role of the Waqf and Its Socio-Economic Contributions

The characteristics of *waqf* led to the creation and development of a third sector separate from the profit-based private sector and the official public sector. The concept of *waqf* points towards an Islamic system that recognizes the importance of the non-profit sector in social and economic development and offers the required legal and institutional protection for this sector to function isolated from both motives of self-interest and the power of government. Moreover, this sector is supported with resources that make it a main actor in the social and economic life of Muslims.[38]

From the outset, the *waqf* dealt with important issues within Islamic society, i.e., education, health, social welfare and environmental welfare. Subsequently, Muslim society relied profoundly on the *waqf* for the provision of education, cultural services such as libraries and lectures, scientific research and health care, including the provision of physicians' services, hospital services and medicines. For example, it was noted that the Island of Sicily under the Islamic rule had 300 elementary schools. All of them were established by the *waqf* and all were provided with *waqf* revenues to pay teachers and school supplies.[39]

Most of the major cities in the Islamic world, such as Jerusalem, Damascus, Baghdad, Cairo and Nishapur, had a number of high schools and universities specializing in different fields of science such as medicine, chemistry and Islamic studies. Examples are universities like Al-Qarawiyyin in Fez, Al-Azhar in Cairo, and Al-Nizamiyah and Al-Mustansiriya in Baghdad.

The *waqf* domains provided these universities with buildings, teaching materials, scientific books, salaries for teachers and scholarships for students. Scientific libraries were also created by *waqf* and supplied with hundreds of thousands of volumes. Expense for libraries' employees, supervisors and script writers were provided from the huge revenues of orchards and rentable buildings made as *waqf* for the benefit of these libraries.[40]

The *fuqahaa*, who usually do not permit *waqf* as a form of mobile assets, made an exception with regard to copies of the *Qur'an* and scientific books, due to the significance of libraries and books. In order to enable the lending of books to scholars and researchers, they ruled that it was not permissible to require a deposit from book borrowers, even though the *waqf* founder made such a provision in the *waqf* document. Such a condition by the founder is invalid. *Waqf* for scientific research in medicine, pharmacology and other sciences was very common throughout Islamic history.[41]

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[38] Kahf, M. (1999) "Towards the Revival of Awqaf," *op. cit.*

[39] Sayed, A. M (1989) "Role of Awqaf in Islamic History," in: Hassan Abdullah Al-Amin (ed.), *Idarat Wa Tathmir Mumtalakat Al-Awqaf*, Jeddah: IRTI, p. 239.

[40] *Ibid.*, pp. 238-240.

[41] *Ibid.,* pp. 288-290.

The *waqf* for education led to a mentality of independence with respect to Muslim scholars and gave them the opportunity to keep their distance from rulers. The *waqf* also was able to reduce socioeconomic differences by offering merit-based education to outstanding students rather than those who were able to pay for educational services. Consequently, the economically deprived classes had educational opportunities that allowed them to compete with the upper class.

Health services were also provided on a regular basis by the *waqf,* including hospitals. medical equipment, salaries to physicians and their assistants, schools of medicine and pharmacy and scholarships to students. Special *awqaf* were established for specialized medical schools to conduct research in chemistry and pay for hospital patients' food and medicine.[42]

The *waqf* also contributed to the area of welfare, environment protection and animal care. The first *waqf* upon which the Muslim jurists established most of their rulings is the *waqf* of Umar Ibn Al-Khattab in Khaybar. It was endowed for social assistance to the poor and needy travelers. The *waqf* objective was to support the poor, so it has become known in *Shari'a* that if a founder did not declare an objective for his *waqf*, supporting the poor and needy must be regarded the *de facto* objective. Moreover, several *awqaf* were endowed for orphans, for widows and for helping poor men and women with the cost and requirements of marriage. There were special awqaf for furnishing the homes of the poor, for nursing mothers, for battered wives, and for travelers. Furthermore, *awqaf* encouraged the liberating of slaves, the care for young children, and the provision of drinking water for villages. There were also *awqaf* for animal and bird care, for repairing riverbanks, and for the establishment of frontier reinforcements.[43]

2.8 The Role of Waqf in Educational and Social Development

The educational role of *waqf* started from the mosque, which was not only a place of praying and worshipping, but also a source of education. In fact, at the beginning of the Islamic civilization, the mosque played the role of the school. However, the form of the educational *waqf* has evolved to the *kuttab*, which was similar to a small school where children are taught reading, writing, *Qur'an*, and mathematics. Despite the continuance of the *kuttab*, the educational *waqf* developed into normal schools, which increased all over Islamic society. As schools had direct relations with libraries, people started to assign them as *waqfs* since they were aware of the important role of books in education.

The social benefits provided by the *waqf* system were various. Kuran mentions that a large number of Muslims withheld their properties to build medical centers and hospitals, some of which were built to treat animals.[44] Alongside medical services, there

[42] *Ibid., pp.* 249-287.
[43] Kahf, M. (1995) "Sanadat Al-Ijarah" [Ijarah Bonds], Jeddah: IRTI; Kahf, M. (1999) "Towards the Revival of Awqaf," *op. cit*.
[44] Kuran, T. (2001) "The Provision of Public Goods under Islamic Law," *op. cit*.

were several forms of social services provided by the *waqf*, including helping the poor make the *hajj*, helping poor people get married, and building homes for orphans, elderly, and disabled people.[45] Islamic history has known exceptional and unique *awqaf* as well. For example, *awqaf* were created to furnish orphaned girls with dowries, to provide income for the payment of fines of needy prisoners, and to buy clothing for elderly people in villages.[46] *Waqf* thus provided a wide range of social services, which, as evidence shows, even benefited non-humans, including donkeys and storks, who at times were housed by *waqf*.[47]

The *waqf* has also played a major role in improving the status of women, who were directly involved in the creation and administration of *waqf*,[48] which is explained in more detail below (see 2.10). Additionally, though an Islamic institution, there were no legal restrictions to including non-Muslims among the beneficiaries. For example, a Jewish traveler in the 1640s described how, during a journey from Egypt to Istanbul, he and his companions spent most nights at a *waqf*-endowed inn open to people of all faiths.[49] This was also true with regard to soup kitchens, hospitals, shelters, and other social welfare institutions.[50] *Awqaf* by non-Muslims were established in *Shari'a* courts, and these were always established to benefit their own communities.[51] Isin & Lefebvre observed that the *waqf* granted minorities institutional rights which could be seen as "another way in which the *waqf* combines simultaneously a civic pluralization and civic integration with the accordance of legal right and legitimation."[52] Minority *awqaf* founded by a community member or leader acquired legal rights in both secular and sacred codes. Makdisi relates:

> "This is a fundamental moment in the legal history of citizenship for it demonstrates that legal equality in sacred law is not expressly limited to that religion's faithful but can be used as a strategy to protect against state law, seizure, and taxation."[53]

Thus, *waqf* constituted non-Muslims as citizens with certain rights that made them legal subjects within a broader regime of citizenship.[54]

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[45] Çizakça, M. (2000) *A History of Philanthropic Foundations, op. cit.*
[46] Dumper, M. (1994) *Islam and Israel, op. cit.*
[47] Stillman, N. (1975) "Charity and Social Service in Medieval Islam," *op. cit.*
[48] Fay, M. A. (1998) "From Concubines to Capitalists: Women, Property and Power in Eighteenth-Century Cairo," *Journal of Women's History,* 10(3), pp. 118-140.
[49] Lewis, B. (1956) "1641-1642 de Bir Karayit'in Tfirkiye Seyahatnamesi," (trans. by F. Selkuk), *Vakıflar Dergisi*, 3, 97-106.
[50] Stillman, N. (1975) "Charity and Social Service in Medieval Islam," *op. cit.,* p. 112-13.
[51] Shaham, R. (1991) "Christian and Jewish Waqf in Palestine during the Late Ottoman Period," *Bulletin of the School of Oriental & African Studies,* 54, p. 463.
[52] Isin & Lefebvre (2005) "The Gift of Law: Greek Euergetism and Ottoman Waqf," *European Journal of Social Theory,* 8(1) pp. 5-23.
[53] *Ibid.*; Makdisi, J. (2002) "Legal Logic and Equity in Islamic Law," reprinted in *Islamic Law and Legal Theory*, p. 7.
[54] Isin & Lefebvre (2005) "The Gift of Law," *op. cit*.

Kahf reformulates the definition of *waqf* to express its economic content. He argues that the *waqf* could be described as "diverting funds (and other resources) from consumption and investing them in productive assets that provide either usufruct or revenues for future consumption by individuals or groups of individuals."[55] He therefore describes the *waqf* as a process that combines the act of saving with the act of investment. For him, the act of making a *waqf* is

> "taking certain resources off consumption and simultaneously putting them in the form of productive assets that increase the accumulation of capital in the economy for the purpose of increasing future output of services and incomes."[56]

Services provided by *waqf* may take the form of a prayer space in a mosque, a patient bed space in a hospital building, or a student space in a school building. By the same perception, the *waqf* may provide a product that can be sold to the public in order to generate net income for the beneficiaries of the *waqf*. To Kahf the formation of an Islamic *waqf* is similar to the creation of a business corporation with an unlimited life duration.

> "It is an action that involves investment for the future and accumulation of productive wealth that benefits future generations. Hence, the Islamic *waqf* is a developmental process by virtue of its definition as it involves the accumulation of productive wealth through present investment that favors future generations since the *waqf* gives its beneficiaries future fruits free of any charge. The *waqf* implies a sacrifice of a present consumption opportunity for the benevolent purpose for providing income and services for the future generations."[57]

Waqf assets may be divided into two classes: assets that generate consumable services to be utilized by the beneficiaries, such as schools, hospitals and orphanages, and assets intended for investment. The latter generates marketable goods and services to be sold for the purpose of producing a net income which will be divided between the beneficiaries.

2.9 The Economic Contribution of the *Waqf*

The *waqf* system plays a significant role in economic development. Recent statistics show that one third of all economically productive land in the Ottoman Empire was controlled by the *waqf* system. The evidence of the substantial economic significance of the *waqf* system lies in the variety of services provided by the *waqf*. It supported

[55] Kahf, M. (1998) "Financing the Development of Awqaf Property," Seminar Paper, Kuala Lumpur: IRTI, March 2-4, 1998.
[56] *Ibid.,* p. 6.
[57] *Ibid.,* p. 7.

so many economic sectors that the evolution of Islamic civilization is incomprehensible without taking account of them.[58]

On the Ottoman period, Yediyıldız wrote:

> "Thanks to the prodigious development of the *waqf* institution, a person could be born in a house belonging to a *waqf*, sleep in a cradle of that *waqf* and fill up on its food, receive instruction through *waqf*-owned books, become a teacher in a *waqf* school, draw a *waqf*-financed salary, and, at his death, be placed in a *waqf* provided coffin for burial in a *waqf* cemetery, in short, it was possible to meet all one's needs through goods and services immobilized as *waqf*."[59]

In this regard, Hodgson observes that the *waqf* system eventually became the primary "vehicle for financing Islam as a society."[60] Baskan comments, through the great variety of recipients and players, the *waqf* system was a practice that "succeeded for centuries in Islamic lands in redistribution wealth, as a product of state-individual cooperation."[61] Peters also pointed out that the *waqf* had "profound effects on the tax structure of the state, the redistribution of wealth in society and the urban fabric of Islamic cities."[62]

The predominant mosques established in the Middle Ages, together with many of the architectural masterworks that characterize the Middle East's great cities, were financed through the *waqf* system. They all give evidence to its sizeable economic significance.[63]

At the creation of the Republic of Turkey in 1923, three-quarters of the country's arable land belonged to *awqaf*. Also, one-eighth of all cultivated soil in Egypt and one-seventh of that in Iran were known immobilized as *waqf* property. In the middle of the 19th Century, one-half of the agricultural land in Algeria, and in 1883 one-third of that in Tunisia, was owned by *awqaf*.[64] In 1829, when Greece isolated from the Ottoman Empire, its new government expropriated *waqf* land that composed about a third of the country's total area.[65] It is estimated that the total income of the approximately 20,000 Ottoman *awqaf* in the 18th Century was equivalent to one-third of the total revenue of the Ottoman state, including income from tax farms in the Balkans, Turkey

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[58] Kuran, T. (2001) "The Provision of Public Goods under Islamic Law," *op. cit.*
[59] Yediyıldız, B. (1990), *op. cit.* p. 5.
[60] Hodgson, M. (1974) *The Venture of Islam, op. cit.,* p. 124.
[61] Baskan, B. (2002) "Waqf System as a Redistribution Mechanism in Ottoman Empire," *op. cit.,* p. 23.
[62] Peters, F. E. (1986) *Jerusalem and Mecca: The Typology of the Holy City in the Near East*, New York: University Press, p. 173.
[63] Kuran, T. (2001) "The Provision of Public Goods under Islamic Law," *op. cit.*
[64] Barkan, O. L. & Ekrem, H. (1970) *Istanbul vakiflari tahrir defteri: 953 (1546) tarihli,* Istanbul: Fetih Cemiyeti, p. 1100.
[65] Fratcher, W. F. (1973) "Trust," in: *International Encyclopaedia of Comparative Law,* Tubingen, Germany: J.C.B. Mohr., Vol. 4, p. 114.

and the Arab world.[66] Assuming that individuals cultivating *waqf* land were taxed equally as those working land belonging to state-owned tax farms, this last figure suggests that approximately one-third of all economically productive land in the Ottoman Empire was controlled by *awqaf*. Even though these estimations rely on debatable assumptions, there is no disagreement over the extent of the *waqf*. Equivalent estimates are unavailable for assets other than land, but it is known that the *waqf* system came also to control a huge range of urban assets, including residences, shops, and production facilities.

There is strong evidence that even a single *waqf* could carry great economic importance. Kuran cites the example of the Khassaki Sultan charitable complex, founded in 1552 in Jerusalem by the wife of Ottoman Sultan Suleiman the Magnificent, Hurrem Sultan, also known in the West as Roxelana. The Khassaki complex possessed 26 entire villages, several shops, a covered bazaar, 2 soap plants, 11 flour mills, and 2 bathhouses all across Palestine and Lebanon. For centuries, the revenues produced by these assets were used to operate a huge soup kitchen (which exists to this day), along with a mosque and two hostels for pilgrims and wayfarers.[67]

Regrettably, there are no statistics to measure the economic impact from the early Islamic centuries onward. In the 18th Century, a *waqf* established in Aleppo by Hajj Musa Amiri, a member of the local elite, included for instance 10 houses, 67 shops, 4 inns, 2 storerooms, several dyeing plants and baths, 3 bakeries, 8 orchards, and 3 gardens, among various other assets, including agricultural land.[68] Additional proof of the immense economic significance of the *waqf* system lies in the variety of services it supported. For example, by the end of the 18th Century, in Istanbul, the largest city in Europe at that time, up to 30,000 inhabitants were fed daily by charitable *imarets*, public soup kitchens, established under the *waqf*.[69] An examination of the Turkish *awqaf* founded in the 18th Century shows that only 29 percent served a religious function, and that an additional 25 percent supported schools that taught religion along with other subjects. The remaining *waqf* financed essentially non-religious purposes.[70]

Practical examples of the economic contribution of the *waqf* include the following:

- The *waqf* facilitated renting shops with low prices in the markets, which caused property prices to decrease and, in turn, activated the commercial movement in these markets. The markets that had no *awqaf* had to minimize their prices in order to be able to compete with the *waqf* markets to maintain their businesses.
- The *waqf* helped eradicate unemployment and create job opportunities.

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[66] Yediyıldız, B. (1984) "XVII. Asır Türk Vakıflarının İktisadi Boyutu," *Vakıflar Dergisi*, 18, p. 26.
[67] Kuran, T. (2001) "The Provision of Public Goods under Islamic Law," *op. cit.*
[68] Meriwether, M. L. (1999) *The Kin Who Count: Family and Society in Ottoman Aleppo, 1770-1840*, Austin: University of Texas Press, pp. 182-83.
[69] Huart, C. (1927) "Imaret," in: *Encyclopaedia of Islam,* Leiden: E. J. Brill, 1st ed., Vol. 2, p. 475.
[70] Kozak, E. (1985) "Bir Sosyal Siyaset Müessesesi Olarak Vakıf," Istanbul: Akabe, pp. 20-35.

- The *waqf* helped the poor access money, which increased the demand for many products and services that would otherwise be reserved to the wealthy.
- The *sabeel*, or the water fountain, that was built in main commercial roads, had a major role in facilitating trade and the movement of the commercial caravans travelling between cities and villages.

2.10 Women and Waqf

While Islamic law grants women the right to own property, *waqf* provides additional legal sanction and protection to women's property ownership and control as it is governed by Islamic law and falls under the authority of the Islamic courts. Alienating property in *waqf* has short-term and long-term benefits for both women and men. The donor of an endowment can retain all of his/her estate, which is more than the maximum for bequests or testamentary gifts. The *waqf* permits the donor to designate heirs to the income without adhering to traditional Islamic inheritance law, which stipulates that the estate of a deceased Muslim should be divided with a greater share to men. In addition, property endowed by a *waqf* is not subject to taxation.

Fay (1998) observed a pattern among 18th Century women's *waqfiyyat*. Most women founded family *awqaf* and named themselves the beneficiaries and administrators of their own *awqaf* during their lifetimes. Thus, women used the endowment system as a court-sanctioned trust fund from which they could derive an income over which they exerted control. Fay found that by endowing *awqaf*, women were able to protect their property from voracious relatives, benefit from its income during their lifetimes, ensure their right to manage it, and pass it on to their designated heirs.[71] In his examination of women's *awqaf* in 16th Century Istanbul, Baer came to similar conclusions about the reasons why women created *awqaf* and saw a similar pattern in women's stipulations.[72] However, women were also members of their society and were making *awqaf* for reasons linked not only to their gender, but also to their class, and in response to the social and economic conditions of the time. Similar to men, they unquestionably saw the institution of the *waqf* as a way to protect and pass on property during particularly chaotic periods in history.

The records of the Ottoman Ministry of *Awqaf* show a total of 3,316 entries related to *waqf* cases during the entire Ottoman period.[73] The ministry's index includes various transactions associated with *awqaf*, including additions, deletions, and changes, as well as the establishment of new *awqaf*. However, it recorded only those *waqfiyyat* housed in its archives. Additional *waqfiyyat*, as well as records of transactions involved in the establishment of a *waqf*, can be found in other collections, including the national archives, the *Dar Al-Watha'iq Al-Qawmiyya*. The ministry's index lists 496

[71] Fay, M. A. (1998) "From Concubines to Capitalists," *op. cit.*
[72] Baer, G. (1983) "Women and Waqf: An Analysis of the Istanbul Tahrir of 1546," *Asian and African Studies,* 17.
[73] Fay, M. A. (1998) "From Concubines to Capitalists," *op. cit.*

new *awqaf* founded in the 18th Century which 393 men and 126 women endowed. That women established about 25 percent of these *awqaf* is consistent with results other researchers obtained for both the Arab provinces and Anatolia during the Ottoman period. For example, Gerber's investigation of endowment records from 15th- and 16th-Century Edirne shows that women made up 20 percent of the new *awqaf*[74] while Baer's analysis of the Istanbul *tahrir* (record) of 1546 shows that women developed 36.8 percent. Baer also cites evidence revealing that women made 36.3 percent of the *awqaf* in 18th Century Aleppo, 24 percent in Jerusalem between 1805 and 1820, and 23.4 percent in Jaffa during the entire Ottoman period.[75]

2.11 The Influence of the Waqf on other Legal Systems

Kuran claims that one inspiration for the *waqf* was possibly the Roman legal concept of a sacred object, which provided the basis for the inalienability of religious temples.[76] Moreover, the *waqf* might have followed the philanthropic foundations of the Byzantines, and Jewish institutions of consecrated property (known as *hekdesh*). However, there are imperative differences between the *waqf* and each of these predecessors. The Roman sacred object was authorized, and initiated, by the state, which acted as the property's administrator.[77] By contrast, a *waqf* was typically established and managed by individuals without the sovereign's involvement. Under *Shari'a* law, the state's role was limited to enforcement of the rules governing its creation and operation.

A Byzantine philanthropic foundation was typically attached to a church or monastery, and it was subject to priestly control.[78] A *waqf* could be attached to a mosque, but nevertheless be established and administered by people outside the religious sector.

According to Jewish law, it was considered profanity to consecrate property for one's own benefit.[79] The *waqf* system had played a central role in achieving development of the Islamic civilization at the educational, social and economic levels. As Kuran comments "Not only did the *waqf* turn into a defining feature of Islamic civilization; it went on to become a source of cross-civilization emulation."[80]

There is also evidence that the *waqf* influenced the development of unincorporated trusts in other regions, including Western Europe, where the institution of the trust emerged only in the 13th Century – half a millennium after it had struck roots in the

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[74] Gerber, H. (1983) "The Waqf Institution in Early Ottoman Edirne," *Asian and African Studies,* 17, pp. 29-45.
[75] Baer, G. (1983) "Women and Waqf," *op. cit.*
[76] Kuran, T. (2001) "The Provision of Public Goods under Islamic Law," *op. cit.*
[77] Köprülü, F. (1942) "Vakıf Müessesesinin Hukuki Mahiyeti ve Tarihi Tekamülü," *Vakıflar Dergisi,* 11, pp. 1-35, pp. 7-9; Barnes, J. R. (1986) *An Introduction to Religious Foundations in the Ottoman Empire*, Leiden: E.J. Brill.
[78] Jones, W. R. (1980) "Pious Endowments in Medieval Christianity and Islam," *Diogenes,* 109, p. 25.
[79] Elon, M. (1971) "Hekdesh," in: *Encyclopaedia Judaica,* New York: Macmillan, Vol. 8, pp. 279-87.
[80] Kuran, T. (2001) "The Provision of Public Goods under Islamic Law," *op. cit.,* p. 10.

Islamic Middle East.[81] Legal historians have early established that the origins of the Western trust may in fact be traceable to an Islamic legal foundation, the *"waqf."*[82] Gaudiosi argues that the Crusaders brought the *waqf* back to England. Cattan found general similarities and differences between the *waqf* and the early English trust while Thomas provided a brief overview of the *waqf* and also noted that the *waqf* may have affected the development of the English trust.[83] The same inclination that exists in Islamic societies to manage family wealth over time has also been present in societies with Western legal systems.[84]

Gaudiosi examined the theory of Islamic influence on the English trust and applied it directly to a 13th Century English legal document. The 1264 Statutes of Merton College, Oxford University, would seem to characterize the quintessential English academic institution. However, in its early stages of development, Oxford may have owed much to the Islamic legal institution of *waqf*. The founding of Merton College in 1264 is considered the foundation of the modern college system. Other colleges at Cambridge, Oxford and elsewhere followed the Merton's prescription as an example for the formation of model colleges. In his critical reading of the 1264 Statutes of Merton College, Gaudiosi identified many similarities between that document and the classic *waqf*.[85]

Until the 19th Century, legal scholars considered the Roman fideicommissum to be the origin of the trust in England. By the 19th Century, this theory had been replaced by the theory that it relied on Germanic influences, with scholars agreeing that any analogies between the fideicommissum and the use were "merely … of a superficial kind."[86] As there was a clear dispute over the origin of the English trust, some scholars turned to Islamic law. Sufficient contact existed between Islam and Europe to deserve examination. Gaudiosi (1988) indicated that the trust appeared during the period of increased contacts between Europe and the Muslim world when the Franciscan Friars – who were thought to have introduced the use of the trust in England – were also active in the Middle East. Saint Francis himself stayed there in 1219-1220, pilgrimages to the Holy Land were quite common during the 11th and 12th Centuries, and the Crusades, which lasted from approximately 1095 to 1291 AD, sent tens of thousands of Europeans to the Middle East. Jerusalem was a particularly significant point of contact between England and the Muslim world. The similarities between the *waqf* and the early English trust are remarkable. As Cattan noted:

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[81] Gaudiosi, M. (1988) "The Influence of the Islamic Law of Waqf…," *op. cit.*

[82] Schoenblum, J.A. (1999) "The Role of Legal Doctrine in the Decline of the Islamic Waqf: A Comparison with the Trust," *32(4) Vanderbilt Journal of Transnational Law, pp. 1191-1227.*

[83] Cattan, H. (1955), "The Law of Waqf," in: M. Khadduri & H. J. Liebesny (eds.), *Law in the Middle East,* Washington, DC: Middle East Institute; Thomas, A. V. W. (1949) "The Origin of Uses and Trusts-Waqfs," *Southwestern Law Journal,* (3), pp. 162-166.

[84] Powers, D. S. (1999) "The Islamic Family Endowment (*waqf*)," 32 *Vanderbilt Journal of Transnational Law, pp. 1167-1190.*

[85] Gaudiosi, M. (1988) "The Influence of the Islamic Law of Waqf…," *op. cit.*

[86] *Ibid.*

> "Under both concepts, property is reserved, and its usufruct appropriated, for the benefit of specific individuals, or for a general charitable purpose; the corpus becomes inalienable; estates for life in favor of successive beneficiaries can be created. . . without regard to the law of inheritance or the rights of the heirs; and continuity is secured by the successive appointment of trustees or *mutawallis*. The same actors are found in both institutions: the *waqif* or settlor, the *mutawalli* or trustee, and the beneficiaries, both present and future."[87]

Certainly, since it was permitted to retain the feature of perpetuity with regard to the application of the trust income, even after the rule against perpetuities had limited the duration of other trusts, the English charitable trust is more similar to the *waqf* than to either the fideicommissum or the salmannus. The sole important difference between the *waqf* and the English trust is the expressed or implied reversion of the *waqf* to charitable purposes. This distinction can be noted as the *waqf* will be invalid under Islamic law without an ultimate charitable purpose. However, such difference can be found between the Islamic family trust, *waqf ahli*, and a non-charitable English trust. The *waqf khairi*, conversely, was required to be dedicated to a charitable purpose from its initiation and therefore no reversion provision was required.[88]

A further distinction is the English vesting of a "legal estate" over the trust property in the trustee. Whereas the trustee may in name be the "owner" of the trust property, he is at the same time bound to administer that property for the benefit of the beneficiaries. The responsibility of the English trustee therefore does not differ considerably from that of the *mutawalli*. Consequently, it can be concluded that the English trust is much more similar to the *waqf* than to the Salic salmannus. The *waqf* and the trust are extremely similar in composition, and sufficient opportunity for transmission of the Muslim institution existed at the early time the trust started to emerge in England. Moreover, Gaudiosi reached a conclusion that Walter de Merton may have been, to some extent, familiar, directly or indirectly, with the form of the Islamic charitable trust. A 'House of Scholars of Merton' was to be established "for the support in perpetuity" of students at the University of Oxford or elsewhere, along with a number of clergymen. Moreover, in the opening sentences of the statutes, de Merton set forth a charitable purpose for his trust and assigned properties for the support of that object. These elements are familiar to the Islamic *waqf.* A *waqf* was invalid without a charitable purpose, and the assignment of property was required to be in perpetuity. Further conditions of an Islamic *waqf* were also met by the Merton trust, as the property assigned was tangible, immobile, and yielded an income.

According to Gaudiosi, the Statutes of 1264 that established Oxford's Merton College as an unincorporated charitable trust fulfilled the conditions of a classical *waqf*.

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[87] Cattan, H. (1955), "The Law of Waqf," *op. cit.,* p. 214.
[88] Gaudiosi, M. (1988) "The Influence of the Islamic Law of Waqf…," *op. cit.*

> "Were [they] written in Arabic, rather than Latin, … the statutes could surely be accepted as a *waqf* instrument… Nowhere did Merton's founder declare that his source of inspiration was the Islamic *waqf*. Nevertheless, in view of the cross-Mediterranean contacts of the time, the theory is conceivable."[89]

2.12 Modern Attempts to Revive the Waqf in the Islamic World

The concept of *waqf* indicates that the Islamic system recognizes the importance of the non-profit sector in social and economic development and provides the necessary legal and institutional protection for this sector to function away from self-interested motives and the power of the government.[90] It also provides this sector with resources that make it a major player in the social and economic life of Muslims and charges it with functions that are desired to be outside of the traditional private and public sectors of the economy.[91]

Historically, the Islamic society assigned education, health, social welfare and environmental welfare to this third sector, which in many instances provided additional services and public utilities. Consequently, it has been noted that Muslim society depends essentially on *awqaf* for the provision of services at all levels.

The institution of *waqf* could continue to play a crucial role in social and economic development. Several Muslim countries and organizations have noticed the potential for the development of *waqf* properties, the revival of their functions and their ability to provide the important services they used to carry out in the past. For example, the North American Islamic Trust was established to provide services to the Islamic society of North America and the World *Waqf* Foundation made a commitment to activate the role of the *waqf* in order to contribute to different charitable purposes and help the poor and needy. The Law of *Awqaf* in Algeria stated that all *awqaf* properties that were diverted to other usages must be returned to *awqaf* and devoted to promoting the charitable objectives assigned for them by the founder. The existing assets of *awqaf* in most Muslim countries represent a huge amount of social wealth that can be developed to provide services for the society. As there are countries that have developed their *waqf* systems, such as Kuwait, it is possible to learn from their administrative processes and experience (Sait & Lim, 2006).

As the *waqf* is not a *Qur'anic* scripture, it is more easily subject to creative interpretation (*ijtihad*) and change. Although modern reforms in several Muslim countries have abolished, nationalized or highly regulated endowments, the *waqf* remains influential and there are signs of its reinvigoration. Islamic *awqaf* properties occupy a considerable proportion of the societal wealth in several Muslim and non-Muslim countries.

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[89] Gaudiosi, M. (1988) "The Influence of the Islamic Law of Waqf…," *op. cit.,* p. 1254.

[90] Bremer, J. (2004) "Islamic Philanthropy: Reviving Traditional Forms for Building Social Justice," Paper submitted at the 5th Annual Conference, Centre for the Study of Islam and Democracy Annual Conference on Defining and Establishing Justice in Muslim Societies, Washington: CSID.

[91] Singer, A. (2000) "A Note on Land and Identity," *op. cit.*

The concept of *waqf* itself is also a principle that entails generous applications in the direction of developing the non-profit, non-governmental sector and increasing the quantity of welfare services that aim at improving the socio-economic welfare of a society. This provides a strong justification for a detailed study of the potentiality of the application of *awqaf* and the development of their properties in Muslim countries and communities. In fact, it encourages studying the potentiality of the idea even in all non-Muslim economies (Kahf, 1998).

Kahf notes that the Islamic definition of *waqf* makes its assets cumulative, in application to the principle of perpetuity in *waqf*. He argues, as discussed earlier in this chapter, that because *waqf* assets may not be sold or disposed of in any form, they are only liable to appreciate. They are not permitted to decline since it is illegal to consume the assets of *waqf* or to leave them inactive by any action of neglect or abandon. The *waqf* is not only an investment, but it is a cumulative, ever-increasing investment. This is reflected in the fact that a considerable proportion of cultivable lands and metropolitan real estates are in the domain of *waqf* to the extent that *awqaf* properties were estimated at over one third of the agricultural land in several countries, including Turkey, Morocco, Egypt and Syria (Kahf, 1998).

2.13 The Decline of the Role of the Waqf

Most Arab and Islamic countries have had a long history with the Islamic *waqf*. It used to be one of the most important tools of institutionalized, sustainable giving that was able to promote development and to make a real shift in society at the educational, social and economic levels without relying on governmental or foreign funds (Kuran, 2001). However, the remaining traces of *waqf* have become distorted as a result of several practices that occurred in the last century. The culture of *waqf* almost vanished to the extent that the majority of Muslims do not have even a basic knowledge about *waqf* today. A variety of economic and political reasons led to the decline of *waqf*.

For example, during the colonial era, the *waqf* was reconstructed to mirror the western trust.[92] Some argued that the perpetuity condition may have also caused difficulties from an economic perspective. Schoenblum (1999) observed that while the *waqf* may have served efficient purposes in its earlier development, such as the consolidation of land for agricultural use, it has been unable to accommodate the demands of the fast and modern economy. Rather than modernizing the *waqf* institution, the post-colonial Muslim states, under the impress of modernizing 19th Century reforms, abolished or nationalized the *waqf*. Some also restricted the family *waqf* and forbade the establishment of new ones. Some scholars also argued that the *waqf* did not serve the purposes for which it was originally intended, and the state could administer them more efficiently (Sait & Lim, 2006). Whatever the reason behind its decline, "the eclipse of *waqf* has left a vacuum in the arena of public services,… students, health

[92] Lim, H. (2000) "The Waqf in Trust," in: S. Scott-Hunt and H. Lim (eds) *Feminist Perspectives on Equity and Trusts,* London: Cavendish, pp. 47-64.

patient, the homeless, travelers, the poor, the needy and prisoners are only some of the vulnerable people who have lost the cover of the *waqf*."[93]

At this point, it is important to note the perspectives in the available literature on the reasons for *waqf's* decline. The Arab/Muslim countries' reforms have mainly abolished the *waqf ahli* (family *waqf*) and incorporated the *waqf khayri* into their state structure. In Israel, the Israeli government neither redistributed the *waqf ahli* lands to benefit the Palestinian community, nor incorporated *waqf khayri* into the state structure, but rather confiscated and administered these *awqaf*, restricted Muslim jurisdiction over them and deprived the Muslim community to benefiting from them.

Several commentators relied upon different arguments to assess the 'performance' and the 'decline' of *waqf*. Kuran (2001) noted that in general, a range of public goods that are currently provided by government agencies were provided in the past through private initiatives of the *waqf*. After the second half of the 19th Century the giant cities of the Middle East started to establish municipalities to deliver urban services in a centralized and coordinated manner. However, Kuran argues that because the *waqf* system played an important role in the pre-modern economy of the Middle East, it may have contributed to turning the region into an underdeveloped part of the world. Kuran also raised the issue of inflexibility of *waqf*. He claimed that as Islamic law required the manager of a *waqf*, its *mutawalli*, to obey the founder's stipulations to the letter, the system lacked the flexibility to keep up with rapidly changing economic conditions. Kuran states:

> "Reasonably well-suited to the slow-changing medieval economy into which it was born, it thus proved unsuitable to the relatively dynamic economy of the industrial age. By the 19th Century the system's rigidities made it appear as a grossly inadequate instrument for the provision of public goods; and this perception allowed the modernizing states of the Middle East to nationalize vast properties belonging to *waqfs*."[94]

However, I argue that Kuran can be invalidated from two perspectives. Firstly, the classic *waqfiyya* contained a standard formulary outline of operational alterations that the *mutawalli* was entitled to exercise.[95] Thus, the *waqf* system offered operational flexibilities. From the outset the designer of the *waqf* system noted that every dysfunctional *waqf* has a final destination: namely, the benefit of the poor. This regulation meant that the assets supporting a dysfunctional *waqf* would ultimately be transferred to public use, such as a soup kitchen, thus limiting the misplaced resources. The assignment of a *waqf* did not have to be perpetual. So, in practice it could address a temporary need, such as assisting the victims of a particular flood. In such

[93] Sait & Lim (2006), *op. cit.,* p. 76.
[94] Kuran, T. (2001) "The Provision of Public Goods under Islamic Law," *op. cit.,* p. 843.
[95] Akgündüz, A. (1996) *İslâm Hukukunda ve Osmanlı Tatbikatında Vakıf Müessesesi,* 2nd ed., Istanbul: OSAV, p. 257-70; Little, D. P. (1984) *A Catalogue of the Islamic Documents from Al-Haram Aš-Šarif in Jerusalem*, Beirut: Orient-Institute, pp. 317-18).

cases the *mutawalli* would eventually apply the *waqf's* revenue to a similar mission.[96] Thus, when the victims of the designated flood were back on their feet, the *waqf* would start assisting the victims of another flood; and, in the absence of more flooding, it would begin delivering aid to victims of other natural disasters.

Kahf (1999) noted that the Islamic characterization of *waqf* makes its assets cumulative, the application of the principle of perpetuity in *waqf* means that a *waqf* asset must not be alienated or disposed of in any form, i.e., a *waqf* asset remains in the *waqf* domain perpetually and any new *waqf* will be added to that domain, meaning that *awqaf* assets are only liable to increase. They are not prone to decline since it is illegitimate to consume the assets of *waqf* or to make them inoperative by any action of neglect or indiscretion. As Kahf puts it, "the *waqf* is not only an investment, but it is a cumulative and ever-increasing investment."[97]

This is supported by historical practices regarding the Muslim development of land, which eventually resulted in a significant proportion of cultivable lands to the extent that *awqaf* properties were estimated more than one third of the agricultural land in several countries. This is in addition to the urban *awqaf* that represents a massive part of total urban real estates.

There is a fine line at this point. The *mutawalli's* best understanding of the founder's desires must form the basis of all decision-making related to the *waqf* and the mere fact that operational changes would make the *waqf* more efficient does not give the *mutawalli* an implied power to substitute his own judgment for that of the founder. Founders would normally give their *mutawallis* broad powers to manage properties with an inspiration toward maximizing overall value, however, subject only to judicial review.

Subsequently, the *waqf* had sufficient operational flexibility to maintain it in compatibility with development. It was not uncommon for the *waqfis* to authorize their *mutawallis* to sell or exchange *waqf* assets *(istibdal).* Hoexter, for instance, has shown that between the 17th and 19th Centuries the *mutawallis* of an Algerian *waqf* established for the benefit of Mecca and Medina managed, acting on the authority they enjoyed, to enlarge this *awqaf* through perceptive purchases, sales, and exchanges of assets.[98] Similarly, Jennings has observed that in 16th Century Trabzon some founders unambiguously empowered their *mutawallis* to exercise their own judgment on industry issues. Jennings noted that the *Shari'a* courts with jurisdiction over Trabzon's *awqaf* approved an extensive range of adaptations. As a result, these *awqaf* were able to undertake repairs, adjust payments to suit market conditions, and rent out fruitless properties at rates low enough and for satisfactorily periods to tempt renters to mak-

[96] Akgündüz, A. (1996), *op. cit.,* p. 143-47.
[97] Kahf, M. (1998) "Financing the Development of Awqaf Property," *op. cit.,* p. 8.
[98] Hoexter, M. (1995) "*Huquq Allah* and *Huquq al-ibad* as Reflected in the *waqf* Institution," *Jerusalem Studies in Arabic and Islam,* 1995, Vol. 19, pp. 133-56.

ing development.[99] The *mutawallis* of a bathhouse *waqf* were required to seek official permission to make repairs or change administrators. In the instances examined by Jennings, the local judges in possession of this *waqf's* deed endorsed the proposed expenditures and staff changes.[100] Marcus noted such operational flexibility during the 18th Century in Aleppo.[101]

Moreover, though a power to revoke is not authorized, indeed, it would be incorrect to state that no power can be reserved to change the *waqf* during the *waqif's* life; a *waqif* may retain a power to alter or amend. The power to alter or amend may appear as an alternative to a power to revoke. Islamic law only permits one such alteration or amendment.[102] The assertion for this rule of judicial construction is that "once the discretion is exercised, it is exhausted."[103] This limitation on the power should be compared with the right of the settlor of a trust to exercise such powers throughout his life regarding to both income and corpus. Noticeably, the retention of such a power can create tax problems and lead to the inclusion of the subject property in the settlor's gross estate. However, endowment property as *awqaf* was taxed at a lower rate. Therefore, several colonial rulers and modern states attempted to restrict or eliminate *waqf* as it has effect on the tax base in many regions.[104] Kozlowski notes the failed efforts of Mohammad Ali in 1846 Egypt to preserve the tax base by forbidding the creation of any new *waqf*: "His regulation proved impossible to enforce and [he] violated it himself by creating a number of endowments in favor of his family."[105]

Besides of examples of *waqif* authoritative flexibility, some commentators have indicated that there are limits to the *waqif's* control over the *waqf's* management. Arjomand notes that the *waqf* deed could suffer damage or even disappear with the passage of time.[106] This may cause doubts about the authenticity of all its provisions.[107] In these situations, the *Shari'a* court might use its supervisory authority to modify the *waqf's* administrative role, its mode of operation, and even its objective.

Moreover, even if there was no disagreement over the deed itself, judges had the right to order unstipulated changes in the interest of either the *waqf's* intended ben-

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[99] Jennings, R. C. (1990) "Pious Foundations in the Society and Economy of Ottoman Trabzon, 1565-1640," *Journal of the Economic & Social History of the Orient,* 33, p. 335.
[100] *Ibid.*
[101] Marcus, A. (1989) "The Middle East on the Eve of Modernity: Aleppo in the Eighteenth Century," New York: Columbia University Press, p. 311.
[102] Fyzee, A. (1974) *Outlines of Muhammedan Law*, *op. cit.,* p. 288.
[103] Cattan, H. (1955), "The Law of Waqf," *op. cit.,* p. 211.
[104] Kozlowski, G. C. (1985) *Muslim Endowments and Society in British India*, Cambridge: Cambridge University Press, p. 9.
[105] *Ibid.*
[106] Arjomand, Said Amir (1998) "Philanthropy, the Law, and Public Policy in the Islamic World before the Modern Era," in W. F. Ilchman, S. N. Katz & E. L. Queen II (eds.), *Philanthropy in the World's Traditions*, Bloomington: Indiana University Press, pp. 117-126.
[107] Yerasimos, S. (1994) "Les Waqfs dans Amenagement Urbain d'Istanbul au XIXe Siecle," in: F. Bilici (ed.), *Le Waqf dans le Monde Musulman Contemporain (XIXe-XXe Siecles),* Istanbul: Institut Francais d'Etudes Anatoliennesm pp. 43-45).

eficiaries or the broader community. Writing on the flexibility of Islamic law in general, Gerber provides the case of a richly endowed 17th-Century mosque that lost its congregation as a result of emigration.[108] When asked if the endowment assets could be transferred to another mosque, a Palestinian jurisconsuit (Mufti) stated that "there is room for disagreement and permission for individual interpretation." The practical interpretation of this *fatwa* is that a transfer is legitimate if it appears reasonable and is conditionally in the best interest of the Muslim community. Appreciably, under exceptional rule, the *fatwa* was not based on the interpreting of the founder's intent or on special provisions in the *waqf* deed but on the Mufti's own insight of effectiveness.

2.13.1 Maladministration and Enforcement

Another way to assess *waqf* performance is the enforcement of law and maladministration. Diwan & Diwan, for example, wrote on the issue of *waqf* administration in India:

> "All the world over mismanagement, maladministration of, and corruption in *waqf* have become legendary ... Yet, satisfactory solution of [sic] problem eluded us. Another and probably more effective effort has now been made by Parliament by replacing the 1954 Act with the *Waqf* Act 1995. It may be hopefully thought that India would succeed providing better management of *awqaf* and eradicate corruption."[109]

As mentioned earlier, the *waqif* can stipulate the line of sequence of *mutawallis*. He can even empower a *mutawalli* to appoint his successor. Moreover, according to all schools of Islam apart from the Malakite school, the *waqif* himself can serve as *mutawalli*. However, once a *mutawalli* is designated, he cannot be removed by the *waqif*, who cannot reserve a power to do so. In cases where the *waqif* has not retained the power to designate a successor or is no longer able or alive, the board of *awqaf* or the *qadi* has the power to replace a *mutawalli* in addition to oversee the *mutawalli's* operation.

The extent and limitation to the *mutawalli's* duty should undoubtedly be determined and defined. Indeed, the *mutawalli* is expected to do everything that is necessary and reasonable to protect and administer the *waqf* property according to all schools of Islam. His duty is viewed as a moral and religious duty. However, the *mutawalli* can be removed for misfeasance, insolvency, breach of trust, or adverse claims to the *waqf*, also he can be held accountable in a case of misappropriating his position. Recent Indian legislation imposes a fine on the *mutawalli* for wrongdoing.[110] With regards to the *qadis,* they are expected to exercise their power to create an institutional deterrent against self-interests on the part of tempted *mutawallis*, particularly those

[108] Gerber, Haim (1999), *Islamic Law and Culture, 1600-1840*, Leiden, Netherlands: E. J. Brill, p. 84.
[109] Diwan, P. & Diwan, P. (1997) *Muslim Law in Modern India*, 7th ed., Allahabad Law Agency, pp. 277-78.
[110] Hidayatullah, M. & Hidayatullah, A. (19th ed., 1990) *Mulla's Principles of Mahomedan Law,* Bombay: N.M. Tripathi Pvt. Ltd., p. 173.

of long-standing *awqaf* where the temptation would likely be greatest. As Reiter has explained with respect to the 20th Century experience of enforcement in Jerusalem:

> "One of the weaknesses of the *waqf* system is the absence of an efficient supervisory mechanism for the administrations of its properties ... procedures of governance ... do not vest the qadi with the means to discharge this duty. Neither have the authorities devised auditing rules to ensure control of sound management of *awqaf* by the qadi.... This weakness is exploited by the *mutawalli* ... to derive personal gain from *waqf* resources...".[111]

However, Reiter notes that it is difficult to arrive at conclusions in view of a substantial amount of reliable data. His study examined "available evidence" that dealt mainly with the problems of the supervisory mechanism, concluding that some *mutawallis* were indeed dismissed for misconduct.

The difficulties found with respect to 20th Century Jerusalem can also be found in India. Thus,

> "The institution of family *waqf* also needs immediate attention of the government as well as of the public particularly Muslims. These *awqaf* are looked upon by *mutawallis* in management as though they were *awqaf* for their benefit only. They tend to ignore the rights and interests of other beneficiaries."[112]

Kozlowski[113] pointed to similar problems regarding the lack of *qadi* supervision that occurred regularly in India in colonial times.

Therefore, it may be strongly argued that the plans of the *waqif* were often not fulfilled due to the absence of a reliable enforcement regime to the extent that there is no personal liability, that it is inadequately outlined, or that is only occasionally imposed. The requirement that the *mutawalli* does all that is necessary and reasonable to protect and administer *waqf* property has significant operational consequences. Yet, he cannot freely sell, mortgage, or lease the underlying property except with the approval of the governing board or the *qadi*. However, an enforcement system must exist to hold accountable a *mutawalli* who has misappropriated his position.

2.14 Autonomy of the *Waqf* in the Ottoman Era

Çizakça argued that the Ottoman case should be interpreted cautiously as it can be traced to French colonialist and orientalist arguments about the autocracy of the Ottoman Empire.[114] Moreover, Gerber noted that at least in some parts of the Ottoman

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[111] Reiter, Y. (1996) *Islamic Endowments in Jerusalem under the British Mandate*, *op. cit.*, p. 181.
[112] Qureshi, M. A. (1990) *Waqfs in India: A Study of Administrative and Statutory Control*, New Delhi: Gian Publishing House, p. 39.
[113] Kozlowski, G. C. (1985) *Muslim Endowments and Society in British India*, *op. cit.*
[114] Çizakça, M. (2000) *A History of Philanthropic Foundations, op. cit.,* p. 5-24.

Empire the *waqf* was uncommonly used for the purposes of protecting property against repressive confiscation.[115] Rather than interpreting this motive to establish the *waqf* as an act against an oppressor, it can be considered as an act of piety, where the object is embraced under the sacred feature, a *waqf* enters into another legal order and the founder of this object gains the recognition and limitations of this law.[116]

Awqaf were founded in Ottoman cities as hospitals, shelters, public kitchens, orphanages, and most importantly, schools and mosques. Therefore, it can be considered as charitable endowments for the benefit of the citizens. Ibn Battuta describes the civic spirit of *waqf* endowment in Damascus thus:

> "The people of Damascus vie with each other in the building and endowment of mosques, religious houses, colleges, and sanctuaries. Every man who comes to the end of his recourse in any district of Damascus finds without exception some means of livelihood opened to him."[117]

As Singer suggests, maintaining the practices of the *Selçuks* and *beys* (the local notables), the Ottoman sultans recognized existing endowments and established many new ones to support such institutions and public works in conquered cities. Indeed, under Ottoman imperial support, founding *awqaf* became nearly synonymous with city-building; not only imperial capitals such as Bursa and, certainly, Istanbul, but also provincial cities such as Aleppo, Jerusalem, Damascus, and Cairo were endowed with outstanding complexes known as *külliyes*.[118] Isin & Lefebvre (2005) observe that by founding *awqaf*, appointing supervisors, managers, and trustees to manage them, and perpetually maintaining them, the creation of an urban civic administration by imperial authorities is evident, exactly the kind that socio-political criticism has accused the Ottoman Empire of lacking.[119] They add that,

> "in the occidental tradition from Montesquieu to Weber, the Ottoman Empire is interpreted as having inadequate mediation between imperial and provincial notables and authorities with the result that the development of a social and economic civic spirit was inhibited, which 'diminished the likelihood of an indigenous movement to amend Islamic provisions contrary to self-governing."[120]

To some extent, it should be argued that the state itself (in conjunction with privately endowed *awqaf*) integrated civic space and organized Ottoman cities. Through such performance, the state instituted its own rule by proceeding through this sacred ob-

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[115] Gerber, H. (1983) "The Waqf Institution in Early Ottoman Edirne," *op. cit.,* p. 35.
[116] Isin & Lefebvre (2005) "The Gift of Law," *op. cit.*.
[117] Van Leeuwen, R. (1999) *Waqfs and Urban Structures: The Case of Ottoman Damascus*, Studies in Islamic Law and Society, Vol. 11, Leiden: Brill, p. 73.
[118] Singer, A. (2000) "A Note on Land and Identity," *op. cit.,* p. 28.
[119] Kuran, T. (2001) "The Provision of Public Goods under Islamic Law," *op. cit.,* p. 882; Mardin, S. (1969) "Power, Civil Society, and Culture in the Ottoman Empire," *Comparative Studies in Society and History,* 11.
[120] Isin & Lefebvre (2005) "The Gift of Law," *op. cit.,* p. 17.

ject and the practices of gift-giving. Where a member of the regime's establishment or even a sultan endows a *waqf,* he or she proceeds in the same legality as the subjects of the Ottoman Empire. Therefore, another complexity can be added to this 'gift of law': the *waqf* is not just a form of protection against the state, but a legitimization for the government authority and its policies; the *waqf* and the state were mutually combining.[121]

As Van Leeuwen convincingly demonstrates, *waqf* was primarily an urban institution and shaped the civic space of Ottoman cities, acting as crossroads between "*urbs*, the city in its material form, and *civitas*, the idea of an urban community."[122] According to Van Leeuwen, on the one hand, the *qadi* is the representative of the sultan and has to abide by the sultanic decrees; on the other hand, the sultan is subjected to the same general rules that apply for everyone else, such as the procedures for establishing the validity of evidence, the sacrosanct nature of the stipulations of the founder, and the rules for the validity of *waqf*.[123]

Therefore, it appears that the conversion of sacrilegious wealth into sacred endowment is a movement whereby a social gift produces legal subjects, sacrosanct, secure, and achieves a legal recognition. As Van Leeuwen puts it, "by becoming a *waqf*, an object is subjected to a whole set of rules developed specially to protect its status and to enhance its exploitation to the general benefit to the community."[124] Thus, instead of claiming that Islamic law has no notion of the juristic person, it appears more rational to suggest that Islamic law in its Ottoman misappropriation establishes a juristic person with rights. Or, more courageously, Islamic law, insofar as it pertains to guaranteeing property rights by alienating them into the sacred, endows the subject, which is to say autonomy, right, and legal resort.[125]

2.15 Conclusion

The 19th Century involved steps towards centralization.[126] For example, in Egypt all lands belonging to existing *awqaf* were formally nationalized in 1812. Yet, the legal framework for establishing and administering *awqaf* remained the same, therefore, in the following decades huge new *awqaf* were founded, with the obvious effects on state revenues. A further attempt to impose state control over *waqf* properties was made in the 1860s, when the Egyptian government determined that the revenues of all charitable *awqaf* would henceforth flow into a common treasury, for expenditure wherever they consider it suitable. Likewise, Baer notes that in several Ottoman regions a generous variety of new projects were financed through revenues that had

[121] Isin & Lefebvre (2005) "The Gift of Law," *op. cit.*.
[122] Van Leeuwen, R. (1999) *Waqfs and Urban Structures: The Case of Ottoman Damascus*, *op. cit.,* p. 203.
[123] *Ibid*., p. 54.
[124] *Ibid*., p. 66.
[125] Isin & Lefebvre (2005) "The Gift of Law," *op. cit*.
[126] Çizakça, M. (2000) *A History of Philanthropic Foundations, op. cit.,* p. 110-68.

been reserved for different purposes.[127] During the 20th Century, most Muslim countries nationalized the *waqf* which involved massive confiscations of *waqf* properties. Persistently, due to a shortage of funds, governments of the region approached the *waqf* system as a potential source of new revenue.

In the process of reforming the *waqf*, the stipulations of *waqf* founders stopped to be treated as 'sacred and inviolable', denying the fact that it violates Islamic *Shari'a* principles. The 'reformers' contributed to this radical conversion, basing their opinion on a range of Westernizers for whom the *waqf* system seemed to decline purely because of its identification with Islam.[128] According to Kuran,

> "European policymakers fanned the reforms for reasons of their own… They hoped to transform the world in the image of their own societies. They thought that stronger states would find it easier to pursue Westernization… they wanted to facilitate foreign investment in the Islamic world. They sought to curb the losses that their subjects incurred in trying to have property seized for repayment of debt, only to learn that it was inalienable."[129]

Furthermore, European leaders wished to enable central governments to repay their Western creditors, proceeding further "whether interested in reforming the *waqf* system or in destroying it, all these groups exaggerated its inefficiencies."[130]

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[127] Chapter on "Waqf Reform," in Baer, Gabriel (1969) *Studies in the Social History of Modern Egypt,* Chicago: University of Chicago Press, pp.79-80.

[128] *Ibid*., p. 83-88; Köprülü, F. (1942) "Vakıf Müessesesinin Hukuki Mahiyeti ve Tarihi Tekamülü," *op. cit.,* p. 24-25.

[129] Kuran, T. (2001) "The Provision of Public Goods under Islamic Law," *op. cit.,* p. 889.

[130] *Ibid.;* Davison, R. H. (1973) *Reform in the Ottoman Empire, 1856-1876*, New York: Gordian Press, p. 258; Köprülü, F. (1942) "Vakıf Müessesesinin Hukuki Mahiyeti ve Tarihi Tekamülü," *op. cit.,* p. 24; Ozturk, N. (1994b) "Merkezden Yonetimin Asamalari: Evkaf-i Hümayun Nezaretinin Teskili," in: F. Bilici (ed.), *Le Waqf dans le Monde Musulman Contemporain (XIXe-XXe Siecles),* Istanbul: Institut Francais d'Etudes Anatoliennes, p. 25.

CHAPTER 3:

THE IMPACT OF SUCCESSIVE REGIMES ON THE WAQF IN JERUSALEM

3.1 Origin of the Legislation Which Affected *Awqaf* Properties

The previous discussion has indicated the contributions and impacts of the *waqf* in the entire socioeconomic life of the Muslim community. It also examined the important role of the *waqf* in development and demonstrated a clear decline in the status of the *waqf* as an institution in the Middle East and in most Muslim countries. This discussion is primarily focused on exploring how the *waqf*, in Palestine and in Jerusalem in particular, is distinguished. The *waqf* in Palestine has experienced a decline similar to that elsewhere in the Islamic world, but with a different implication. As explained earlier, the legal system that governs the *waqf* in Palestine has been influenced by the powers that have ruled Palestine over the last two centuries, challenged by the political situation. The following part is demonstrating the reasons why the *waqf* in Palestine has been different from other Islamic countries. But before examining the impact of Israeli rules on the *waqf*, it is necessary to first review the *waqf* position during the Ottoman, British Mandate and Jordanian periods, as understanding the impact of these powers has significant implications for the current *waqf*.

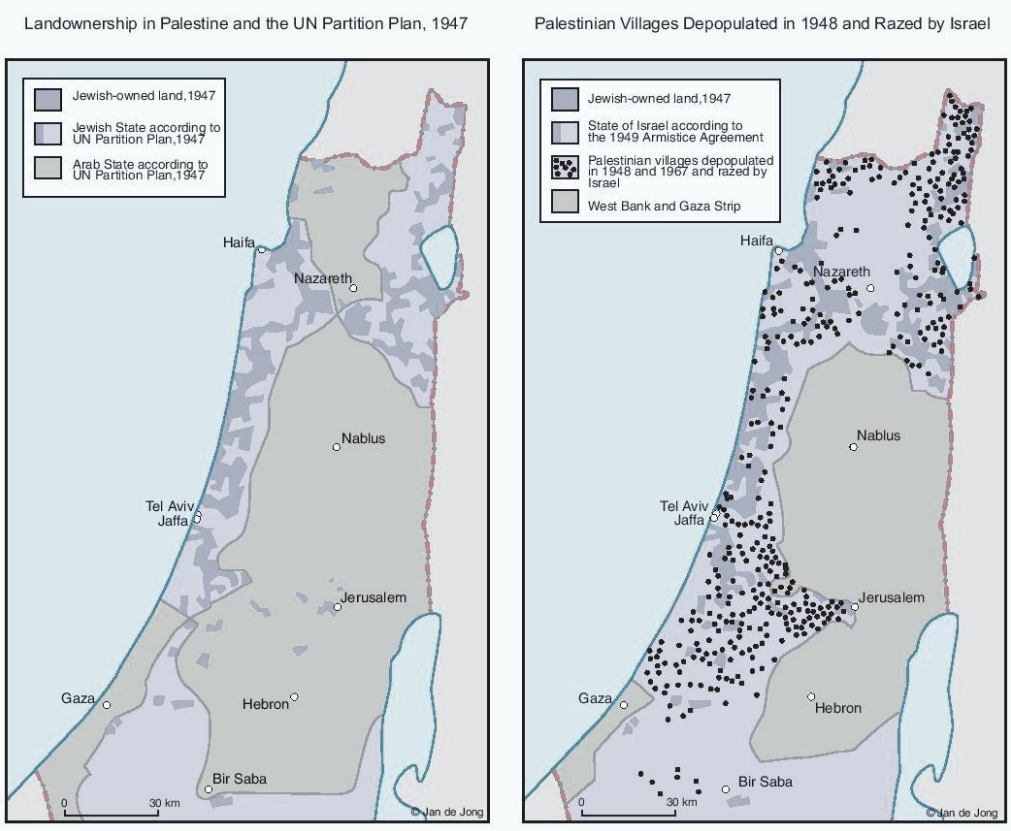
Since the *waqf* is primarily a form of property or land, its legal influence should be attributed to the conflict over the land "in general" in the Middle East. The literature indicates that the *waqf* properties as the land in general were influenced by different and various means, mechanisms, and laws by those who ruled Palestine in the last two centuries.

Before proceeding with the discussion of the law of *waqf* in Jerusalem, it is necessary to first understand the history of the legal system in Palestine, followed by the discussion of the land laws in Palestine, as this will help to grasp the overall legal issues related to *waqf* law.

Jerusalem is regarded as a special case with a different status at all levels. The legal situation in Jerusalem is both complicated and rare as the legal system emerged in unsteady circumstances due to the varying powers that ruled Palestine throughout history. The 1948 partition of Palestine led to the creation of complex and different law systems in the West Bank, Gaza Strip and Jerusalem, as well as in the parts of the country which were occupied in 1948. Until the end of Ottoman rule in 1917, the legal system in Palestine was based on the principles of the Islamic *Shari'a* law. During the British Mandate that followed, the British remodeled the legal system, along with Ottoman law-making, and introduced the principles of the Anglo-Saxon system, which is based on Common Law and the Magna Carta.

When the West Bank, including East Jerusalem, came under the rule of the Hashemite Kingdom of Jordan in 1948, the Jordanian legal system, which is influenced by many

other systems, prevailed. The Gaza Strip came under the Egyptian administration where the joint legal system of the former British Mandate prevailed. Later, after the 1967 War, the Israeli occupation imposed its military law on the West Bank and the Gaza Strip and made East Jerusalem subject to Israeli law (following its illegal annexation in 1980). In 1994, the Oslo Accords provided for the establishment of the Palestinian Authority and Palestinian legislators began to unify and harmonize the diverse legal systems prevailing in the Palestinian territories in order to create their own jurisdiction. Since then, unifying legislation has been enacted for both the West Bank and Gaza Strip.[131]



Map 1: Remains of Palestine after the 1948 Partition and War
(Source: PASSIA, 2002)

3.2 Waqf Pre-Legislation in the Mamluk Era

As discussed earlier, a number of modern states allocate the largest part of their budget to public services in the health, educational and social fields. In many Islamic countries, these services were carried out in the past and still are by the institutions of the *waqf,* funded from revenues from these endowments. The *waqf* gradually developed in Islam, and the number of *awqaf* increased throughout Islamic history, but

[131] Suleiman, Haitam, & Home, Robert, "'God is An Absentee, Too': The Treatment of *Waqf* (Islamic Trust) Land in Israel/Palestine," *Journal of Legal Pluralism* (2009), 59: 49-65.

it was not documented or proven that *awqaf* were codified and registered until the end of the Ottoman era. Therefore, the lack of registration and documentation led to the loss of many *awqaf* in most parts of the Islamic world, especially in Palestine. The *waqf* was living and protected within the framework of the Islamic power but later on this changed due to the geopolitical changes that occurred towards the end of the Ottoman rule and the colonialism that replaced it.[132]

The Mamluks established many endowment properties in Jerusalem, and preserved and took care of them in a systematic way, constantly restoring the old buildings in the holy city. For example, Al-Zahir Baybars (1260-1277) renewed the external mosaics around the eight sides of the Dome of the Rock and also built *mihrab Al-Silsilah*. Qalawun (1279-1290) repaired the roof of Al-Aqsa Mosque in the southwest, and his son Al-Nasir Mohammad bin Qalawun (1309-1340) later repaired the southern wall of the sanctuary adjacent to the *mihrab* of Daoud. He also covered a wall in front of Al-Aqsa Mosque with marble, cast gold from iron in the Dome of Al-Aqsa Mosque and the Dome of the Rock, and built arches in the elevated part of the northern staircase that connects the lower area of the sanctuary to the elevated area on which the Dome of the Rock rests. Al-Ashraf Shaaban (1363-1377) built the minaret of Bab Al-Asbat, and Sultan Qaitbay (1468-1495) delivered drinking water to the impressive building that was erected to the east of the western colonnade. *Sabeel* Qaitbay is at the northern end of the Qaitbay *mastaba*, and both are located between the Gate of the Sanctuary and the edge of the courtyard of the Rock.[133] Qaitbay also sought to establish the Mamluk endowment school in Jerusalem, known as Ashrafiyah School. The last sultan, Qansawi Al-Khoury (1500-1516), covered the dome of Al-Aqsa Mosque and the base of the Dome of the Rock again with lead. He also authorized massaging the walls and painting the doors of Al-Aqsa Mosque with oil colors.

The period between the 13th and 15th Centuries was characterized by the pilgrimage to Jerusalem of scholars and ascetics from all parts of the Islamic world. Scholars from Egypt arrived, who were appointed to government positions such as managing endowments and teaching the Qur'an in mosques. Others came from the eastern and remote regions, from Afghanistan, Ardabil and Khoy in Azerbaijan, from the Crimea and Kerman in Anatolia, from Ras Al-Ain in the Jazira, and from Mosul and Baghdad in Iraq, and even places close to Karak and Ajloun.[134]

It is noteworthy that the Mamluks built two central avenues that split the Old City, the first going from west to east, named Bab Al-Silsila Road, by which name it is still known to this day. From there, south and then east some small endowment markets were established, such as the Al-Harireya market, the Cooks market, the Al-Mobaidin market, and, close to the Al-Ain staircase, the Al-Sagha market. The second central road that was built was the one that linked Bab Al-Amud (Damascus Gate) in the north to Bab An-Nabi in the south. Known as Wadi Al-Tawahin line (today as Al-Wad Road),

[132] *Ibid*.
[133] Khalifa, A. (2001) *Guide to the First Two Qiblatyin*, Beit Al-Maqdes: Al-Aqsa Institution, p. 76.
[134] Cohen A. (1990) *Studies in the History of the City*, Jerusalem: Yad Yitzhak Ben-Zvi, p. 108.

it extended from Bab Al-Amud to the staircase of Al-Ain, and at the end of the valley was a well called Ayoub's Well.

Salah Al-Din also created and developed several important endowments and built a large hospital that was, however, stopped. On the eastern side of it, at the intersection of the two central roads, markets were established, such as the Attarin market, the vegetable market, and the clothes market. The ceilings of these markets were built with stone domes, with many windows built above them in order for light to enter. These markets all ceased to exist as well.

The Mamluks also built an important water network, which supplied Jerusalem with water from several sources. Rain water was stored in the wells that were located in the yard of each house, pools were built on the north-eastern side of the Haram Al-Sharif compound and in the city center. Pools were built in Christian neighborhoods to store water, and water was brought from Ain Silwan and Ayoub's Well, and during the era of Salah Al-Din, underground channels were built to supply the city with water. Then the level of the city was raised to the level of the Haram Al-Sharif through arched corridors that were used as secret passages that linked the Haram and the city. The corridors were channels of water that drained into ponds and basins that were made to supply water to the city and the sanctuary area. Restorations of these canals took place during the rule of Al-Nasir Mohammad bin Qalawun in the years 1313, 1320, 1327, and in the days of Khashqadam and Qaitbay between the years 1465-1470.

There were also three cemeteries inside the city of Jerusalem belonging to the Islamic endowment. One is located in the north above the Adhami corner, the second, Bab Al-Rahma cemetery, is in the east, and the third and largest is the Mamilla cemetery in the west. In addition, *awqaf* in Jerusalem included many orchards filled with fruit trees, vineyards, figs and apples, ten stone buildings built on the lands of the Al-Khanqa *Waqf*, and some plots of land that were designated as "yards" for certain Sufi groups such as Qalandria.[135]

3.3 The Waqf During Ottoman Rule in Palestine: 1516-1917

Palestine was a recognized region in the Ottoman Empire and the Ottoman legal system prevailed for more than four centuries, ending in 1917. The Ottoman legal system developed in two main eras: first, from the creation of the empire until the "Regulations Era" (the year 1839), and second, from the "Regulations Era" until 1917. During the first era, the Ottoman legal system was established on the principles of Islamic *Shari'a* law, Islamic *fiqh*, and the norms and resolutions issued by the Sultan (the ruler). However, due to different reasons during the 17th and 18th Centuries, the Ottoman Empire lost some of its power and control leading to the reform period known as the Regulations Era. In 1839, the reform regulations aimed at modernizing the Empire and several secular rules were adopted and some western legislations introduced

[135] *Ibid.,* p. 114.

(for example the French Law of Commerce) in order to enhance commercial activities between the empire and Europe. With the introduction of the reform regulations the empire regulated and harmonized by law the rules that were based on religion, norms, and the Sultanic Law; this led to the enactment of significant legislation which is still valid in Palestine today; prominent among them is the Land Code of 1858.[136]

Until 1918, Palestine was a part of the Ottoman Empire. In 1858, the Empire tried to regulate its land policy by registering ownership of land. This was resisted and circumvented by the Palestinians for a range of reasons, namely: evading joining the army as the owners of registered lands were often drafted to fight with the Ottoman army. Most of the land in Palestine thus remained unregistered and continued to be used in a communal manner.

A series of reforms were introduced with the adoption of the Ottoman Land Code of 1858, which defined five categories (Articles 1-7) of tenure types:

1) Amiri lands: The *rakaba* of these lands belongs to the Bait Al-Mal, so the state sells from it what it wants to whomever it wants according to a "*tabu*" deed, and the leasing of these lands is done annually.
2) Owned lands: Divided into four sections: (1) housing; (2) lands that were *miri* and then became personal property through proper sorting and ownership; (3) lands that were owned and distributed after the Islamic conquest of them (*ushri*) (which did not happen in Palestine); and (4) *kharaj* lands, which was decided to be left in the hands of the original non-Muslim residents.
3) Waqf lands: Divided into two parts: (1) valid (personal) property whose owner endowed it in accordance with the *Shari'a*, thus, it belongs to the endowment and the state has no right to it; (2) *Miri* lands that were endowed by the sultans (of which there are many), or with the permission of the sultan, whose income was endowed with its *rakaba* remaining for the Bait Al-Mal, so that land becomes a *waqf* for all Muslims because it is originally like that.
4) Abandoned lands: Land that is not allowed to be owned, such as public roads, and that is allocated to the general population of a town for public benefit. These include pastures, forests, deserts, public squares, public or seasonal markets, and mosques.
5) Al-Mawat lands: Lands cut off from urbanization that are always common to everyone, and any person may benefit from them with the permission of the land commissioner in the region, as they were granted free of charge, provided that they invested them.

The Ottomans established the land registry system, but it contained many negative aspects regarding the process of mapping and of property settlement. It is noteworthy

[136] Home, R. K. (2003) "An Irreversible Conquest? Colonial and Post-colonial Land Law in Israel/Palestine," *Social & Legal Studies*, 12 (3), pp. 291-310.

that with the end of the Ottoman rule, only five percent of the land of Palestine was registered. Even in the case of land registration, the register often fails to show the true size of the land in question.

The state introduced a system of directing endowments: it was enacted in 1870 and appointed persons who had the right to supervise endowments. Accordingly, the endowments were divided into two parts:

1) *Mazbuta*: Endowments whose management is controlled and whose interests are directly managed by the Sultan's endowments treasury.
2) Unattained (attached): endowments that are managed by their guardians, while the board of endowments maintains them.

There are no accurate statistics for endowments in Palestine, and all the numbers provided by various researchers are conclusions based on insufficient information, which also varies because it refers to different periods of the Ottoman era. The Ottoman administrative apparatus, especially in the field of endowments, was not sufficiently developed to keep accurate and comprehensive records of all endowment lands and others, making it very difficult to determine these cases.

It could be possible to carry out a relative inventory of the remaining endowments in Palestine, but this work requires great effort and time. The ratios related to the total area of the endowment lands in Palestine are not based on definitive and scientific evidence, and from the foregoing it can be said that these ratios are only a small part of a large amount.

It is noted that a large percentage of endowments were not registered in the files of *Shari'a* courts during the Ottoman era, which prompted the British not to consider any endowment that was not included, which was also stipulated in the English law of 1919 on endowments.

The Ottoman period witnessed a revival and movement for the endowment. It is known that Sultan Suleiman the Magnificent built the wall for the city of Jerusalem to protect the holy places, while the lower part of it dates back to the earlier periods of the Fatimid, Ayyubid and Mamluk.

Sultan Suleiman also built the Sultan's Pool outside the walls on the southeast side of Bab Al-Khalil (Jaffa Gate) and had water channels dug to drain the water that was brought into the city towards the Haram Al-Sharif and the adjacent area. The water was directed in three directions inside the Haram and five outside of it, with two channels going north and three west. The water project was completed in 1541.[137]

[137] Armstrong, Karen (1997), *Jerusalem: One City, Three Faiths*, Ballantine Books, p. 526.

Vegetables were planted on plots of land inside and outside of the walls, and there were many vineyards and orchards belonging to the *waqf* that date back to the era of the Mamluks, who were famous for such plantations.[138]

The Ottomans built many markets as endowments for the Dome of the Rock, such as the market of merchants and perfumers, the vegetable market, the Bashoura, the great market, the goldsmith market, the Khan Al-Qatannin. The development works for this endowment brought about evolution and progress and the number of shops outside the market increased. The Mamluk sultan built the plot of land that was an endowment for the Dome of the Rock and announced a family *waqf*, paying the Dome of the Rock endowment treasury a huge sum to obtain the land use rights. The total annual income of the Dome of the Rock endowment from fees imposed on shop tenants in the Khan was very high. This is an indication that the guardians of the endowment always aimed at making economic reforms so as to increase its rent. Similar works were documented in two new markets that the Ottomans established at the disposal of the Dome of the Rock endowment. The rental of shops was for a period of nine continuous years. The purpose of this was to urge merchants to make efforts to invest money in order to increase activities that would generate economic benefits.

Dumper found that the *waqf's* political, economic and social role increased during the late Ottoman period. The areas of *waqf* under Ottoman control were so extensive, that a ministerial department and operational legal system were established.[139] Ottoman law recognized the legal validity of *awqaf* subject to supervision by Islamic religious courts. During the Ottoman period, *waqf* properties were included in the cadastral survey and registered in the same manner as other land. Therefore, the state developed a special office for *awqaf* for registration, control and the clarification of titles. In case a title to *waqf* properties could not be established, the state would take over the land in question.

The legal status of lands divided *waqf* into two types: (1) *waqf sahih* (true) which were endowed in *mulk* land, and (2) *waqf ghayr sahih* (untrue) which were found on *miri* lands. However, during the late Ottoman period, two further categories became known: *madbota* (under the direct control of the state) and *mulhaq* (privately administered), although the state later also imposed a supervisory role over *mulhaq*.

Dumper (1994) further noted the successful historical development of the *waqf* system in Jerusalem during the Ottoman period, attributing the growth of the status of Jerusalem as a holy city in the Muslim world and the increase of its political significance as the reasons for this development. As the Al-Aqsa Mosque was regarded one of the holiest places in Islam, *awqaf* were established to support the increasing number of hostels established for pilgrims and travelers. Moreover, well-known Jerusalem

[138] Cohen A. (1990) *Studies in the History of the City*, *op. cit.*
[139] Dumper, M. (1994) *Islam and Israel, op. cit.*

families such as the Husseinis, the Khalidis, the Jarallahs, and the Alamis also began to found *awqaf* for their families and for public purposes.

While the state's control of the *waqf* with respect to budgeting and accountability in the late Ottoman period affected the independence of the *waqf* (Dumper, 1994), an important feature of *waqf* remained unvarying: its status as a holy institution whose proceeds should ultimately reach and benefit the Muslim community. Moreover, despite its expanded interference in the *waqf,* the Ottoman government failed to achieve full control and monopoly over it. For instance, the family *waqf* continued to occupy great areas of land in Palestine.

3.4 The British Mandate for Palestine: 1920-1948

Britain was mandated for Palestine by the League of Nations. The mandate was governed by a High Commissioner who entirely exercised all administrative and legislative powers in the country. During the British Mandate period, broad legislation was introduced in various areas that are still valid today. At the same time, the Ottoman laws remained valid except for the amendments thereto or substitution thereof in accordance with the British Mandate laws. The British Mandate government reshaped the legal system by transforming it from the Ottoman Latin to the Anglo-Saxon system (i.e., the British joint law).

3.4.1 British Mandate Land Laws

With the Balfour Declaration of 1917, Britain committed itself to aid and allow the establishment of a Jewish homeland in Palestine, thus facilitating the settlement of Jews and achievement of their purposes. With the fall of the Ottoman Empire at the end of World War I, the League of Nations placed Palestine under the authority of the British Mandate of Palestine. The importance of land to the Mandate system was expressed in Article 6 of the 1922 League of Nations Mandate for Palestine:

> "The Administration of Palestine, while ensuring that the rights and position of other sections of the population are not prejudiced, shall facilitate Jewish immigration under suitable conditions and shall encourage … close settlement by Jews on the land, including State lands and waste lands not required for public purposes."

Article 1 further stated, "the Mandatory shall have full powers of legislation and of administration, save as they may be limited by the terms of this mandate." According to Article 46 of the Palestine Order in Council of 1922, "[t]he jurisdiction of the Civil Courts shall be exercised in conformity with the Ottoman Law in force in Palestine on November 1st, 1914" and this was confirmed by the Council of the League of Nations on 24 July 1922 and published in the League of Nations Official Journal in August 1922.

In other words, the legal categories of land that existed under the Ottomans remained in force when the British Mandate was established, subject to minor modifications

amending rules applicable to the tenure types. For instance, reforms were made with respect to *Mewat* lands by the *Mewat* Land Ordinance of 1921, which altered Article 103 of the Ottoman Land Code to read:

> "Any person who, without obtaining the consent of the Administration, breaks up or cultivates any wasteland shall obtain no right to a title-deed for such land, and, further, shall be liable to be prosecuted for trespass."

Accordingly, while the Ottoman Land Code remained a cornerstone of the land system in Palestine, the benefits thereunder were withdrawn by the Mandatory rule. A few effectual changes were made to the land system, beginning with proclamations aimed towards the introduction of a reliable registration system. In 1918, the Chief Administrator issued a proclamation prohibiting the sale or disposition of any land without the consent and approval of the Administration.[140]

The proclamation was superseded by two laws: the Land Transfer Ordinance of 1920 and the Settlement of Title Ordinance of 1928. The former required every land transaction to be registered and the latter provided for a procedure of examination of titles throughout the Mandate for the purpose of establishing a new and accurate land registry. While the Mandatory government successfully arranged for the registration of property and settled many disputes over ownership in much of Palestine, this was not the case for the Old City of Jerusalem, where the process for settling title remained unsettled.[141]

3.5 Waqf During the British Mandate Period

The new legal system established by the British Mandate was strengthened by creating a system of courts and introducing many British laws.[142] Palestinian Muslims were concerned by the prospect of their religious affairs being controlled by a Christian power headed by Zionists, namely Sir Herbert Samuel, the first high commissioner, and Norman Bentwich, legal secretary in charge of the *awqaf* and *Shari'a* courts. After Muslims complained of religious discrimination and demanded control over their affairs, Samuel issued an order in December 1921 establishing a Supreme Muslim Council (SMC), which is further explained below.

Thus, the British entrusted the administration and supervision of all *waqf* matters and property to the SMC and placed religious endowments under the exclusive jurisdiction of religious courts (i.e., *Shari'a* Courts).[143] While the mandatory government infrequently intervened in *waqf* property matters, it enacted an Order in Council in 1931,

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[140] Kedar, A. S. (2001) "The Legal Transformation of Ethnic Geography: Israel Law and the Palestinian Landholder 1948-1967," *New York University Journal of International Law and Politics,* Vol. 33 (4).
[141] Owen, R. (ed.) *New Perspectives on Property and Land in the Middle East*, *op. cit.,* pp. 161-173.
[142] Bagaeen, S.G.S. (2006) "Evaluating the Effects of Ownership and Use on the Condition of Property in the Old City of Jerusalem," *Housing Studies*, 21:1, 135-150.
[143] See Palestine Order in Council of 1922, Articles 52, 53, 54).

which determined that the Muslim *waqf* had exclusive ownership of the Haram Al-Sharif, and, at the same time, made provisions for Jewish access to the Al-Buraq Wall for use and prayers albeit in a limited manner. Schedule 1 of the Palestine (Western or Wailing Wall) Order in Council provided:

> "(A) To the Moslems belong the sole ownership of, and the sole proprietary right to, the Western Wall, seeing that it forms an integral part of the Haram Al-Sharif area, which is a Waqf property…".

3.6 The Supreme Muslim Council

The SMC was established by an Order issued by the first British High Commissioner in Palestine, Sir Herbert Samuel, in December 1921, which also regulated the SMC's activities. The SMC consisted of a president and four members, two of whom were to represent the district of Jerusalem and the remaining two the districts of Nablus and Acre. All were to be paid from government and *awqaf* funds (Dumper, 1994).

Image 1: Founded in 1929 and engraved on the facade of the building from the top in raised letters "As our fathers built and did, we build and we do," in a clear message of continuity and preservation of national and religious identity. (Source: PASSIA)

The SMC was an active institution in standing against the Zionist project in Palestine, and after it organized the *waqf* affairs and opened an Islamic college as well as schools in various regions of Palestine, it devoted its efforts to preventing the infiltration of lands by Jewish immigrants, lending to many landowners who were suffering from financial hardship. It also purchased large areas of land and some villages (e.g., the villages of Zita and Deir Amr), turning them into *waqf* for the people, and common land (e.g., in the villages of Al-Taybeh, Al-Tira, and Aqil).[144] Construction of the SMC

[144] *Political Encyclopedia*. Vol. VI (1st ed.). Beirut: The Arab Institute for Studies and Publishing, pp. 42-43.

building was completed on December 22, 1929, and the facade on the top was inscribed in large letters with "As our fathers built and did, we build and we do," in a clear message of continuity and the preservation of national and religious identity. Some interpreted this inscription, which was ordered by the Mufti, as a reference to the similar architecture between this building and Islamic buildings in the Arab world and Andalusia. As the Mufti wanted, the four-story building became a new political statement. Distinguished by its luxury, it included 140 rooms, 45 of which suites, and there were three elevators for the use of guests. In 1936, the building was turned it into the British government headquarters. Later, the Zionist establishment acquired it and made efforts to Judaize it, before it was finally sold to a Jewish investor, completely ignoring the fact that it was an Islamic *waqf* that cannot be sold legally.

Image 2: The Supreme Muslim Council building which after 1967 was occupied by Israel and converted into the Waldorf Astoria Hotel (Source: Mickytc, CC BY-SA 3.0)

The main purpose of the establishment of this SMC was to deliver to its hands the control and management of *awqaf* and *Shari'a* affairs in Palestine. The British government was to have no intervention in the constitution of the Council; the powers of administration and control with regard to Muslim *awqaf* were vested in the Council to the exclusion of the government. Although the Council was not vested specifically by the Order with the power to administer and control *Shari'a* courts, Section 1 entrusted it with the control and management of *Shari'a* affairs, and through Section 8 it was empowered to appoint the judges and inspectors of *Shari'a* courts after the nomination of the Council had been approved by the government. The Council was given the power to dismiss all *awqaf* and *Shari'a* officials, including the judges and inspectors, without the prior approval of the Government, and was obliged only to report the fact of dismissal and the reasons therefor to the government. The SMC was to be elected in general elections, but the special law required by Section 4 of the

Order, prescribing the method of election and laying down the functions, status and precedence of the President, was never submitted to government for enactment. Council members were to be elected by secondary electors elected by the inhabitants of the district which the member was to represent in accordance with the Ottoman Law of Elections to the Chamber of Deputies.[145] The duties of the SMC were defined as follows:

(a) To administer and control Muslim *awqaf* and to approve the annual *awqaf* budget and, after approval, to transmit the budget to government for information;
(b) to nominate the President and members of the *Shari'a* Court of Appeal, and the inspector of *Shari'a* courts, with the approval of the government. After such approval, they then had the power to appoint the *qadis* (judges) of the *Shari'a* courts. If the government withholds its approval, it shall signify to the Council within 15 days the reasons therefor;
(c) to appoint muftis from among the three candidates to be elected by a special electoral college in accordance with the special regulation to be passed by the Council, provided that the election of muftis in the Beersheva District shall be made by the sheikhs of the tribes (The regulation for the election of muftis was never enacted);
(d) to appoint the directors and superintendents of *awqaf* and all *Shari'a* officials;
(e) to control the general *waqf* committee and all other committees and *waqf* administration;
(f) to dismiss all *waqf* and *Shari'a* officials. When an official is dismissed, notice thereof is sent to government with reasons for dismissal;
(g) to enquire into all Muslim *awqaf* and to produce proof and evidence establishing the claim to these *awqaf* with a view to having such returned to the Council.

As for its activities, from its establishment until 1936 the SMC:

(a) built 21 new mosques and three minarets and repaired 313 mosques, including their minarets, in towns and villages;
(b) built 224 new buildings, including shops and houses, some of them of considerable value, such as the *waqf* building which was originally the Palace Hotel in Jerusalem and is now used as government offices;
(c) repaired 300 *waqf* buildings, including shops and houses;
(d) drained and assisted in draining many swamps on *waqf* lands;
(e) planted about 40,000 trees on *waqf* lands;
(f) contributed to the enlargement of *waqf* lands by the purchase of about 25,000 dunums;

[145] "Regulations for the Formation of the Supreme Islamic Council in Palestine issued by the High Commissioner for Palestine May 15, 1921." Archives of the Foundation for Reviving Heritage and Islamic Research. File No. 13/21/39.1/97 The Facts: The Official Palestine Government Gazette, N. 58, Jerusalem, January 1, 1921, pp. 3-4.

(g) maintained eight schools for boys, girls, and orphans and gave 24 schools annual grants-in-aid;

(h) granted scholarships to 64 Muslim students in universities in Egypt, Syria, and Europe;

(i) established a Muslim orphanage that took care of some 270 to 300 students of both sexes. After completing their elementary studies, the orphans were trained in various industries including printing, carpentry, tailoring for men and women, bent woodwork, shoe-making, work for the blind, and book-binding;

(j) contributed financially towards the training of about 40 Muslim midwives who graduated from the midwifery school under the Department of Health.

(k) Repaired, most importantly, Al-Aqsa Mosque and other parts of the Haram Al-Sharif, at a cost of some £P.100,000 - according to a British report of 1936.

3.7 Autonomy of the *Waqf* under British Rule: Why?

Dumper points out that during the British Mandate period, parts of the *waqf* system took on "quasi-state functions and the administrators and managers assumed important political roles."[146] Bagaeen argued that the situation in Palestine during the Mandate allowed the *waqf* to maintain its status and centrality in Muslim society, and added the struggle over land, characterizing the nationalist struggle in Palestine between the Zionist movement and the Arabs.[147] According to Doukhan, the British endowed the SMC with autonomous powers in religious matters, including the management of *awqaf*, because of the need for Muslims to conduct their affairs by themselves under non-Muslim rule.[148]

Despite the fact that the *waqf* as a Muslim institution has declined throughout the Muslim world in the 20th Century, Reiter indicates that the case of Jerusalem since the Mandate period, and in particular the case of East Jerusalem since 1967, is distinct.[149] Moreover, the Palestinian movement during the Mandate encouraged the Palestinian leadership to use *waqf* properties as a buffer against the sale of land to the Jews.[150] Dumper showed that despite government restrictions (e.g., Defense Regulation 1937), the *waqf* system as administered and represented by the SMC was able to "operate in a relatively autonomous manner."[151] When the Mandate government tried to impose restrictions on *waqf* it failed due to the strong holy character of the *waqf*. Also, the state recognized the important representational role of the *waqf* that served the Muslim community and assisted the organizational and administrative efforts of the British. The Mandate period was thus exceptional as the *waqf* played a mediating role between the state and the population. However, the British Mandate authorities

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[146] Dumper, M. (1994) *Islam and Israel, op. cit.,* p. 2.

[147] Bagaeen, S.G.S. (2006) "Evaluating the Effects of Ownership and Use," *op. cit.*

[148] Doukhan, M. J. (ed.) (1933) *Laws of Palestine 1926-1931*, *Volumes I-IV,* Tel Aviv, Palestine: L.M. Rotenberg, pp. 1362-1364.

[149] Reiter, Y. (1997) *Islamic Institutions in Jerusalem, op. cit.,* p. 23.

[150] *Ibid.,* p. 27.

[151] Dumper, M. (1994) *Islam and Israel, op. cit.,* p. 21.

were not satisfied with the SMC's national role on the ground, which eventually prompted them to enact the Islamic Endowments Law, according to which Haj Amin Al-Husseini was removed from all his positions in the SMC and from the position of *fatwa*.[152] After the occupation of Palestine, Israel considered that the SMC and its members had become absent by law.[153]

3.8 The Waqf in Jerusalem Under Jordanian Rule

To date, Jordan continues to exercise its sovereignty and law over the *waqf* institutions in Jerusalem. While Jordanian law became obsolete with the establishment of the Palestinian Authority (PA) in the West Bank and Gaza, it continues to form the legal basis of the operation of some institutions in Jerusalem where the PA is not allowed to function. In addition to its religious role characterized by building mosques and running the religious affairs of Muslims, the *waqf* is today the major land and real estate owner in Jerusalem.[154]

In 1948, when East Jerusalem passed into Jordanian rule, the nationalist struggle over land and assets in Jerusalem ceased with the restoration of Muslim rule (in this case Jordanian) over the eastern part of the city. Under the Jordanians, the management of *waqf* property in Jerusalem and the West Bank was placed under the jurisdiction of the Jordanian Ministry of *Waqf* in Amman and its activities allowed the decline of *waqf* until 1967; only 16 new *awqaf* were founded in Jerusalem during the 19 years of Jordanian rule compared to 90 new ones under the first 23 years of Israeli occupation (from June 1967 to the end of 1990).[155]

Awqaf in Jordan and Palestine were formerly organized through the administration of the Ottoman Agreement issued on 19 Jumada II 1280 *Hijri* (December 1, 1863), which remained in force until it was cancelled by Article 10 of the Islamic *Awqaf* Law of 1946. It is noteworthy that the First Fundamental Law of Transjordan of 30 *Shawal* 1346 *Hijri* (April 19, 1928), took a special interest in the Islamic *Awqaf*. Article 61 stipulated that Islamic *waqf* affairs and administration of w*aqf* financial affairs are managed by a special law and that *waqf* affairs are governmental issues. It can be seen at this stage that following the establishment of Muslim states during the early years of the 20th Century, the *waqf* system was transformed from the private sector to the control of the state, which claimed to be in a better position to manage the *waqf* law (Lim, 2000).

After the establishment of Jordan as a Kingdom in 1946, the Constitution emphasized that *awqaf* affairs and administration of *waqf* financial and other affairs shall be man-

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[152] Al-Muhtadi, Abla (2012) *Hajj Amin Al-Husseini and the National Challenges in Palestine 1917-1937*, Amman: Dar Al-Maya for Publishing and Distribution; Hammouda, Samih, "The Role of the Supreme Islamic Council in Preserving the Lands of Palestine from the Danger of Leakage to the Zionist Movement 1922-1948," *Jerusalem Annals*, No. 15 (Spring-Summer 2013), p. 79.

[153] Dumper, Michael (1992) *Israel's Policy towards the Islamic Endowments in Palestine,* Beirut: Institute for Palestine Studies, p. 6. Hammouda, Samih, "The Role of the Supreme Islamic Council,", *op.cit.*

[154] Bagaeen, S.G.S. (2006) "Evaluating the Effects of Ownership and Use," *op. cit.*

[155] Reiter, Y. (1997) *Islamic Institutions in Jerusalem, op. cit.,* p. 28.

aged by law (Article 63), and subsequently the Jordan Law of Islamic *Awqaf* No. 25 of 1946 was issued. It had previously been a temporary one under No. 4 of 1946, was then endorsed by the Legislative Council with some amendments and additions on November 21, 1946, and ratified and issued by a Royal Decree on December 2, 1946. The Law was issued as temporary according to Article 61 of the Fundamental Law since the (Jordanian) Constitution was not yet declared. Upon presentation to the Legislative Council, it was re-issued as a permanent law and was enacted by reference to Article 61 of the Kingdom's First Organic Law at the time of the declaration of independence on May 25, 1946. There was no reference to Article 63 of the Constitution as it was only declared on June 12, 1946. Moreover, *Awqaf* Law No. 1 of 1946 issued by virtue of law had been issued on June 12, 1946, according to *Awqaf* Law No. 4 of 1946, and later became permanently named Law No. 5 of the same year.

The government of Jordan stated that *awqaf* affairs and financial matters are to be organized by a special law due to its distinguished status: *waqf* has its own independent entity, its funds are not to be mixed with other public funds, it is totally independent of any other bodies whilst giving it, and its funds have all the privileges that public and government funds and interests enjoy. This was an early recognition of the importance of *waqf* to guard and protect it from loss and aggression, enabling it to fulfil its mission while seeing to its total independence. The Ministry of *Awqaf* was renamed on January, 16 1968 according to Law No. 4 of 1968 which stated that the Director of the Higher Council of *Awqaf* or the Supreme Judge assumes the cabinet of the Ministry of *Awqaf* to be known from therein as the Ministry of *Awqaf,* Islamic Affairs and Holy Places.

In Palestine, however, *awqaf* affairs were managed through the Higher Islamic Council according to Islamic Council Regulation issued in Palestine during the British Mandate on December 20, 1921. Following the declaration of unification of the two banks of Jordan at a conference in Jericho on December 1, 1948, the Lower House of the Jordanian Parliament ratified the unification on December 13, 1948. Unification was announced after parliamentary elections (to include parliamentarians from the two banks of Jordan) on April 24, 1950 and Law No. 62 was issued in 1951, stating the adoption of the provisions of *Awqaf* Law No. 25 of 1946 throughout the Kingdom as of May 1, 1951.

Jordanian laws for *awqaf* affairs remained in force on the two banks even after the Israeli occupation. The Jordanian Ministry of *Awqaf* continued to directly manage the affairs in the West Bank and even after Jordan's legal and administrative disengagement from the West Bank on August 7, 1988, relations were not severed, leaving them until the Palestine Liberation Organization (PLO), which was recognized as the sole legitimate representative of the Palestinian people by the Arab League at its Summit in Rabat in 1974, would regain the rights of the Palestinian people on their land. Islamic *awqaf* affairs and the eastern courts were excluded from the disengagement due to their significance and lest they fall directly under the Israeli Ministry of Religious Affairs.

When the Palestinian Authority assumed power and requested that it be entrusted with endowment affairs, the Jordanian government agreed to disengage from the administrative and legal ties to religious courts and Islamic endowments in the West Bank. However, Jordan excluded the courts and endowments in East Jerusalem from the disengagement agreement, as talks on the issue of Jerusalem was postponed until the final negotiations. To date, Jordanian laws regarding Islamic endowments in the holy city remain in force and jurisdiction is under the responsibility of Jordan. Under the Jordanians, the management of *waqf* property in Jerusalem was placed under the jurisdiction of the Jordanian Ministry of *Waqf* in Amman. Today, Jordanian law continues to govern *Waqf* institutions in Jerusalem and societies and charities registered under Jordanian laws.[156]

Jordan has been keen on sponsoring and protecting the Islamic endowments, especially Al-Aqsa Mosque and has issued important decisions in this regard. For example, on April 24, 1950, the Jordanian National Assembly determined:

1) To support complete unity between the eastern and western banks of Jordan and their meeting in one state – the Hashemite Kingdom of Jordan, headed by His Majesty King Abdullah bin Al-Hussein – on the basis of constitutional representative rule and equal rights and duties among citizens.
2) Confirmation of the preservation of all Arab rights in Palestine and the defense of those rights by all legitimate means, with fullness of truth, and without prejudice to the final settlement of its ordinary cause within the scope of national aspirations, Arab cooperation and international justice.

On April 27, 1950, the British government decided to officially recognize this union, and the Council of the League of Arab States agreed that the annexation of the Palestinian part to the Kingdom of Jordan was necessitated by practical reasons.[157] In August 1950, the Jordanian government decided to appoint Aref Al-Aref as mayor of Jerusalem and in February 1951 formed an Islamic scientific commission in Jerusalem to be a guardian of virtue and morals. It was headed by Sheikh Mohammad Al-Amin Al-Shanqiti and had elite Muslim scholars as members: Sheikh Yousef Tahboub, Sheikh Kamal Ismail, Sheikh Hilmi Al-Muhtasib, the *Shari'a* judge of Jerusalem, Sheikh Hilmi Al-Idrisi, the *Shari'a* judge of Nablus, and Sheikh Asaad Al-Imam as head of the commission's office. Its headquarters were in the offices of the Supreme Islamic Council in Jerusalem, whose secretary was Anwar Al-Khatib.[158]

King Abdullah bin Hussein also ordered the creation of the position of Superintendent of the Haram Al-Sharif and Custodian of the Holy Places, and issued a royal decree appointing Ragheb Al-Nashashibi to the post. The decision stated that the Omari Pact shall be adopted as a constitution and respect for all that is contained in it, and King

[156] Ministry of Awqaf Islamic Affairs and Holy Places, *General Information,* https://portal.jordan.gov.jo/.
[157] Abdel Hadi, M. (1994) *The Palestinian Question 1934-1974*, Beirut: Institute for Palestine Studies.
[158] Hashem Al-Saba*, Al-Sareeh newspaper*, 24 February 1951.

Abdullah asked to be careful and cautious, to preserve the historical and legal *status quo*, and to block any internationalization projects of Jerusalem, and that the holy city is in Arab hands and will remain Arab, under the care of God and guarded by the Jordanian Arab army.

It is noteworthy that King Abdullah bin Al-Hussein was keen to arrive in Jerusalem every week on Thursday afternoon, where he would spend the night and perform prayers in the blessed Al-Aqsa Mosque on Friday, where the sermon was read by Sheikh Abdul Hamid Al-Sayeh and Sheikh Abdullah Ghosheh. The king also brought a number of ministers and officials to listen to religious lessons at the blessed Al-Aqsa Mosque.[159]

It is noteworthy that King Hussein bin Talal, six days after assuming the throne on May 8, 1952, contributed to the reconstruction of the Dome of the Rock, which is considered the first Hashemite reconstruction in the Jordanian era. This was followed by the second reconstruction in 1959, which was completed on August 6, 1964.

Jordan has carefully sought to respect the *status quo* in the Holy Places during its 19-year rule. It facilitated the passage of visitors, Christian pilgrims, and some Jewish tourists through the Mandelbaum Gate and arranged for a biweekly Israeli convoy to the Hadassah Hospital/Hebrew University enclave on Mount Scopus in East Jerusalem. Jordan also maintained and cared for the city's neighborhoods and the cleanliness of the Al-Buraq Wall, a religious and tourist landmark, especially on Jewish holidays.[160]

After the Israeli occupation in 1967, Sheikh Abd Al-Hamid Al-Sayeh, head of the *Shari'a* Court of Appeal in Jerusalem, initiated the founding meeting of the Higher Islamic Council in Jerusalem in the presence of 22 personalities from Jerusalem. In its first statement, the Council, headed by Sheikh Abdul Hamid Al-Sayeh, declared that it considered Israel's occupation of Arab Jerusalem and its suburbs null, illegitimate, and contrary to the will of the city's residents who had rejected the Israeli occupation and annexation of Arab Jerusalem [see Map 2] in violation of United Nations resolutions, as Israel was legally bound by UN Security Council Resolutions 242 and 338 and the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict so as to protect and not change the holy sites in Jerusalem.

UN Security Council Resolutions 252, 476 and 478 also legally obligate Israel to safe-guard and not change the *status quo* of the holy sites in Jerusalem. In its statement, the Higher Islamic Council in Jerusalem vowed that it would take care of Islamic affairs in the West Bank, including Jerusalem, until the occupation ends. The Council is re-sponsible for managing the *Shari'a* courts, taking care of and protecting the Al-Aqsa Mosque and the real estate and properties of the Islamic endowments.[161]

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[159] *Palestine: No Prayer under Bayonets – The Memoirs of Sheikh 'Abd al Hamid Al-Sa'ih,* Beirut: Institute for Palestine Studies, 1st ed., 1994, pp. 82-86.
[160] *Ibid.*, Benvenisti, M. (1976) *Jerusalem: The Torn City*, Minneapolis: Israel Typeset Ltd. and University of Minnesota, p. 68.
[161] *Palestine: No Prayer under Bayonets, op. cit.,* pp. 82-86.

Map 2: Jerusalem After 1967 (Source: PASSIA, 2002)

3.9 The Palestinian National Authority: 1994-Present

In accordance with the 1993 Declaration of Principles on Interim Self-Government Arrangements (DOP), several subsequent agreements were signed in order to transfer some powers from the Israeli occupation administration to the newly established Palestinian National Authority (PA) in some parts of the occupied West Bank and Gaza Strip. Among those agreements were the Gaza-Jericho Agreement (or Cairo or Oslo I Agreement), which was signed in Cairo on May 4, 1994, and the Interim Agreement on the West Bank and the Gaza Strip (or Oslo II Agreement), signed on September 28, 1995 in Washington. The agreements stipulated several matters, most prominently: the election of a Palestinian Council, redeployment of the Israeli forces, transfer of civil authorities and responsibilities, free movement for Israelis, legal matters in both

criminal and civil areas, water shares, issues of security and public order, and economic development.

However, the crucial and thus more difficult issues – Jerusalem, Palestinian refugees, Israeli settlements in the West Bank and Gaza Strip, security arrangements, borders, water, and international relations – where postponed to a later stage, and successive Israeli governments have so far been effective in avoiding them. With respect to legislation, the President of the PA issued his first decision on 20 May 1994, decreeing that all laws and statutes that were in force prior to 5 June 1967 in the West Bank and Gaza Strip shall remain valid. Since mid- 1994, the PA Council Authority (the executive power since 5 July 1995 and the Legislative Council since 7 March 1996) assumed the authority to issue laws regulating various aspects of public life for individuals in society.

By the summer of 2000, nearly 48 laws and 200 legislations, aimed at regulating life and developing the unity of law between the governorates of the West Bank and the Gaza Strip were enacted, including those that cancelled many of the military orders the Israeli occupation had issued. These laws are published in the 'The Palestinian Gazette', the PA's official journal.

On June 1, 2000, the PA President decided to establish the High Judicial Council, which consists of a group of senior judges from across the Palestinian governorates and divided the courts into regular, religious, and private courts as well as a High Court of Justice to examine administrative disputes. A few new courts were also created: in the West Bank, the Court of Appeals, temporarily located in Ramallah, applies the law; it is considered the highest regular court and its decisions are binding to the lower courts. In Gaza, the High Court is the highest regular court and its decisions are considered Case Law.

In conclusion, the impact and influence of the different ruling regimes and the succession of diverse and foreign powers in Palestine have detrimentally influenced the performance, efficiency and the vigor of the *waqf's* rules and principles.

CHAPTER 4:

THE IMPACT OF ISRAELI LAWS ON THE WAQF IN PALESTINE

4.1 Introduction: Land and Property Laws in Israel

By 1949, some 700,000 Palestinians had been displaced from their lands and villages and Israel controlled some 20.5 million dunams (approx. 20,500 km²) of land in what had been Mandate Palestine [see Map 3]. Israel achieved this control of land through an extensive framework of laws and military regulations which allowed state authorities to confiscate lands for different purposes. The first challenge Israel faced was to transform its control over land into legal ownership, which was the motivation underlying the passage of the first group of land laws. Israeli law was thus designed to legitimize the ongoing nationalization of land and property.[162]

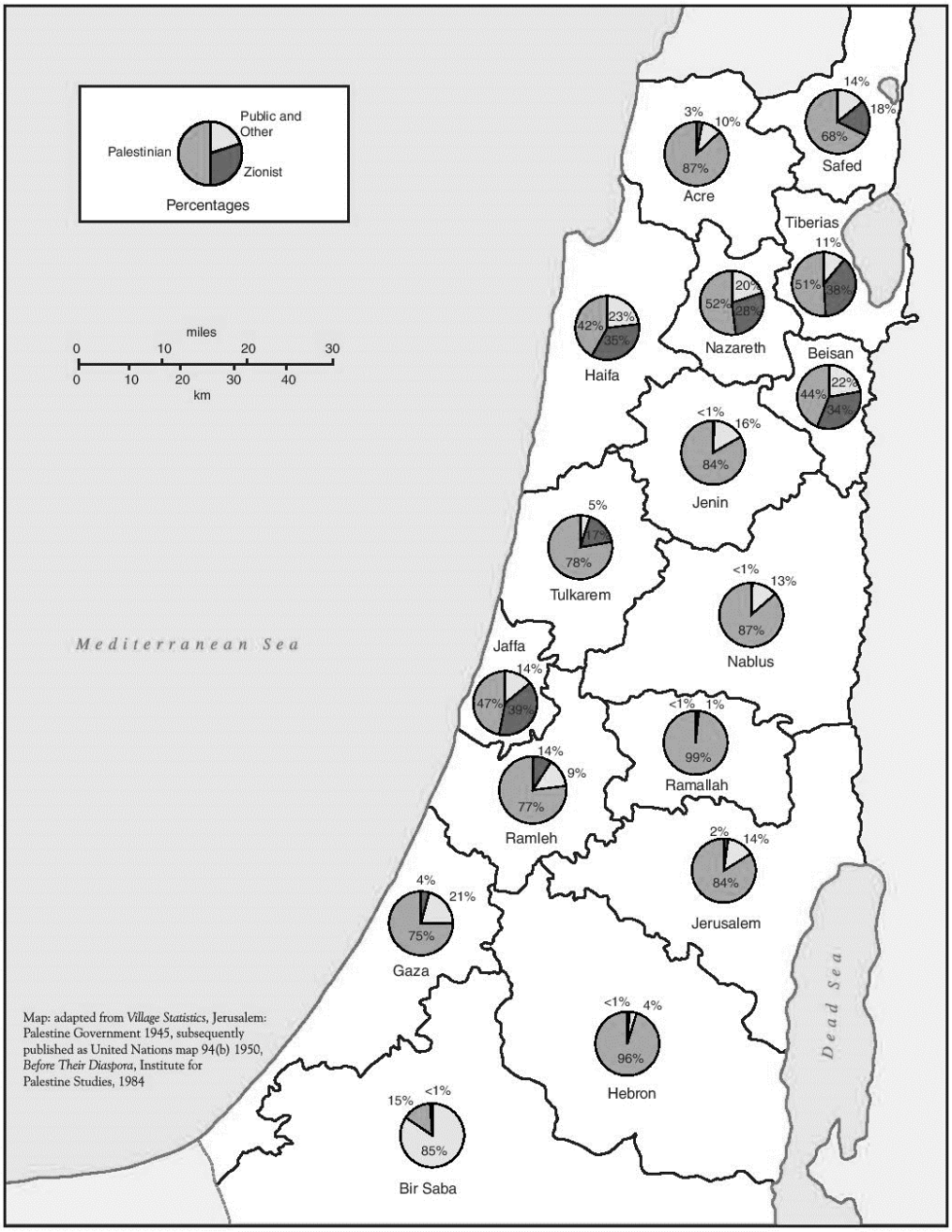
The Palestinian dispossession of their land occurred through various means and stages:

1) The first stage was land acquisition. During the War of 1948, Israel took control of over 77 percent of geographical Palestine and seized the land of 750,000 Palestinians who had fled and were declared 'Absentees' by Israel. Palestinians who fled to places within what became Israel were 'internally displaced', declared 'Present Absentees,' and prohibited from returning to their lands and homes even though they became Israeli citizens.[163] After the establishment of Israel, the areas in which 90 percent of the Palestinians lived were placed under military government. This system and the assignment of almost unfettered powers to military governors were based on the Defense (Emergency) Regulations promulgated by the British Mandate Authority in 1945. Through these emergency laws, Israel declared certain areas as military zones, barring Palestinians from reaching their lands. Later, the state then issued orders to confiscate these lands due to 'neglect' by their owners.

2) The second stage of seizing Palestinians properties was legalizing the acquired land, i.e., transferring their ownership to Jewish hands. Land, once acquired, was considered to be 'redeemed' for the Jewish people and 94 percent of the land was renamed 'Israeli state land', much of which belonged to refugees and internally displaced Palestinians. The process of land takeover "was carried out in several stages, with each given a veneer of legality."[164] First, refugees were declared 'Absentees' and the internally displaced 'Present Absentees', and in a second step the Absentees' Property Law vested them under in the 'Custodian of Absentees' Property', from where they were transferred into the hands of newly established powerful public bodies. The institutions of the new Israeli state were designed to

[162] Hussein A., H. & McKay, F. (2003), *Access Denied: Palestinian Land Rights in Israel,* London, New York: Zed Books.
[163] Jiryis, S. (1976) *The Arabs in Israel*, New York and London: Monthly Review Press.
[164] Hussein A., H. & McKay, F. (2003), *Access Denied: Palestinian Land Rights in Israel, op. cit.*

facilitate the growth of the Jewish nation and to prevent the Palestinian owners from (re-)accessing their land.

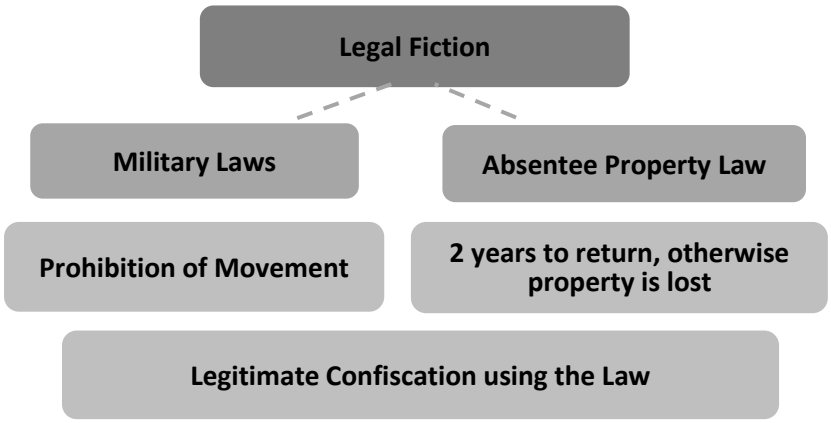


Map 3: Palestinian Land Ownership Before 1948. (Source: PASSIA)

In addition to dispossessing Palestinian refugees and the internally displaced, the Israeli project also continued to confiscate the property of those who had not left their lands. They applied a series of laws and policies to seize Palestinian land, designating

it as "state land" that was theoretically available to all but in reality, was mostly allocated to Jewish citizens. Israeli land policy also discriminated against Palestinian citizens of Israel through its system of regulating land development and land-use planning. Moreover, the judiciary has a disappointing record of discriminating against Palestinians and in many cases even reinforced governmental legislation. Clearly, neither the Israeli government nor the courts have adequately displayed a willingness to promote or protect the principles of equality with respect to land for Palestinian citizens.[165]

Figure 3: Legal Fiction



4.2 Israeli Laws Affecting Palestinian Land Ownership

In the pre-state period, the Fifth Zionist Congress (1901) established the Jewish National Fund (JNF) — a private charitable organization whose purpose was to purchase land for the resettlement of Jews in their 'ancient homeland.' Land purchased by the JNF in Palestine was leased out on a long-term basis to create *kibbutzim, Moshavim* and other forms of Jewish settlement. However, in the years before the creation of the state, 1936-1947, the British Mandate regime introduced a series of land transfer regulations that divided the country into zones. Jews were not allowed to buy land in Zone A, which accounted for 63 percent of the total land area of Palestine and included the Jerusalem environs and Hebron mountains. Buying in Zone B, accounting for another 32 percent of the land, was also restricted.

After the establishment of Israel on 14 May 1948, state-owned lands previously in the possession of British Mandatory Authorities, and the property abandoned by Palestinian refugees, passed into the control of the new Israeli administration. The freshly established Israeli ministries, committees and departments took over the roles performed formally by 'national institutions', i.e., the JNF, the Jewish Agency, and others. The new state also immediately reactivated the Defense 'Emergency' Regulations (adopted by the British in 1939 but later abolished). As British law had applied to the entire country, the government of Israel introduced the Law and Administration Ordinance 'Amend-

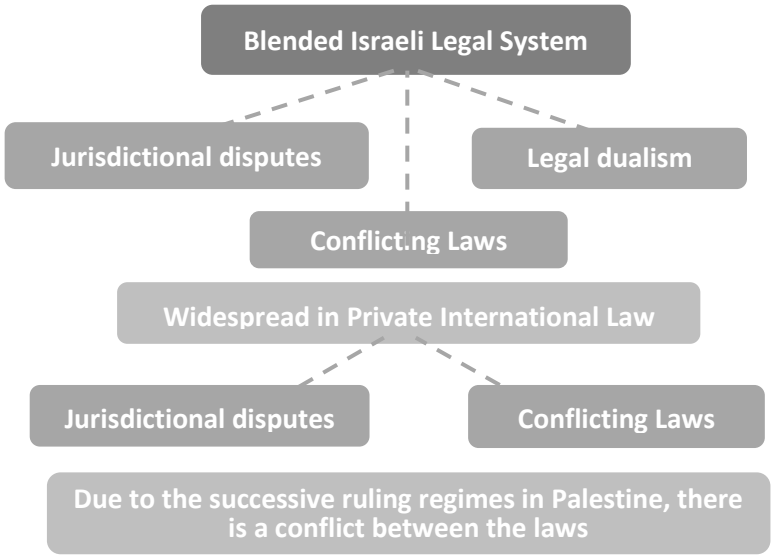
[165] Hussein A., H. & McKay, F. (2003), *Access Denied: Palestinian Land Rights in Israel, op. cit.*

ment' Law (1948) to reinstate the British Emergency Regulations. Some of the seized lands were sold by the government to the JNF, which had developed expertise in reclaiming and developing waste and unproductive lands and making them productive. The 1960 'Basic Law: Israel Lands' provided that state land, JNF-owned land and government-owned land were all "Israel's lands," which "shall not be transferred, whether by means of sale, or in any other manner". Thus, the theory was laid down that such land would be rather leased than sold. While the JNF retained ownership of its land, administrative responsibility for JNF and government-owned land passed to a newly established agency: the Israel Land Administration (ILA).

A 2005 report by COHRE & BADIL summarizes the evolution of Israeli land and property laws in the following three main stages or classifications:[166]

- The necessity to physically acquire and colonize lands abandoned by Palestinians who fled or were expelled, and to forbid their return;
- the necessity of legalizing such land acquisitions in order to pre-empt any future claims made by refugees or their descendants;
- the necessity of proceeding with the nationalization/Judaization process in areas of the country where Arabs still predominated.

Figure 4: Blended Israeli Legal System



[166] Dajani, S. R. (2005) *Ruling Palestine, A History of the Legally Sanctioned Jewish-Israeli Seizure of Land and Housing in Palestine*, Bethlehem/Geneva: BADIL & COHRE, p. 38.

4.3 Israeli Laws That Were Used to Seize Property

The following lists the main laws and regulations regarding land issues enacted by successive Israeli governments since 1948 that have led to almost full control of Palestinian land ownership. Most of this information is taken from the comprehensive report by COHRE & BADIL 2005[167] which lists the laws in chronological order:

- Proclamation, 5708-1948: This proclamation was issued on the same day as the state of Israel was declared. It abolished the White Paper of 1939 and sections 13 and 15 of the 1941 Immigration Ordinance, as well as the 1940 Land Transfer Regulations retroactively to 18 May 1939, invalidating transactions conducted since then.

- Law and Administration Ordinance, 5708-1948: This law describes the competences and powers of the Provisional Government. It allows Jews who came to the country illegally under Mandate laws to remain as legal immigrants. The law provides that "The 1940 Land Transfers Regulations are … repealed retroactively from the 18th May, 1939" to allow 'new claims' to be filed. It also states that "Palestine," wherever appearing in the law, shall henceforth be read as "Israel" in any new law. It also grants legality to all regulations and orders issued by the Jewish Agency and other Jewish groups on matters concerning supplies and services.

- Area of Jurisdiction and Powers Ordinance, 5708-1948: Due to the fact that Israel had conquered lands far beyond those allocated to it under the 1947 UN Partition Plan, this law states that:

  "Any law applying to the whole of the State of Israel shall be deemed to apply to the whole of the area including both the area of the State of Israel and any part of Palestine which the Minister of Defense has defined by proclamation as being held by the Defense Army of Israel."

  Article 3 of the Law makes it retroactive and effective from the day of the reestablishment of the Jewish state – the 6th of Iyar 5708 (15 May 1948).

- Abandoned Areas Ordinance, 5708-1948: This law defines 'abandoned area' as "any area or place conquered by or surrendered to armed forces or deserted by all or part of its inhabitants, and which has been declared by order to be an abandoned area." All properties in these areas are also declared 'abandoned' and the government is authorized to issue instructions as to the disposition of such properties. A Minister empowered to make regulations for the implementation of this Ordinance may, subject to the approval of the Prime Minister, make regulations, prescribe punishments therein and issue directions concerning any movable or immovable property within any abandoned area."

[167] Dajani, S. R. (2005) *Ruling Palestine…* BADIL & COHRE, *op. cit.*

- Defense (Emergency) Regulations: Article 125 of these regulations states that:

  "A Military Commander may by order declare any area or place to be a closed area for the purposes of these Regulations. Any person who, during any period in which any such order is in force in relation to any area or place, enters or leaves that area or place without a permit in writing issued by or on behalf of the Military Commander shall be guilty of an offence against these Regulations."

  This law was used to prohibit a Palestinian land owner from entering his own land so that it could be determined as unoccupied, and then expropriated under the Land Acquisition (Validation of Acts and Compensation) Law (1953).[168]

- Emergency Regulations (Security Zones) Law, 5709-1949: The law designated an area as 'security zone' which meant that no one could permanently live in, enter, or be in that zone. This "measure was used extensively in various parts of the country, including areas in the Galilee, near the Gaza Strip and close to the borders. Lands so acquired would often be sold to the JNF."[169] The regulations remained in place until 1972.

- Emergency Regulations (Cultivation of Waste [Uncultivated] Lands) Law, 5709-1949: This law was enacted in 1948 and amended in 1951 as Emergency Regulations (Cultivation of Waste Lands) Law, 5711-1951. It empowered the Ministry of Agriculture to declare lands as 'waste' lands (Article 2) and to take control over 'uncultivated' lands (Article 4) in order to ensure their cultivation after successive warnings. including those declaring 'security areas.' Once the owners were barred from their lands that became 'security zones', these were defined as 'uncultivated' and seized.[170]

- Emergency Land Requisition (Regulation) Law, 5710-1949: This law abolished the earlier Emergency Regulations (Requisition of Property) Law, 5709-1948 and authorized the requisition of land in where it is necessary for the "defense of the state, public security, the maintenance of essential supplies or essential public services; the absorption of immigrants or the rehabilitation of ex-soldiers or war invalids." It further included clauses concerning the requisition of houses (chapter 3), and states in Article 22b that: "A competent authority may use force to the extent required for the carrying into effect of an order made by a competent authority or a decision given by an appeal committee under this Law."

  The law retroactively legalized land and housing requisitions that were carried out under existing emergency regulations.[171] In 1955 it was amended (Land Requisition Regulation (Temporary Provision) Law, 5715-1955) to allow the government

[168] Kirshbaum, D. A. (2007) "Israeli Emergency Regulations and the Defense (Emergency) Regulations of 1945," *Israel Law Resource Center, February.*
[169] Dajani, S. R. (2005) *Ruling Palestine*, *op. cit.,* 40.
[170] *Ibid.*
[171] *Ibid.,* 41.

to retain property seized under the law for longer than the three years originally specified. Along with another amendment in 1957, the law also specified that any property held after 1956 would be determined to have been acquired on the basis of the British Land (Acquisition for Public Purposes) Ordinance of 1943.

- Land (Acquisition for Public Purposes) Ordinance (1943): This British law from 1943 was later used by Israel to confiscate lands for government and 'public' purposes, such as building offices and parks. The 1964 amendment to this law, Acquisition for Public Purposes (Amendment of Provisions) Law, 5724-1964, specified procedures to be followed in the acquisition of lands based on this and other laws, including the original Land (Acquisition for Public Purposes) Ordinance (1943), the Town Planning Ordinance (1936), and the Roads and Railways (Defense and Development) Ordinance (1943). The 1964 amendment also put forward circumstances under which no compensation would be offered to those whose lands was expropriated; normally, where the expropriation had occurred prior to the coming into force of this law.

  Israel utilized this law broadly to expropriate lands belonging to Palestinians, who often challenged this and did not accept compensation. Thus, the law was amended in 1978, Acquisition for Public Purposes (Amendment of Provisions) (Amendment No. 3) Law, 5738-1978, determining that in cases "where the owner refuses compensation or does not give consent within the time allotted, these funds would be deposited with the Administrator-General in the name of the owner."[172] Lands acquired under this law were used for the building of new Jewish settlements or other ventures from which Palestinians with Israeli citizenship were excluded. An example is Jewish-dominated Upper Nazareth which was created in this way, subject of several lawsuits filed at the Supreme Court.[173] The law also stipulated that around 40 percent of the owner's land can be confiscated without compensation and implied that 'public purposes' means serving Jewish interests. From 1,200 dunams confiscated in Nazareth for public purposes, 80 dunams were used for public buildings and the rest to build Jewish housing.

- Jerusalem Military Government (Validation of Acts) Ordinance, 5709-1949: This law extended "Israeli jurisdiction to 'the Occupied Area of Jerusalem' (the western part of Jerusalem that was incorporated into Israel in 1948) and declared that all orders and regulations enacted by the Military Governor or other Government ministries shall be given the force of law."[174]

- Development Authority (Transfer of Property) Law, 5710-1950: This established the 'Authority for the Development of the Country' (or 'Development Authority') which was "to acquire and prepare lands for the benefit of newly arriving Jewish

[172] *Ibid*., 43.
[173] *Ibid.*
[174] *Ibid.*

immigrants." Enormous quantities of land ascribed for this purpose were purchased from the 'Custodian of Absentee Property'. Article 3(4) (a) states:

"the Development Authority shall not be authorized to sell, or otherwise transfer the right of ownership of, property passing into public ownership, except to the State, to the Jewish National Fund, to an institution approved by the Government, for the purposes of this paragraph, as an institution for the settlement of landless Arabs, or to a local authority; the right of ownership of land so acquired may not be re-transferred except, with the consent of the Development Authority, to one of the bodies mentioned in this paragraph."[175]

- Prescription Law, 5718-1958: Enacted in 1958 and amended in 1965, this law repealed or reversed British practices pertaining to the Ottoman Land Code (1858).[176] It enabled Israel "to claim as 'State lands' areas where Palestinians still predominated and where they could still affirm their own claims on the land (for instance, in the north of the country)."[177] Together with other land-related laws, it changed the criteria for the use and registration of the very common *miri* lands, to make their acquisition easier. Furthermore, under the law farmers were required to prove continuous cultivation of land over a 15-year period (the 'prescription' period). Article 5 of the Law states:

  "The period within which a claim in respect of which an action has not been brought shall be prescribed (such period being hereinafter referred to as "the period of prescription") shall be:

  (1) in the case of a claim not relating to land – seven years;
  (2) in the case of a claim relating to land – 15 years or, if the land has been registered in the land register after settlement of title in accordance with the Land (Settlement of Title) Ordinance (1), 25 years."

  According to the law, lands purchased after March 1, 1943 would be subject to a 20-year verification period, and that the period between 1958 and 1963 would not be counted toward the 'prescription' period. As of 1963, a large amount of the lands in question had still not been surveyed so that calculations of the 20-year verification period were in effect halted, and the State could affirm its own claims to these lands. As Israel verified cultivation by using British aerial photographs of 1945, farmers who had not yet worked their lands at the time the photographs were taken could not meet the requisite 15-year 'prescription' period. "As Israel did not acknowledge other evidence of cultivation, i.e., tax records, as a result numerous Palestinians have fallen victim to a 'Catch-22': in the process of trying to establish their legal ownership they (retroactively) lost their lands."[178]

[175] *Ibid.,* 42.
[176] *Ibid.,* 45
[177] *Ibid.*
[178] *Ibid.*

The justification of the law is also reflected in a 1965 report by the Israeli Land Administration (ILA), stating,

> "In the Northern area, there was a danger of the [acquisition of rights] by prescription according to the Statute of Limitation (1958) regarding all State land, and those [lands] of the Custodian of Absentee Property and the Development Authority. Particularly in the area of the [Arab] minorities where various elements began to take over State land and those of the Development Authority, and [sic] there was worry that these lands would be taken away from the hand of the ILA [Israeli Land Administration] and be transferred to the ownership of the trespassers."[179]

- The Absentees' Property Laws: Initially issued as emergency provisions by the Jewish leadership, these became laws after the 1948 War. They include:
  - The Emergency Regulations (Absentees' Property) Law, 5709-1948 (December)
  - The Absentees' Property Law, 5710- 1950
  - The Land Acquisition (Validation of Acts and Compensation) Law, 5713-1953
  - The Absentees' Property (Eviction) Law, 5718-1958
  - The Absentees' Property (Amendment No. 3) (Release and Use of Endowment Property) Law, 5725-1965, and
  - The Absentees' Property (Compensation) Law, 5733-1973.

Under the Absentees' Property Laws two million dunams of land were confiscated and handed to the custodian, who later transferred the land to the Development Authority.[180] The category of "present absentees" (*nifkadim nohahim*) affected about 30,000-35,000 Palestinians, who were internally displaced during the 1948 War (i.e., were present but considered absent; while they enjoyed certain rights as citizens, their right to use and dispose of their property was denied. A detailed account of exactly how 'abandoned' Arab property assisted in the absorption of the new immigrants was prepared by Schechtman[181] who stated:

> "It is difficult to overestimate the tremendous role this lot of abandoned Arab property has played in the settlement of hundreds of thousands of Jewish immigrants who have reached Israel since the proclamation of the state in May 1948. Forty-seven new rural settlements established on the sites of abandoned Arab villages had by October 1949 already absorbed 25,255 new immigrants. By the spring of 1950 over 1 million dunams had been leased by the custodian to Jewish settlements and individual farmers for the raising of grain crops.

[179] Kedar, A. S. (2001) "The Legal Transformation of Ethnic Geography," *op. cit.,* p. 171.
[180] Suleiman H. & R. Home (2009) 'God is an Absentee, Too', *op. cit*.
[181] Flapan, S. (1987) *The Birth of Israel, Myths and Realities*, London and Sydney: Croom Helm.

> Large tracts of land belonging to Arab absentees have also been leased to Jewish settlers, old and new, for the raising of vegetables. In the south alone, 15,000 dunams of vineyards and fruit trees have been leased to cooperative settlements; a similar area has been rented by the Yemenites Association, the Farmers Association, and the Soldiers Settlement and Rehabilitation Board. This has saved the Jewish Agency and the government millions of dollars. While the average cost of establishing an immigrant family in a new settlement was from $7,500 to $9,000, the cost in abandoned Arab villages did not exceed $1,500 ($750 for building repairs and $750 for livestock and equipment). Abandoned Arab dwellings in towns have also not remained empty. By the end of July 1948, 170,000 people, notably new immigrants and ex-soldiers, in addition to about 40,000 former tenants, both Jewish and Arab, had been housed in premises under the custodian's control; and 7,000 shops, workshops and stores were sublet to new arrivals. The existence of these Arab houses vacant and ready for occupation-has, to a large extent, solved the greatest immediate problem which faced the Israeli authorities in the absorption of immigrants. It also considerably relieved the financial burden of absorption."[182]

> Accordingly, the amount of land confiscated through the Absentee Property Law is uncertain and much disputed. Robert Fisk interviewed the Israeli Custodian of Absentee Property, who assumed that the amount may be up to 70 percent of the territory of Israel, the West Bank and the Gaza Strip:

> "The Custodian of Absentee Property does not choose to discuss politics. But when asked how much of the land of the state of Israel might potentially have two claimants – an Arab and a Jew holding respectively a British Mandate and an Israeli deed to the same property Mr. Manor [the Custodian in 1980] believes that 'about 70 percent' might fall into that category."[183]

Custodial and Absentee land are estimated to comprise 12 percent of Israel's total territory:

> "Of the entire area of the State of Israel only about 300,000-400,000 dunums -apart from the desolate rocky area of the southern Negev, at present quite unfit for cultivation, are State Domain which the Israeli Government took over from the Mandatory regime. The JNF and private Jewish owners possess around two million dunums. Almost all the rest belongs at law to Arab owners, many of whom have left the country. The fate of these Arabs will be settled when the terms of the peace treaties between Israel and her Arab neighbors are finally drawn up. The JNF, however, cannot wait until then to obtain the land it requires for its pressing needs. It is, therefore, acquiring part of the

[182] Schechtman, J. (1952) *The Arab Refugee Problem*, New York: Philosophical Library, 95-96.
[183] Fisk, R. (1980) "The Land of Palestine, Part Eight: The Custodian of Absentee Property," *The Times*, 24 December.

land abandoned by the Arab owners, through the Government of Israel, the sovereign authority in Israel."[184]

The Absentees' Property Law played a major role in making Israel a workable state. In 1954, up to one third of Israel's Jewish population lived on absentee property and almost a third of the new immigrants (250,000 people) settled in urban areas from where Palestinians had fled. According to Peretz "of 370 new Jewish settlements established between 1948 and … 1953, 350 were on absentee property."[185]

- The Absentees' Property Law, 5710-1950: This law replaced the Emergency Regulations (Absentees' Property) Law, 5709-1948 and defined "absentee" was to ensure that it applied to every Palestinian or resident in Palestine who had left his original place of residence in Palestine for any place inside or outside the country after the UN's resolution on the partition of Palestine.[186] The law stipulated that

  (a) "property" included immovable arid movable property, moneys, a vested or contingent right in property, goodwill and any right in a body of persons or in its management;
  (b) "absentee" means –
    (1) a person who, at any time during the period between the 16th Kislev, 5708 (November 29, 1947) and the day on which a declaration is published, under section 9(d) of the Law and Administration Ordinance, 5708-1948(1), that the state of emergency declared by the Provisional Council of State on the 10th Iyar, 5708 (May 19, 1948) (2) has ceased to exist, was a legal owner of any property situated in the area of Israel or enjoyed or held it, whether by himself or through another, and who, at any time during the said period -
      (i) was a national or citizen of the Lebanon, Egypt, Syria, Saudi Arabia, Trans-Jordan, Iraq or the Yemen, or
      (ii) was in one of these countries or in any part of Palestine outside the area of Israel, or
      (iii) was a Palestinian citizen and left his ordinary place of residence in Palestine
        (a) for a place outside Palestine before the 27th Av, 5708 (September 1, 1948); or
        (b) for a place in Palestine held at the time by forces which sought to prevent the establishment of the State of Israel or which fought against it after its establishment;
    (2) a body of persons which, at any time during the period specified in paragraph (1), was a legal owner of any property situated in the area of Israel or enjoyed or held such property, whether by itself or through another, and all the mem-

[184] Jewish Virtual Library, "Israel Lands: Privatization or National Ownership," https://www.jewishvirtual-library.org/israel-lands-privatization-or-national-ownership.
[185] Peretz, D. (1958) *Israel and the Palestinian Arabs*, Washington, DC: Middle East Institute.
[186] Jiryis, S. (1981) "Domination by the Law," *Journal of Palestine Studies*, Vol. 11, No. 1 (Autumn), 10th Anniversary Issue: *Palestinians under Occupation*, p. 84.

bers, partners, shareholders, directors or managers of which are absentees within the meaning of paragraph (1), or the management of the business of which is otherwise decisively controlled by such absentees, or all the capital of which is in the hands of such absentees.

The provisions in the law ensured that the term 'person' would not apply to Jews and appointed a Custodianship Council for Absentees' Property, whose head was the Custodian of Absentees' Property (Article 2), under whose legal holdings the properties of the "absentees" and "present absentees" came.[187] According to Article 4 (a)(2), "Every right an absentee had in any property shall pass automatically to the Custodian at the time of the vesting of the property; and the status of the Custodian shall be the same as was that of the owner of the property."

Those who were found to occupy property breaching this law faced expulsion and those who built on such property faced demolition.[188]

According to Israel Government Yearbook 5719 (1958), the 'village properties' of absentee Arabs:

> "which was appropriated by the Custodian of Absentees' Property included [the land of] some 350 completely abandoned or semi-abandoned [Arab] villages, the aggregate area of which was about three-quarters of a million dunums... Among the agricultural properties were 80,000 dunums of abandoned groves… [and] more than 200,000 dunums of plantations were taken over by the custodian."

It was estimated that "the urban properties ... include[d] 25,416 buildings in which there are 57,497 dwellings and 10,727 business and trade premises"[189] and that "the total amount of 'abandoned' lands to which Israel laid claim vary between 4.2 and 5.8 million."[190]

The Absentees' Property Law has also undergone several amendments in 1951 and 1956 to clarify rental arrangements and tenant protection rights on such property.

4.4 Biased Political Classification of Waqf Laws

Since 1948, all absentee properties, including those of the Islamic *waqf*, were placed under the control of various authorities culminating into a privatization process. Through this process, the ownership of these lands was formally transferred from the state to *kibbutzim*, *moshavim* and private companies without state control. In this regard, Israel refused to distinguish between *waqf* property and other land, allowing the

[187] Dajani, S. R. (2005) *Ruling Palestine*, *op. cit*., 41.
[188] *Ibid.*
[189] *Israel Government Yearbook 5719* (1958), 235.
[190] Dajani, S. R. (2005) *Ruling Palestine*, *op. cit.,* p. 55.

Custodian of Absentee Property to establish his claim to *waqf* property. This was justified on the grounds that the Supreme Muslim Council (established during the British Mandate), which had administered much *waqf* property since 1921, had itself become an 'absentee' under the terms of the 1950 Absentees' Property Law because most of its members were refugees. This interpretation disregarded the fact that many of the beneficiaries of the *awqaf* were not absentees. The only *awqaf* that escaped the provisions of the Absentee Property Law were *mulhaq* and *dhurri awqaf,* whose *mutawallis* remained in Israel and did not fall under the conditions that put them in the 'absentee' category. In this way, 85 percent of all *waqf* property within the state was transferred to the Custodian.[191]

The confiscation of *waqf* was widely opposed by the Palestinian community. As one commentator observed, it was considered unjust, unfair, and not legally justified, since *waqf* property is regarded as belonging to God and income from such property is devoted to charitable purposes. Moreover, the needy members of the Islamic community for whom *awqaf* were endowed were not absentees — on the contrary most of them did 'exist' in Israel.[192]

Aware of the risks of this policy and upon recommendation by the government-established "Cohen Committee", Israel put an agreement in place made by the Ministry of Religious Affairs and the Custodian of Absentees' Properties regarding the management of the Muslim 'religious' places.[193] On 20 November 1951, they agreed that the Ministry would be directly responsible for the management of such sacred places, despite the fact that they were considered 'absentee' properties, and on 7 September 1952, the government approved this in Decision No. 591,[194] precluding Muslims from protecting and maintaining their holy sites.

As a result, many mosques and cemeteries were sold by the custodian to the government's Development Authority, which in turn sold them to Jewish investment companies, resulting in many of those places becoming synagogues, museums, cafes, restaurants or shops. The mosques that were not sold were often deserted and could not be maintained or used by Muslims, who were not allowed to even access them.

The Development Authority was not allowed to sell property acquired from the Custodian to any body other than the state, the JNF, or a local authority, so as for the Israeli government to ensure that it remained in Jewish hands.[195]

As Granott, a previous chairman of the JNF, stated:

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[191] Dumper, M. (1994) *Islam and Israel, op. cit.,* p. 35.
[192] Jiryis, S. (1976) *The Arabs in Israel*, *op. cit.*
[193] Berkovits, S. (2006) *"How dreadful is this Place!" op. cit.,* p. 213.
[194] *Ibid.,* p. 214.
[195] Dumper, M. (1994) *Islam and Israel, op. cit.,* p. 33.

> "The Development Authority was based upon a sort of legal fiction. It was not desired to transfer abandoned property to government ownership, as this would be interpreted as confiscation of abandoned property. The government was disinclined to take such a step, which had been unfavorably regarded abroad, and no doubt opposed...it was necessary to find the means of disposing of the property legally."[196]

Although the extent of *waqf* property acquired by the JNF is not known, it is certain that all *waqf* property, which was originally endowed to provide services to the Muslim community, was transferred to it.

The battle that ensued over these confiscations reached the courts, where Muslim claimants argued that Islamic *Shari'a* courts had jurisdiction to appoint new managers in the place of the absentees (legally, such power is bestowed to judges; to appoint trustees or even to act on behalf of them if they are absent), and to take back administration of *waqf* property from the Custodian. However, these attempts failed to retrieve any of the *waqf* properties, almost all of which, including rich farmland, commercial and other properties, were claimed by the Custodian and subsequently transferred to the Development Authority in 1953, in the same way as other 'absentee' property. The Land Acquisition (Validation of Acts and Compensation) Law 1953 stipulated that Israel should pay compensation to the *waqf* owners, but instead it was paid to the Ministry of Religious Affairs.[197] Like other 'absentee' property, *awqaf* were eventually transferred to the JNF. Only mosques and graveyards were not transferred to the state, though the administration of such *awqaf* was passed to the Ministry of Religious Affairs and not to the Muslim community.

In 1965, the administration was passed to a Muslim Board of Trustees appointed and controlled by the state. It played a major role in the deterioration of the *waqf*; for example, on some occasions, the board allowed construction work to be carried out at the expense of the remaining mosques and cemeteries.

Through its continuous policy of confiscation and through the Absentees' Property Law (Amendment No. 3) (Release and Use of Endowment Property) of 1965, Israel deprived the *waqf* of any possibility of reacquisition. The 1965 Amendment Law authorized the transfer of the legal ownership of *waqf* property to the Custodian, denying the conditions that were attached when the property was endowed. In other words, it ensured that the property confiscated from the *waqf* would not be returned. Regardless of whether the *mutawalli* or the beneficiary was an 'absentee,' the law allowed the Custodian to pass the property to the Development Authority or to the Board of Trustees. In either case, the *waqf* would be lost or sold. These laws contradicted the distinctive legal and sacred character of *waqf* land, as an essential condition of *waqf* is that its assets must not be sold or transferred in any way. Therefore, the

[196] Granott, A. (1952) *Agrarian Reform and the Record of Israel*, London: Eyre & Spottiswoode, pp. 100-101.
[197] Dumper, M. (1994) *Islam and Israel, op. cit.,* p. 34.

1965 amendment abolished the category of *waqf* land in Israel, apart from mosques. It allowed the state to confiscate vast amounts of Muslim (charity) land and other properties, including cemeteries and mosques, and place them under government administration.[198] Despite the fact that the law provided that income from these properties would be used in part to build institutions and offer services for the Muslim inhabitants in areas where such property is located, this never happened. According to Benvenisti,

> "Most *waqf* property in Israel was expropriated under the Absentee Property Law (giving rise to the sarcastic quip "Apparently God is an absentee [in Israel]") and afterward handed over to the Development Authority, ostensibly because this was necessary to prevent its being neglected, but actually so as to make it possible to sell it. Only about one-third of Muslim *waqf* property, principally mosques and graveyards that were currently in use, was not expropriated. In 1956, its administration was turned over to the Board of Trustees of the Muslim *waqf*, which by then was made up of collaborators appointed by the authorities. These "trustees" would sell or "exchange" land with the ILA without any accountability to the Muslim community. Anger over these deeds led to acts of violence within the community, including assassinations."[199]

4.5 The Impact of the Israeli Judiciary on Waqf

In the 1990s, the Islamic Movement in Israel began surveying and protecting waqf properties, with the goal of revitalizing abandoned mosques and cemeteries and preventing their destruction or alteration by official Israeli authorities and Jewish companies.

In seeking to protect the *waqf*, they sought recourse notably from the Supreme Court of Israel. On 21 November 2004, following consultation with Muslim leaders, Adalah, a legal organization representing the interests of the Palestinian minority in Israel, petitioned the Supreme Court of Israel against the Minister of Religious Affairs, the Minister of Justice and the Prime Minister, asking that the Court issue an order requiring the Minister of Religious Affairs to issue regulations for the protection of Muslim holy sites in Israel, as was done for Jewish holy sites. The purpose of the Protection of Holy Places Law of 1967 was to protect and preserve sacred places from desecration, from anything which could obstruct and hinder access to these places by followers of religious traditions, or could insult their religious beliefs.[200] Article 4 gives the Minister of Religious Affairs responsibility for implementing the law and authorizes it "after consultation with the religious leaders, or in accordance with their advice and the agreement of the Minister of Justice, to promulgate regulations in order to implement

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[198] Dajani, S. R. (2005) *Ruling Palestine*, *op. cit*., 41.

[199] Benvenisti, M. (2002) *Sacred Landscape,* University of California Press, p. 297-298.

[200] Adalah, "Adalah Petitions Supreme Court in Name of Muslim Religious Leaders Demanding Legal Recognition for Muslim Holy Sites in Israel," *Adalah: The Legal Center for Arab Minority Rights in Israel* (2004), https://www.adalah.org/en/content/view/6304.

the law." The law further stipulates seven years imprisonment for anyone found guilty of desecrating a holy site, or five years for obstructing and forbidding access to a holy site. The petition further pointed out that the Penal Law (1977) prohibited the abuse of holy sites and sanctioned imprisonment for the desecration of a holy site.

The Protection of Holy Places Law further obliges the Minister of Religious Affairs to regulate and administer all holy sites as set out in a list. However, the 120 places officially declared as holy sites are all Jewish. Thus, legal representative of Adalah, Adel Bader, argued in the petition that despite the general scope of the law, it was applied in a discriminatory manner by the Minister of Religious Affairs as he had exercised his powers in a prejudiced way by setting forth regulations which specify only Jewish holy places. Due to these discriminatory practices, neglect and desecration of Muslim holy sites in Israel has become common thing. Numerous mosques and holy sites have been converted, for instance, into bars, night clubs, stores and restaurants. The petition further indicated that the Minister's failure to issue regulations for the protection of Muslim holy places can be clearly regarded as:

> "a breach of the Protection of Holy Places Law, violates the principle of the rule of law and the principle of equality, and contravenes the principles of administrative law, which provide that the Minister of Religious Affairs must use his powers in a transparent, reasonable, non-arbitrary and non-discriminatory manner."[201]

Additionally, these regulations were not applied to protect the Muslim holy places this constituted as discrimination in the designation of the budgets for holy places, since items are designated in the budget for Jewish holy places only, on the basis that no regulations exist to assigning Muslim holy places. Also, some of these places are sacred not only for Muslims in Israel, but also for millions of Muslims abroad. The religious places cited in the petition include Al-Ghabisiyya Mosque, Qisariya (Caesarea) Mosque, Ein Hod Mosque, Hateen Mosque, Al-Hamma Mosque, the Great Mosque in Bir Al-Saba', and the mosques in Maqam Sayyidna 'Ali and al-Nabi Rubin.

Adalah observed that desecration and neglect of Muslim holy places has been widespread since the creation of the state and the issue has been repeatedly brought to the attention of the government over many years.

4.6 Mosques

In the court case of Bhmr 1931/97, the Israeli civil court held that the mosque should be considered as a sacred place only if the property itself is sacred, the use itself does not give the place the sacred element.[202] However, it is generally accepted in Islamic

[201] Adalah, "Adalah Petitions Supreme Court in Name of Muslim Religious Leaders…", *op. cit.*
[202] Suleiman, Haitam (2015). "Conflict over *Waqf* property in Jerusalem", *op. cit.,* p. 106.

law that a decision made by a *Shari'a* court *qadi* will give the place the sacred element. The same rules are applied to graveyards.

It can be said without any dispute that the mosques originally, from the earliest Islamic period, were established based on the fact that people had prayed in a place and therefore the place became considered sacred for the reason of the practice itself. This was the case even if it did not have a roof and was affirmed and approved by all Muslim schools of thought. These schools also generally agreed that once a place is regarded as a mosque, it will be eternally constituted as a sacred place, irrespective of whether worshippers have stopped using that place. The same rules are also applied with regard to graveyards.

There was an increase in the number of cases where sacred *awqaf* such as mosques and cemeteries were confiscated and unlawfully released against the principle of Islamic law. Therefore, the *qadi* of the *Shari'a* Court of Appeal, Ahmed Natour, declared a *marsoom qadai* (legal decree) which required that all other *Shari'a qadis* follow his order and consider it as legally binding on them. Qadi Natour's order explained that the reason behind delivering such a *marsoom* was that Muslim *waqf* places in general, and the sacred ones specifically, were gradually losing their status.

Natour added that despite the fact that the *qadi* is the superior supervisor over the *waqf*, the violation and abuse on the *waqf* properties had become a routine practice. He called on others not to ignore the attempts to take advantage and use the *Shari'a* courts and dishonestly release *waqf* properties. He also mentioned that this *marsoom* was for the 'public benefit' of Muslims in general and justified it with reference to the fact that Israel had attempted on several occasions to confiscate *awqaf* properties, starting with the Absentee Law 1950, which prohibited the *Shari'a* courts from their rights to supervise *awqaf* properties, to the amendment of section 3 of the Law in 1965 which considered *waqf* properties as free of any conditions mentioned in the *waqf* documents.

Natour further explained how the *Shari'a* courts were abused to validate agreements between *mutawallis* and peculiar foundations, changing the original purpose of the *waqf* despite the fact that such a change must have the *Shari'a* Court of Appeal's permission. Natour reviewed cases where agreements had been made in relation to the *asl* of the *waqf* that did not comply with *Shari'a* law, for example, when the *Shari'a* court allowed *mutawillis* to release eight *awqaf*, rent them for a long term of 48 years, and justified this action as 'in the interest of the *waqf*'. These properties were then sold after just three years from the rent. Natour argued that because these practices have led to loss and decline of the original purpose of *waqf,* a number of procedural steps must be followed to protect the remaining *awqaf* from abolition for the interest of the *waqf* and the public. The steps in the *marsoom* were as follows:

- The *Shari'a qadis* are not allowed to deliver any *fatwa* which may permit the use of sacred *waqf* properties or any other *awqaf*, for other purposes than were de-

clared in the *waqfiyya*. Even if the *qadi* tries to justify such an action by relying on *Shari'a* judgments, these judgments may not be in the best interest of the Muslim public and may violate the basic principles. Therefore, the graveyards must be kept protected and sacred. Likewise, mosques are sacred even if they are closed or deserted. Islam views mosques as eternally sacred as long as one prayer was performed there, even if it was destroyed and Muslims no longer attend services there.

- The *qadi* cannot issue or confirm any agreements or propositions in relation to *waqf* lands where such action may affect the *asl* of the *waqf* (i.e., sale, rent, or substitution).
- Every *Shari'a* court that appoints *mutawallis* must bring them to account every six months. The court must perform these reports, do the arbitrage, and show them to public. Therefore, any report or documents which related to the *waqf* must be kept in an official register and should be available to the public to be able to observe the position of their *awqaf*. This procedure is very important as in the past many *fatwas* and approvals were not properly documented. Moreover, the *Shari'a* courts must dismiss any *mutawalli* who has misappropriated his position and made no action to protect the *waqf*, and he must be brought to account.
- The *Shari'a* courts are not allowed to appoint *mutawallis* without seeking the permission of the *Shari'a* Court of Appeal and must choose only those who have good character, history and no criminal record.
- All the *qadis* must realize that when they sign the *marsoom* they should have understood every term in it and this *marsoom* is legally binding in the *Shari'a* court system and will be part of that system.

In a meeting with Qadi Natour, he revealed that the Minister of Religious Affairs has responded to him in a letter dated 3 June 1996, strongly refusing to accept his *marsoom*, saying it was void and may infringe upon the whole legal system. The minister also claimed that Natour is not authorized in the first place to issue such a *marsoom*. Natour challenged the minister saying he himself had no jurisdiction to issue such a letter, which he considered an improper intervention from the executive body of the judicial system. Qadi Natour argued that the *Shari'a* Court of Appeal has a jurisdiction to issue proposals as he has done, and he condemned the fact that the minister was depriving him of that right.

Natour explained this with reference to similar *marsooms* issued by him in the past, i.e., *marsoom* 2 of 2 January 1995 and *marsoom* 3 of 4 February 1996, to show that the *Shari'a* Court of Appeal should by default have that right of jurisdiction.

Qadi Natour explained his opinion as President of the *Shari'a* Court of Appeal with regard to the mosque as a sacred place, in a *fatwa* issued on 1 September 1999, which considered the mosque of Bir Al-Saba' a sacred place even though the building itself was not in use since 1948 — as it was transformed into a museum by Israel. The place had become sacred once the *waqif* (the founder) declared the *waqf* to be used as a

mosque and a prayer was performed there, even once. According to Natour, this was the case even if the building of the mosque was not completed, the mosque was destroyed, not in use, or its worshipers built another mosque — it is still considered perpetually sacred.

4.7 The Great Mosque in Bir Al-Saba'

The position of the Great Mosque of Bir Al-Saba' is explained in detail below, as this case exemplifies in general the position of sacred *awqaf* in Israel.

In August 2002, a request was made for the re-opening of the Great Mosque in Bir Al-Saba' (Beersheba) to allow Muslim residents and visitors to pray in it. The Great Mosque is the only mosque in Bir Al-Saba' and has been neglected since 1991. A petition was submitted by Adalah on behalf of the Association for Support and Defense of Bedouin Rights in Israel, the Islamic Committee in the Naqab, and 23 Palestinian citizens of Israel, against the Municipality of Bir Al-Saba', the Development Authority, the Ministry of Religious Affairs, and the Minister of Science. Adalah's main request was based on the fact that free access to the mosque is protected by the rights to freedom of religion and dignity. On 10 January 2005, the Supreme Court of Israel sat to adjudicate on the petition. However, Justices Procaccia, Hayut and Jubran suggested that the petitioners and respondents review their positions and instead reach an agreement to change the mosque to a cultural and social center for use by the Muslim community of Bir Al-Saba', except for the purpose of praying. The court asked the two parties to respond within 60 days with their reservations and proposals, based on which it would then decide how to continue with the case.[203]

The Great Mosque in Bir Al-Saba' was the first mosque to be found in the Naqab (Negev). It was established in 1906 in order to provide a place of worship for the Muslim residents of and visitors to Bir Al-Saba' and for the Arab Bedouins of the area. Construction of the mosque was financially supported by Bedouin sheikhs, who contributed about half of the funding. From 1906-1948, the building was used as a mosque, but after the formation of the state of Israel in 1948, it was confiscated and used as a court and prison until 1953, then used as a museum until 1991. At present, as for the past 34 years, the mosque became neglected and unprotected. Although the Muslim residents of Bir Al-Saba' and the nearby villages have requested it, they are prevented from praying in the mosque, which is situated in the Old City, surrounded by restaurants and bars, a municipal building and a public garden [see image 3].

Currently, there are around 259 synagogues for the 180,000 Jewish residents in Bir Al-Saba', which translates to one synagogue for every 700 Jewish residents. According to data from the Israeli Central Bureau of Statistics, approximately 5,000 Muslims live in Bir Al-Saba'; if proportionality would apply, the Municipality should thus provide its

[203] Adalah petition 7311/02, see https://www.adalah.org/uploads/oldfiles/admin/DownLoads/SPics/0196693.pdf.

Muslim population no less than eight mosques. This does not take into consideration the approximately 150,000 Muslims in the nearby Naqab, for which Bir Saba' provides services as well and who constantly work and visit the town. Yet, the Great Mosque is the only mosque and it cannot be used.

Image 3: Bir Al-Saba' Mosque (Source: Bukvoed, 2022 CC BY 4.0)

Repeated requests by the Muslims of Bir Al-Saba' to pray in the Great Mosque were declined by the municipality. In January 2004, Adalah found that the municipality had circulated a proposal for transforming the Great Mosque into a museum and submitted an injunction to the Supreme Court to issue an immediate order to forbid structural work to be performed on the site and to changing the mosque into a museum. In February 2004, the court ordered the municipality to maintain the *status quo*, to restrict any work on the building apart from what is necessary for its maintenance, and to desist from making any additional changes or additions to it. The court's ruled that the municipality is permitted to make restorations to the building only for the purpose of protecting its structure and that these restorations may not affect or change the building from being a mosque, pending a final judgment on the case.

In May 2003, the state established an inter-ministerial committee to study the dispute and make recommendations concerning the possibility of re-opening the Great Mosque for prayer. In September 2003, the Prime Minister's Office published the names of eight proposed individuals for the inter-ministerial committee, none of whom were Arab or Muslim. When Adalah opposed the composition of the committee in October 2003, the Prime Minister's Office considered to include one Muslim representative. However, the Attorney General's office then notified the court that the committee had been finalized without any Muslim or Arab representative. The

committee announced its first report in September 2004, recommending that Muslims living in and around Bir Al-Saba' should not be allowed to pray inside the Great Mosque, saying that though it acknowledged the building's historical value and the necessity not to damage or change it, it did not see a justification for altering the *status quo*.

The report further added that since Bir Al-Saba' was a Jewish town, the issue of the Great Mosque was distinct from that of other mosques in mixed cities. "Unconvinced of the need of thousands and/or tens of thousands of Muslims to pray in this building specifically," the Committee claimed that there were three places for Muslims to pray in Bir Al-Saba' — namely the Kay College, Ben-Gurion University and Soroka Hospital — and therefore concluded that, "The realization of Muslims in Bir Al-Saba' and surrounding areas of the right to worship does not need to be restricted to this building, and it is possible for them to pray in the other places."[204] The report also claimed that the land on which the Great Mosque is located was not *waqf* property, but owned by the state. Finally, the committee recommended that the Muslim population should depart to pray in one of the surrounding towns.

The report was submitted to the court and the municipality joined the state to observe that in light of the committee's recommendations, the court should dismiss the petition. The municipality also stated that the issue of "public safety and security" must be taken into account, arguing that the petition was national-political in nature and instigated by Muslims outside the city of Bir Al-Saba'. It referred to opinions presented previously by Professors Rafael Israeli and Moshe Sharon (a former Prime Ministerial advisor on Arab issues), both of the Hebrew University in Jerusalem, which supported this claim. Professor Sharon stated before the committee that "the petition is a political case of the first degree, with no relation to the issue of religion" and that its purpose was to enable the "Islamic Movement" in Israel to gain control over the lands of the state of Israel.[205] Both Professor Sharon and Professor Israeli argued that:

> "According to the Islamic religion, any place over which Islam has passed is transformed into *waqf* property and holy land, and must be returned to Muslims, be it a mosque, or any other building, and for that reason all 'mosques' in the state belong to Islam, and must be restored to Muslims, because the mosque was and remains *waqf* property, just as the land in Israel is all considered to be *waqf* property."[206]

According to Professor Sharon, "The building which is used as a mosque is only a mosque, and does not have any sacred character," thus it is possible to transform mosques into buildings for other purposes, as occurs in Muslim countries such as Turkey, Jordan and even Egypt. In relation to the petition, Professor Sharon stated that "the goal behind it is not coexistence, but the control of the Islamic Movement over

[204] *Ibid.*
[205] *Ibid*.
[206] *Ibid.*

the lands of the state of Israel… if the petitioners' demands revolve around religious services, then they must be satisfied with places where there are large numbers of Muslims."[207]

The committee also heard the Israeli police force as a "civilian body" responsible for public safety and security. It argued that if authorization was given to reinstate the building to its function as a mosque, a conflict may arise between the Muslim and Jewish communities that would interrupt daily life in the Old City of Bir Al-Saba'. It claimed that by "allowing the Great Mosque to function as a place of Muslim worship again, the Court would be opening up a Pandora's Box that would allow the ownership of all Muslim religious sites in Israel to be brought into dispute – including the "Temple Mount" and Jerusalem."[208]

Adalah told the Supreme Court that the committee had relied on false information and, preferring to maintain a *status quo*, was advocating for the perpetuation of discrimination against Muslims and the violation of the rights to freedom of religion, freedom of worship, and dignity for Arab Muslim citizens, adding that,

> "there was no presence or representation of any Muslims from Bir Al-Saba' or elsewhere on the Committee, and that, as it was formed by and constituted of members of various governmental offices, who are essentially a party to the dispute with an interest in maintaining the *status quo*, the Committee's recommendations were neither just nor objective."[209]

In July 2009, the Supreme Court again upheld the previous decisions to disallowing Muslims to use the building as a mosque.

4.8 Conclusion

Land is a key element in the conflict between Israel and the Palestinians. Since its creation, Israel has adopted a land policy that confiscates the land and deprives the indigenous Palestinians of the right to access their land.[210] Prior to 1948, the Palestinian Arab community owned and used most of the land within the state of Israel. Today, Israel controls over 94 percent of the land.

Islamic religious property, including *awqaf*, did not escape Israeli land confiscations, but "the *waqf* was among the greatest losers from the land expropriations."[211] Regardless of the reasons, the Israeli legal system has devised and utilized various modalities and mechanisms to systematically confiscate Palestinian land in general, and more specifically the *waqf*. As discussed in this section, the 1950 Absentees' Property

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[207] *Ibid*, p. 3
[208] *Ibid.*
[209] *Ibid*., p.4
[210] Hussein A., H. & McKay, F. (2003), *Access Denied: Palestinian Land Rights in Israel, op. cit.*
[211] *Ibid.,* p. 77.

Law had the prime and most direct effect upon the land in general and *waqf* specifically. It defines persons who were expelled, fled, or who left the country between 1948-1952, primarily due to the 1948 War, as well as their movable and immovable property, as absentee. Property belonging to absentees (land, apartments, bank accounts and *waqf*) was put under control of the Custodian for Absentees' Property, subordinate to the State of Israel, which, theoretically, had to hold the lands in trust on behalf of the absentee owner. But in practice, the law exclusively empowered the Custodian to transfer the absentee properties to the government's Development Authority, which then transferred them to Jewish hands.

As will be discussed in detail in the next chapter, the Israel government refused to distinguish between *waqf* property and any other land, claiming that *awqaf* properties should be transferred to the custodian because the *mutawallis* were absentees. Yet, this position contradicts *Shari'a* law, as *mutawallis* are not the owners of the *awqaf*. One way of considering the role of *waqf* in Palestine is by examining the extent of *waqf* lands, but the estimates are uncertain, often contradictory and confusing. The literature indicates that there is, in fact, a lack of definite figures, as the Ottoman land administration was not adequate, and although the British started organizing a land registry, it was never completed. Thus, it can be said that the results from previous studies are based on insufficient data.

The literature further shows that complications regarding the units of measurement led to contradictions. For instance, in his "Report on immigration, land settlement and development" (also known as Hope-Simpson Report), Hope-Simpson claimed that *waqf sahih* was no more than 100,000 dunams. However, he did not provide any source, and this was only a feeble estimate. J.B. Barron, Revenue and Customs Director of the British Mandate, gave higher figures basing his estimate on the income of the SMC from *waqf sahih*, but did not count those *awqaf* which were not administered by the SMC.

Estimates for the amount of *awqaf* in Palestine are thus not accurate and fieldwork reveals that Israel does not disclose any information on the exact extent of *waqf*, of which is in full control.

In his excellent study, Dumper concludes that the *waqf's* historic role of the is treated by Israel as a threat to the physical integrity and political stability of the state as a danger to the institutional dominance of the Jewish majority. There are varying degrees of control exerted by Israel that have significantly affected the performance of *waqf*, first, the 'co-optation of leadership' whereby Israel has controlled *waqf* leaders, in terms of payments of their salaries, appointments and required demonstrations of loyalty.[212]

[212] Dumper, M. (1994) *Islam and Israel, op. cit.,* p. 2.

The State had also re-established *Shari'a* courts and replaced the *Shari'a* Court of Appeal in Jerusalem. Such a new structure left the *Muslim qadis* and officials with no legal authority over the administration of the *waqf* system, who were given only an advisory insignificant role, while they were obliged to swear oath of allegiance to the president of Israel and participate in formal celebrations, e.g., Israel's Independence Day.

Israel also refused to appoint a Mufti for the Palestinian Muslim community in Israel, although under *Shari'a* law only the Mufti is eligible to interpret and decide new or disputed issues concerning Muslims. The Ministry for Religious Affairs established two departments to be responsible for the Palestinian religious community: the Division of Muslim and Druze Affairs and the Division for the Christian Affairs. The former was given the responsibility for the administration of Muslim *waqf* property. Other communities in Israel were given a greater autonomy over the administration of their religious affairs. For instance, the Absentee Property Law exempted some church properties from confiscation, such as those belonging to the Greek Orthodox Patriarchate, which was not considered an absentee as defined by the legislation despite the fact that the patriarchate was located in Jordanian Jerusalem. The Druze were given a relative independence over their *waqf* properties and under the 1962 Druze Religious Courts Law obtained authority over personal status and endowment properties (Dumper, 1994).

Amendment No. 3 to the Absentee Property Law in 1965, described by Israeli scholars as a "reform" of the *waqf* in Israel, has effectively implemented the priorities of the Israeli policy. The Amendment freed the remaining *waqf* from the restrictions of *Shari'a* law, such as sale, and restricted the political use of funds generated from those *awqaf*. It, therefore, granted the state a further tool to transfer the remaining *waqf* properties from Muslim hands to the Jewish community through the use of Muslim "state appointees" in a Board of Trustees, which fulfilled the wishes of the government that appointed them and did neither acquire any independence from the government nor any credibility from the Muslim community. Consequently, the literature regarding the Palestinian *waqf* indicates that the main reasons behind the decline of the *waqf* are the influence of state control and property acquisition by the Israeli government.

CHAPTER 5:

THE CHARACTERISTICS OF WAQF IN JERUSALEM

5.1 Waqf in Jerusalem: Archives, Documentation and Resources

Jerusalem/Al-Quds charitable endowments are managed by a special department affiliated with the Jordanian government, which spends about seven million Jordanian Dinars annually on its employees. According to the *Waqf* Department records, *awqaf* nowadays are classified into:

- Rented charitable endowments.
- Leased family *awqaf* that fall under the jurisdiction of the department.

There are 446 endowments, comprising approximately 1,200 families. Most of these endowments are located in the Old City of Jerusalem and need repair and maintenance. They were rented at low prices before 1967.[213]

These are further divided into:

- Nuclear family endowments that have special guardians.
- Endowments whose nature does not allow them to be rented.
- *Awqaf* controlled by the Israeli occupation authorities.

5.2 Pre-Ottoman Period

An important and reliable source about Jerusalem *awqaf* in the Ayyubid and Mamluk eras is the book "Al-Anas Al-Jalil in the History of Jerusalem and Hebron" by Mujir Al-Din Al-Hanbali,[214] who was born in Jerusalem in 860 AH/1456 AD during the late Mamluk era and a judge in the city's *Shari'a* court.

Al-Hanbali's book relies on court records, information based on in-depth study, and valuable sources from historians and travelers, including Al-Waqidi, Al-Yaqoubi, Al-Tabari, Al-Maqdisi, Ibn Khaldun and Al-Suyuti.

It is worth noting that Al-Suyuti also singled out Jerusalem with his works, while the others mentioned the issue of Jerusalem in their books in general. Al-Hanbali counted most of the schools and endowments adjacent to the blessed Al-Aqsa Mosque, the

[213] Ghosheh, Subhi and Abdullah Al-Abadi (2014), "Islamic Endowments in Jerusalem: Humans and Stones," in *Islamic and Christian Endowments in Jerusalem: Legal and Human Dimensions and the Future of Jerusalem,* reviewed and edited by Nadia Saad El-Din, Amman: Arab Thought Forum, pp. 95-102.
[214] Al-Hanbali, Mujir Al-Din (1973), Introduction in *Al-Anas Al-Jalil in the History of Jerusalem and Hebron*, (Vol. 1 and 2), Amman: Almuhtaseb. Al-Hanbali lived in the blessed Al-Aqsa Mosque and its surroundings. In this book, he relied on the Ayyubid and Mamluk legal figures that he had access to, taking advantage of his position as a judge of judges in Jerusalem; Ghosheh, M. (2009) *The Islamic Endowments in Jerusalem – A Documented Historical Study*, Vol. 1, Istanbul: Research Center for History and Arts, p. 19.

names of the endowers, and what he learned from the histories of their *awqaf*.[215] He also relied upon the most important sources that documented endowments before the emergence of modern states: those of the holy Haram Al-Sharif. These documents were discovered in August 1974 in one of the safes in the courtyard of the Haram Al-Sharif near the Mughrabi Gate. Their total number is between 1,300-1,500 documents located in 883 documents, the oldest of which dates back to the year 604 AH/1207 AD and the latest to the year 686 AH/1461 AD. Some 80 percent of the dated documents go back to the last ten years of the 8th Century. A number of the documents are related to endowments, such as real estate, houses and their parts, roads and neighboring buildings.[216] Among the important sources in tracking endowment conditions in Jerusalem are family *waqifiya* documents. Most Jerusalem families preserved legal documents relating to endowments made by grandparents to their descendants and to religious and charitable institutions. One example is the Husseini family which deposited an archive of family *waqf* documents with the Issaf Nashashibi Center for Culture and Arts. Another is the Khalidi family, which keeps important *waqf* documents in the vaults of the Khalidiya Library in Jerusalem. The Heritage Revival Foundation also maintains endowment references. For *waqf* matters, its headquarters in Abu Dis contains about one million Arabic and Ottoman language documents, as well as copies of 573 Jerusalem *Shari'a* courts records.[217]

Shari'a court records are important references, as they go back to the beginnings of the Ottoman rule in Palestine. The Ottoman Empire had been interested in documenting arguments in its own books since its inception in 1300 AD. The *Shari'a* court in Jerusalem documented important events and issues related to demographics in and around Jerusalem, from 1528 AD until the end of the Ottoman Empire in 1917. There are 416 Ottoman *Shari'a* court records in Jerusalem. Its early documentation demonstrates Jerusalem's particular interest in documenting events that took place in the city compared to other cities under Ottoman rule. The records of the *Shari'a* court in Aleppo, for example, only began in 962 AH/1554 AD, in Damascus in 991 AH/1583 AD, and in Tripoli in 1077 AH/1666 AD. Since the *Shari'a* court in Jerusalem and its archives came under Jordanian control, work on the minutes of the *Shari'a* court continued in the same manner until the War of 1967 and the chaos that accompanied it. Fortunately, the development of the records was not greatly affected by this conflict or period and continued to function unchanged until today.

When the Ottoman Empire began organizing the special records of the *Shari'a* court in Jerusalem in 1528, *waqfiyyat* were recorded and well arranged. During the British Mandate period, registration and record keeping were neglected until 1941, when Sheikh Abdul Hamid Al-Sayeh was given the *Shari'a* court in Jerusalem, which was then based inside a section of the Al-Bukhari Al-Naqshbandi *zawiya*.

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[215] Al-Hanbali, Mujir Al-Din (1973) Introduction, *op. cit.,* p. 3.
[216] Al-Asali, Kamel (1983) *Historical Jerusalem Documents*, Vol. 1, Amman: Al-Tawfiq Press, pp. 39-50, 171-281.
[217] Abu Al-Khair, Mustafa (2012) "Legal Protection of Islamic Endowments in Jerusalem in International Law," *Awqaf Journal*, Issue 23, Kuwait: The General Secretariat of Endowments, pp. 15-52.

Sheikh Al-Sayeh brought about a drastic change regarding the *Shari'a* court records, which had accumulated in the former *Shari'a* court headquarters without arrangement. Shari'a court employees and some experts helped to renew the records, evaluate them according to their sequence, determine the location of the documents, and ensure that each record had a beginning and an end, all to make it easier for reviewers to access them.[218] Al-Sayeh also demanded that the Islamic Waqf Department allocate a room in which records would be kept. This was achieved in the endowment building located in Bab Al-Sahira (Herod's Gate) of Jerusalem's Old City.

As it is known that many lands in Palestine are endowment lands, it is arguable that the history of the *Shari'a* court records in Jerusalem starts in the 8th Century AH. It is thus the most important reference in proving the ownership of Muslims and non-Muslims, whether of *awqaf* or other properties, because court records began recording of contracts and endowments before the establishment of the real estate registry in Palestine.[219]

Sheikh Al-Sayeh gathered the men and scholars of Jerusalem and established the Higher Islamic Council in Jerusalem in July 1967, which assumed all the powers of the Council of Endowments, Islamic Affairs and Holy Sanctuaries, and supervised the *Shari'a* courts as well as the Committee for the Reconstruction of the Blessed Al-Aqsa Mosque and the Dome of the Rock. The Religious Affairs Department in Jerusalem is one of the competencies and powers under Jordanian legislation in the West Bank.

The *Shari'a* court records were then further organized and arranged, including numbering them from the 1930s.[220] In 1950, they were also indexed, and an index of the arguments of endowments for Sheikh Yaqoub Al-Afifi was included in the records. This index is still in effect today in the Jerusalem Court and is highly accurate.[221]

A review of these records reveals that a large number of endowments were registered, which means that there is a high density of *waqf* assets in Jerusalem. The records also provide a detailed picture of the development of *waqf* institutions.[222] There are legal arguments from the Ayyubid and Mamluk periods, especially for *awqaf*, which were re-copied and utilized in these records in a way that sheds light on the city's past social, religious and urban conditions.[223] The documents are useful in tracking real estate, not only regarding the reality of the transfer of properties, but also of the restoration, maintenance and additions that have occurred. In this way, they con-

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[218] *Palestine: No Prayer under Bayonets, op. cit.* p. 22.
[219] *Ibid.,* p. 23.
[220] Al-Alami, Muhammad Ali (2019), *The Judges of Al-Quds Al-Sharif and Their Ruling Councils (1517-1917)*, p. 206.
[221] *Ibid.*; Al-Asali, Kamel (1983) *Historical Jerusalem Documents*, *op. cit.*
[222] Sroor, Musa (2005) "Archives of Ottoman Jerusalem, Sources for the Waqf Issue in the Ottoman Period," *Majalat Al-Dirasat Al-Filastiniati* (Institute of Palestine Studies), Vol. 16, No. 63 (Summer 2005), pp. 112-15.
[223] Alawneh et al. (2014) *Records of the Ottoman Shari'a Court of Jerusalem (Record 172-1081-1083 AH)*, Al-Quds Open University, Jerusalem, p. 9.

tribute greatly to the understanding of the building materials used, their sources and their names. Through *waqf* documents, it is possible to identify urban landmarks, agricultural land, office holders, currencies, the names of a number of regional princes, many urban places and sites, markets and families. *Waqf* documents have become an important source of topographic information related to a village, city, or even an entire area. Therefore, *waqf* documents and records are an important source for reviving Islamic heritage, rewriting history, and overturning traditional historical concepts. *Waqf* documents provide information on the number of endowments, their scattered locations, the multiple endowments of sultans and princes, as well as the names of streets and neighborhoods.

Thus, *waqf* documents reflect the general economic reality in the city of Jerusalem and draw a detailed picture of its infrastructure and domestic economy. The activities that appear in the *waqf* records also highlight several aspects of social, economic, educational and cultural life in the city, as well as the structure of local communities. Through these documents, it is also possible to identify the Jerusalem families and the social and governmental status of those who administered or presided over the city's affairs through endowed properties.[224]

The arguments were written in Arabic, the language of deliberations in the *Shari'a* court in Jerusalem, so that even the judge in Turkey wrote and documented in Arabic, and all the judges were Arabs or others who were proficient in the Ottoman language.[225] According to Ghosheh, the Jerusalem *Shari'a* court contains 1,373 endowments, of which approximately 70 percent, or 949 endowments, are family *awqaf*, and the rest charitable *awqaf*.[226]

In his study of the *Shari'a* court records of six endowments in Jerusalem, Al-Asali found that a *waqf* deed may reach tens of pages and includes the following:

The name of the endower in full, the names of the *waqif*, and a detailed description of the *waqf* property to confirm the endower's ownership in a form that does not accept opposition or dispute. This is written within a formula, which is the longest part of the deed. It includes the precisely defined duties of the *mutawalli* or the administrator. Also, the endowment argument confirms that it is not possible to transfer, replace and copy it, and that it remains eternal. The deed includes very important data and information related to the names of judges and relatives of the endowment, as well as data specific to the area under the endowment.[227]

[224] Al-Jubeh, Nazmi (2018) "The Role of Waqf Documents in Elucidating the Urban and Architectural Structure of the City of Jerusalem, The Tankazi School as a Case," in: *Proceedings of the Fourth Academic Conference* (Islamic Endowment in Jerusalem), 392-430.
[225] Al-Alami, Muhammad Ali (2019) *The Judges of Al-Quds Al-Sharif, op. cit.,* p. 69.
[226] Ghosheh, M. (2009) *The Islamic Endowments in Jerusalem, op. cit*.
[227] Al-Asali, Kamel (1983) *Historical Jerusalem Documents*, *op. cit.*

Previous studies have relied only on endowment deeds, but these do not provide enough information to monitor the conditions of the endowment from all economic, social and legal aspects. Endowments in Jerusalem were based on the endowment deeds recorded in the *Shari'a* court, including those which relied on the Ottoman tax records known as *tahrir defterleri*. The study of Fakhr El-Din and Tamari specialized in using the books of these municipal tax assessments.[228] Researchers differed in monitoring the statistical information of endowments based on records and endowment deeds; Ghosheh (2009) tried to monitor a serial number of the affidavit of the endowment, the date, name, type and details of the endowment, its destinations and sources, while the study of the Royal Scientific Society monitored the diversity of the transaction sale, endowment, inheritance, names and religions of real estate users, description of the property and location in terms of area, number of floors and how to use. According to the researchers the endowment deeds do not provide information on the style of construction and engineering plans, who carried out the construction, the reasons for choosing the construction time, the time it took to build, or construction costs.[229] Those who used photography in addition to the records[230] found clear contradictions in numbers and spaces in studies on the same subject. For example, Ghosheh (2009) showed 1,373 endowments, 424 charitable causes, 149 offspring, each with a number of properties, so that the number of endowed properties was several thousand, while the study of the Royal Scientific Society referred to only 3,700 properties. Fakhr El-Din and Tamari emphasized the need for a serious review by researchers, especially with regard to *waqf khayri* and *waqf ahli*, where hundreds of properties were theoretically lost at the level of the entire Old City.[231]

Forced to acknowledge the contradictions in its relationship with the *waqf* management, Israel tried to establish a new situation through the application of the Protection of Holy Places Law: *Laws of the State of Israel*, 1967 in the 1970s. Vol. 21, Article 2 of that law excluded the holy places from the provisions of the Absentee Property Law, thus confirming the authority of the Islamic *waqf* administration over the Haram Al-Sharif and other mosques, cemeteries and shrines in East Jerusalem, and that the residents of East Jerusalem were not absentees under the definition of the 1950 Absentee Property Law with respect to their property located in East Jerusalem.[232]

Many researchers (e.g., Bagaeen, Benvenisti, Dumper, Hasson) pointed out that the literature on Jerusalem indicates that many of the planning problems associated with the development of Jerusalem since 1967 are due to the political circumstances concerning the annexation of the eastern part of the city by Israel in 1967. Bagaeen em-

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[228] Fakhr El-Din, Munir & Salim Tamari (2018), Jeru*salem Endowments and Properties*, Beirut: Welfare Association and Institute for Palestine Studies.

[229] Sroor, Musa (2012) "The Role of Islamic Endowments in Urban Development in Jerusalem," *Jerusalem Annals*, No. 14, p. 70-74.

[230] Ghosheh, M. (2009) *The Islamic Endowments in Jerusalem, op. cit.*, p. 19.

[231] *Ibid.*

[232] Dumper, Michael (1992) *Israel's Policy towards the Islamic Endowments in Palestine*, *op. cit.,* p. 199.

phasized the problem of several legal systems prevailing in Jerusalem today, including the following:

- Israeli Law as the principal law in the Jerusalem municipal area, including municipal laws and by-laws that apply in the same way to Jews and non-Jews, and which both individuals and institutions have to obey, although some Palestinians disregard it.
- Jordanian Law which continues to apply to *waqf* institutions in Jerusalem, including societies and charities registered under Jordanian laws. While Jordanian law became archaic with the foundation of the Palestinian Authority (PA) in the West Bank and Gaza, it continues to form the legal basis of the operation of some institutions in Jerusalem where the PA is not allowed to function.
- Customary Law whose role remains essential in solving disputes and resolving conflicts between Palestinians.[233]

5.3 Israeli "Unification of Jerusalem"

When Israeli forces captured Jerusalem on June 7, 1967, then Minister of Defense, General Moshe Dayan declared:

> "We have united Jerusalem, the divided capital of Israel. We have returned to the most sacred of our Holy Places, never to part from it again. To our Arab neighbors we stretch out, again at this hour, the hand of peace. And to our Christian and Moslem fellow-citizens we solemnly promise religious freedoms and rights. We came to Jerusalem not to possess ourselves of the Holy Places of others, or to interfere with the members of other faiths, but to safeguard the city's integrity and to live with others in unity."[234]

Soon after the War, on June 27, 1967, the Israeli Knesset adopted amendments to two existing laws integrating Jerusalem in its administration and municipality. The Law and Administration Ordinance (Amendment No. 11) Law of 5727-1967 added that: "The law, jurisdiction and administration of the State shall apply to all territories of the land of Israel which the Government shall decree are such by Order." In effect, this allowed Israel to apply Israeli law, jurisdiction and administration over all of Jerusalem, including the occupied parts and the Old City. In addition, the Knesset enacted the Municipal Corporation Ordinance (Amendment) Law (Municipal Law) which annexed 65 km^2 of the West Bank, including East Jerusalem, to the Jerusalem municipality. In effect, these two amendments laid the ground for the annexation of East Jerusalem and the Old City.

[233] Bagaeen, S.G.S. (2006) "Evaluating the Effects of Ownership and Use," *op. cit.*
[234] Neff, D. (1993) "Jerusalem in U.S. Policy," *Journal of Palestine Studies,* Vol. 23, (1) Autumn, pp. 20-45.

However, Israel faced strong opposition from the international community, culminating in the adoption of a series of both UN Security Council and UN General Assembly resolutions declaring the reunification of Jerusalem is not accepted and void. Nevertheless, in 1980 the Knesset reinforced its decision by enacting the 'Basic Law: Jerusalem the Capital of Israel' which declared the unified Jerusalem to be the capital of Israel. This "unification" law also drew criticism and the UN Security Council adopted Resolution 478 on August 20, 1980, condemning the enactment of the Basic Law and declaring the de facto annexation null and void. Similar resolutions have been adopted by the UN General Assembly (e.g., A/Res/35/169; A/Res/35/122).

5.4 The Policy of Seizing *Awqaf* After the Occupation of Jerusalem in 1967

After 1967, Israel began with plans to acquire additional lands in the Muslim and Christian Quarters of the Old City, as well as purchasing properties in these areas. Moreover, the Israeli government bequeathed ownership of all state-owned properties in the Old City to the Company for the Restoration and Development of the Jewish Quarter. Practically all the land in Jewish hands in the Old City is owned by the state, the majority of which has been acquired by expropriation. By invoking the provisions under the British Mandatory Land Expropriation Law of 1943, following the 1967 War, Israel expropriated 116 dunams for the redevelopment of the Jewish Quarter, including the Moroccan Quarter *(Harat Al-Maghariba*), which was demolished to create the large square for Jewish worshippers in front of the Western Wall. This included the destruction of the ancient Buraq and Afdali mosques along with 135 houses and the eviction of 650 Palestinian inhabitants. Compensation for individual inhabitants was never forthcoming since the property of the quarter had been established as *waqf* in 1193 for pilgrims to Jerusalem from North Africa. The Israeli government offered compensation to the *awqaf* administration, but in *Shari'a* law, acceptance of compensation for *waqf* property is only permissible where the property itself is exchanged for a property of equal of more value. The fate of the Moroccan Quarter showed that, "The religious sanctity of a site is no guarantee of its survival. Given opportune political circumstances, the Israeli state does not hesitate to assert its control in favor of the Jewish community."[235] Moreover, from 1967 to 1970, doubtful attempts were made to apply the Absentee Property Law in East Jerusalem; but they were met with determined international opposition. Acknowledging that such problematic practice of wide-scale confiscation of private property in Jerusalem would create an intolerable situation – in the eyes of the international community, and in terms of security – all governments of Israel since 1967 have decided not to make use of this law in East Jerusalem. [236]

In 1968, Attorney General Meir Shamgar articulated the inapplicability of the Absentee Property Law on property within Jerusalem. He stated:

[235] Dumper, M. (2003) *The Role of the Waqf in the Jerusalem Urban Fabric: Demography, Infrastructure and Institutions,* Jerusalem: IPCC, p. 390.
[236] *Ibid*.

> "Since the property was not absentee property when the army entered East Jerusalem, and would not have turned into absentee property if East Jerusalem had continued to be part of Judea and Samaria, we did not see any justification for the annexation of Jerusalem resulting in taking away property from someone who was not actually absent."[237]

In 1970, Israel enacted the Legal and Administrative (Regulation) Law which provided, *inter alia*, that residents of East Jerusalem would not be counted as absentees with respect to their property within East Jerusalem. While East Jerusalem has been an "exception" to the use of the Absentee Property Law, Ariel Sharon, then Minister of Infrastructure, invoked the law to take over Palestinian homes in the Muslim Quarter of the Old City. As revealed in the informal translation of the Klugman Report – authored by a governmental board of inquiry which was commissioned in 1992 by then Prime Minister Yitzhak Rabin to investigate covert and illegal government policies abetting settler activities in Jerusalem – from the mid-1980s until 1992, the Israeli government utilized the Absentee Property Law to acquire Palestinian properties in the city which were then turned over to Jewish settler organizations such as Ateret Cohanim. Consequently, attention must be taken in the application of the Absentee Property Law with respect to property in the Old City. As noted by Ir Amim, "… the law remains on the books. It is not inconceivable that, under altered conditions, it could not be invoked in the future."[238] The Klugman Report also indicated that government pressure was used to convince Palestinian owners to sell their property to Israeli settlers. Based on the experiences reported in the Klugman Report, recent Knesset allowance of funds for the restoration of the Old City have raised fears that they will be used for settler activities.[239]

5.5 The Legal Status of the Waqf in Jerusalem is More Complicated

Being home to the holy places of the three monotheistic religions makes Jerusalem a special case. During the periods of Christian and Muslim rule over the centuries, the shrines, pious foundations and public facilities of Jerusalem were supported by *awqaf*, gifts of the income, or profits generating from inalienable and generally untaxable commercial properties or agricultural lands.[240] Peters notes that the *waqf* has been "the single most important and pervasive economic institution of Islamic society with profound effects on the tax structure of the state, the redistribution of wealth in society and the urban fabric of Islamic cities."[241] Peter notes that the most significant central use of the *waqf* in Mecca and Medina in Saudi Arabia was support to the holy cities. Natsheh indicates that during Ottoman times, the large *awqaf* in Jerusalem

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[237] Ir Amim (2010) *Absentees Against Their Will – Property Expropriation in East Jerusalem under the Absentee Property Law,* Jerusalem, July 2010, available online at: https://www.ir-amim.org.il/sites/default/files/Absentees_against_their_will.pdf.
[238] *Ibid.*
[239] *Ibid.*
[240] Bagaeen, S.G.S. (2006) "Evaluating the Effects of Ownership and Use," *op. cit.*
[241] Peters, F. E. (1986) *Jerusalem and Mecca, op. cit.,* p. 173.

were put under the supervision of the state, the less important under the supervision of local religious officials.[242]

Besides its religious role characterized by building mosques and administering the religious affairs of Muslims, the *waqf* (both privateand public) is the main land and real estate owner in Jerusalem. The *awqaf* administration in Jerusalem is impacted by both an administrative structure instituted by the Ottoman Ministry of *Waqf* in 1840 to supervise *awqaf* in Palestine, and the Supreme Muslim Council (SMC) that was established by the British Mandate.[243] The British granted the SMC autonomous powers in religious matters, including the management of *awqaf*, because of the demands of Muslims to conduct their own affairs under non-Muslim rule.[244] Examining the current position of *waqf* in Jerusalem, Ir Amim concluded that the constant use of the Israeli Absentee Property Law and the lack of conclusive and inclusive property registration created a situation that made the rights of owners or alleged owners predominantly vulnerable in the Old City.[245]

When East Jerusalem came under Jordanian rule in 1948, the administration of *waqf* property in Jerusalem and the West Bank was placed under the jurisdiction of the Jordanian Ministry of *Waqf* in Amman. Jordan's conduct contributed to the decline of the *waqf* in Jerusalem as it founded only 16 new *awqaf* during its 19-year rule, while in comparison, during the first 23 years of Israeli occupation – from June 1967 to the end of 1990 – 90 new ones were established.[246] When the Israelis occupied East Jerusalem in 1967, the religious, national and political struggle over the status of Jerusalem was reinstated and the status of the *waqf* as a central and imperative institution in the lives of the Muslim population of Jerusalem was restored. Israel tried to integrate the Muslim institutions, specifically the *Shari'a* courts, which had jurisdiction over *waqf* property. Such integration was angrily opposed, and as a result, while Israel retained full sovereignty of Muslim institutions, in effect, the *Waqf* in East Jerusalem (including its Old City) was effectively under the control, administration and supervision of the relevant authorities in Jordan.[247]

Fieldwork revealed that individual *waqf* property is recorded in the *Shari'a* court in Jerusalem, relevant records are kept in the Islamic Waqf Department, and many records on the extent of *waqf* property in the Old City are not publicly available. In general, the number of *awqaf* established in Jerusalem notably increased under Israeli rule, particularly when compared to the decline of *awqaf* in the Muslim world on the

[242] Natsheh, Y. (2000) "The Architecture of Ottoman Jerusalem," in: S. Auld & R. Hillenbrand (eds.) *Ottoman Jerusalem: The Living City 1517-1917*, London: Altajir World of Islam Trust, p. 609.
[243] Bagaeen, S.G.S. (2006) "Evaluating the Effects of Ownership and Use," *op. cit.*
[244] Doukhan, M. J. (Ed.) (1933) *Laws of Palestine 1926-1931, op. cit.*, pp. 1362-1364.
[245] Ir Amim (2010) *Absentees Against Their Will – Property Expropriation in East Jerusalem under the Absentee Property Law,* Jerusalem, July 2010, available online at: https://www.ir-amim.org.il/sites/default/files/Absentees_against_their_will.pdf.
[246] Reiter, Y. (1997) *Islamic Institutions in Jerusalem, op. cit.,* p. 28.
[247] Lapidoth, R. et al. (1995) *Whither Jerusalem? Proposals and Positions Concerning the Future of Jerusalem*, The Hague: Kluwer Law, p. 17.

whole. Such an increase can be regarded as a response to the political situation and gave the *waqf* institution into a central position in Palestinian society.[248]

This had different outcomes, e.g., the Israeli 1969 Legal and Administrative Matters Law exempted 'Holy Places' in Jerusalem from the application of the Israeli Absentee Property Law of 1950.[249] While this basically accepted the *waqf* administration's jurisdiction over Al-Aqsa and other *waqf* properties, it also granted Israel the ability not to recognize the administration itself. Dumper indicates how the Israeli government's unrecognizing of the *Shari'a* court and the administration has had several implications for *waqf* property in the Old City and East Jerusalem.[250] For instance, a decision on cases brought before the *Shari'a* court in East Jerusalem looking at rent or tenancy issues could not be carried out because they require enforcement by the civil courts, which are in this case Israeli and therefore not recognized by the *Shari'a* court in East Jerusalem. At the same time, the administration's refusal to conduct litigation in the Israeli civil courts against its tenants, or anybody else for that matter, because it does not accept Israel's sovereignty of East Jerusalem, meant other avenues needed to be considered. As a result of this 'void in legal authority,' the family *waqf* managers and the administration had to rely on moral and community pressure to enforce decisions regarding their properties, using customary laws. Consequently, investment in property and establishing new *awqaf* was neglected due to the uncertainty and the ambiguity with regard to the *waqf* system's jurisdiction and responsibilities, which led to "property blight in Jerusalem particularly in the Old City."[251]

Bagaeen's review of studies on *waqf* properties in Jerusalem revealed a large gap between the considerable number of assets belonging to public and family *awqaf* and the small sums of revenues generated by them.[252] Researchers note a clear difference about how *waqf* property was administered in comparison with private property.

Reiter pointed the finger at the administration of poor management of *waqf* assets under its control,[253] and made a comparison between the *waqf's* management by the managers of family *awqaf* and the administration of public *awqaf* by the SMC during the British Mandate, examining several perspectives, such as the leasing of property, the collection of rent money and property maintenance and repair.[254]

As to the letting of property and the collection of revenue, he found that the managers of family *waqf* leased properties to the same tenants for periods of time longer than what was permitted under the *Shari'a* law. In contrast, public *waqf* properties were leased on a yearly basis through a system of competitive bidding. Reiter also found

[248] Reiter, Y. (1996) *Islamic Endowments in Jerusalem under the British Mandate*, *op. cit*.
[249] Dumper, M. (1994) *Islam and Israel, op. cit.*
[250] *Ibid.,* p. 110-111.
[251] *Ibid.,* p. 111.
[252] Bagaeen, S.G.S. (2006) "Evaluating the Effects of Ownership and Use," *op. cit.*
[253] Reiter, Y. (1997) *Islamic Institutions in Jerusalem, op. cit.,* p. 51.
[254] Reiter, Y. (1996) *Islamic Endowments in Jerusalem under the British Mandate*, *op. cit.,* p. 146-168.

that many properties owned by the *awqaf* administration generated only small rents because they were initially leased many years ago on long-term agreements. Most of these assets were also subjected to rent restrictions and Tenants' Protection Laws (Mandatory, Jordanian and Israeli). It should be noted at this point that the fieldwork revealed that this was actually one of the main reasons for the decline of *waqf* in Jerusalem.

Regarding maintenance and improvement, Reiter points to the fact that though one of the essential duties of family *waqf* managers was to ensure that the *waqf* property was properly maintained, any development of a *waqf* property beyond its original condition was prohibited. He found that family *waqf* properties were not well maintained and in a worse condition than public ones because their managers did not care for them as they would if it was their own.[255]

My fieldwork found that this decline is due to the absence of a supervisory system that holds accountable those *mutawallis* who abuse their position. This was the practice during the British Mandate when the SMC had administered the *waqf*: their endowments were in better condition than family *awqaf* run by managers because contracts drawn by the SMC required tenants to provide adequate maintenance. In a study of the *awqaf* of six families in Jerusalem, including reading 100 *waqf* deeds, Alami shows that due to the long-term control of these awqaf by the traditional families many had acquired special benefits such as long-term leases of valuable *waqf* assets.[256]

5.6 Status of the Holy Places

The Protection of Holy Places Law was introduced in 1967 and remains the foundation of Israeli law in relation to the holy sites. The first article of the law states that:

> "The Holy Places shall be protected from destruction and any other violation and from anything likely to violate the freedom of access of the members of different religions to the places sacred to them or their feelings with regard to those places."[257]

Dumper (1994) notes that this guarantee can be regarded as a challenge to neutralize international public opinion. Article 2 imposes criminal sanctions against any person who desecrates or otherwise violates a holy site or who violates freedom of access. In addition, an enormous number of laws exist to ensure the physical integrity of holy sites and impose sanctions and criminal offences for any violation thereof. The Antiquities Law of 1978 also applies to the majority of holy places within the Old City.

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[255] Reiter, Y. (1996) *Islamic Endowments in Jerusalem under the British Mandate*, *op. cit.*, p. 167.
[256] Al-Alami, M. (2000) "The Waqfs of the Traditional Families of Jerusalem During the Ottoman Period," in: S. Auld & R. Hillenbrand (eds.) *Ottoman Jerusalem: The Living City, 1517–1917*, London: Altajir World of Islam Trust, pp. 145-158.
[257] Protection of Holy Places Law: *Laws of the State of Israel*, 1967: Vol. 21.

According to Article 29(a) of the Antiquities Law, no "building, paving, the erection of installations, quarrying, mining, drilling, flooding, the clearing away of stones, ploughing, planting, or interment" may be carried out on an antiquities site, nor other actions such as "dumping of earth, manure, waste or refuse", "alteration, repair or addition," or "dismantling …, removal of part[s], … writing, carving or painting" except with the "written approval of the Director" of the Department of Antiquities. Article 29(c) adds, "When an antiquity site is used for religious requirements or devoted to a religious purpose, the Director shall not approve digging or any of the operations" listed before without the approval of a Committee of Ministers. It should be stressed at this point that the laws of the Holy Places provide in principle that individual *awqaf*, churches, etc. hold "ownership" or usufruct rights, but the practical application of these laws is that they are controlled exclusively by the Israelis, which in effect counteracts the owners' rights to alter or enjoy their property. My research revealed that these laws severely prohibited the maintenance of Palestinians' *waqf* properties, causing a "property blight" described earlier by Dumper.[258]

5.7 Al-Aqsa Mosque

Jewish religious scholars generally forbid the entry of Jews into the Al-Aqsa Mosque compound. After the 1967 War when Jerusalem was occupied by Israel, Jewish scholars reiterated the religious rule which forbids Jews to enter the site. Recently, also two senior Jewish Rabbis forbade their followers to enter the compound, recalling the 1967 halachic ruling that prohibited ascent to the site.[259] Since Orthodox Jews cannot enter the mosque, the requests nowadays by many Jews to enter are considered political demonstrations and not prayer services. Israeli law has no provisions for Jews to pray at the compound and officially prohibits Jewish prayer there. However, a police station was established inside the compound and Israeli police officers are in *de facto* control; they often forbid Muslims to enter on the pretext of "security ". The Islamic *waqf* in Jerusalem continues to administer the mosque and employs its own guards for its protection; however, it is severely restricted by the Israeli police and also cannot perform any maintenance works as the mosque is subject to the Antiquities Law. As a result, the mosque is in a bad condition. Meanwhile, the Israeli government continues to excavate under Al-Aqsa Mosque compound, putting it in real danger of collapse.

The adjudication of disputes regarding Holy Places is governed by a 1924 Mandate law, which still applies according to a Israel Supreme Court rule. The law stipulates that matters relating to religious rights in the Holy Places (including both disputes between denominations of the same religion and disputes between the religions) are to be decided by the government, and cannot be adjudicated in the courts. However, matters concerning Holy Places not relating to religious rights and interests, such as charges of criminal acts, assault and improper conduct, are adjudicated. The 1924

[258] Dumper, M. (1994) *Islam and Israel, op. cit.,* p. 111.
[259] *RT Online*, 8 August 2019, https://arabic.rt.com/world/1037473.

Mandate law permits the courts to intervene to ensure public order and proper conduct at the holy places.

5.8 Tenancy Rights

Many Jerusalem residents rent their home from either the state or religious institutions. Since 1967, Israeli law has not recognized rents agreed upon during the period of Jordan rule. These extremely low rents, which have not been raised to meet inflation, resulted in the neglect and decay of much of the Old City's *waqf* property.[260] The situation is aggravated by the Tenancy Protection Act of 1954, according to which tenants cannot be evicted either for non-payment of rent, alterations, or subletting if they have been residents for more than 15 years. An additional problem to the low rents in the Old City is subletting, as "Most leases have a clause which allows a tenant to sublet… The *mutawalli* has no control over the subletting clauses but remains nevertheless responsible for the upkeep of the sublet building."[261] This has resulted in a situation in which owners gather close to nothing in rent from their tenants, who then go on to collect current market rates from sublessors.

5.8.1 Rent and Leasing Problems

The rent control laws since the British Mandate are seen as one of the main reasons for the poor condition of *waqf* in Jerusalem. Most of the people living in the Muslim Quarter are not the owners of the houses they live in and pay barely any rent.[262] According to Malpezzi and Willis, the "largest benefits from controls accrue to tenants who have lived in their units for a long time,"[263] made possible by Jordan's Law No. 62 of 1953 for landlords and tenants which gave tenants broad protection. Dumper also considers rent control in the Old City as one of the reasons that make property management difficult.[264] Rizkallah-Khader, who surveyed 210 households in the Old City and examined rents paid supports the above claim. He noted that in 1996, some 55.8 percent of the properties in the Old City paid an annual rent in the range of 1-100 JD; 21.4 percent paid 101-250 JD; 10.4 percent paid 251-500 JD; 8.4 percent paid 501-1,000 JD and only 4 percent paid more.[265] Moreover, the 1972 Israeli Tenants' Protection Law (the 1968 Law, an amendment to the original Mandate Law, was amended in 1972 and called the Consolidated Version) provides that a rent cannot be raised on a tenancy that was formulated prior to 1966, and can only be done by the legal annual increase set by the Israeli government, related to the Israeli cost of living index and only applicable to rents charged in the Israeli currency, the shekel.

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[260] Dumper, M. (1994) *Islam and Israel, op. cit.*

[261] *Ibid.,* p. 288.

[262] Zilberman, I. & Sotzianu, Y. (1998) "Conservation in the Moslem Quarter of the Old City in Jerusalem," Unpublished draft dated 29 July 1998.

[263] Malpezzi, S. & Willis, K. (1990) *Costs and Benefits of Rent Control: A Case Study in Kumasi, Ghana*, Washington DC: The World Bank, p. 5.

[264] Dumper, M. (1992) *Israel's Policy towards the Islamic Endowments in Palestine, op. cit.,* p. 40-41.

[265] Rizkallah-Khader, N. (1996) *Socio-Economic and Health Profile of the Palestinian Inhabitants of the Old City of Jerusalem,* Jerusalem: Society for Austro-Arab Relations, p. 21.

As most rents in the Old City are charged in the Jordanian currency, the dinar or JD, tenants tend to argue that they are not liable for the rent increase stipulated in the law. These claims are usually supported by Israeli courts. Qupty points out that some landlords had changed rents to the Israeli currency thinking that this was more stable than the Jordanian one. However, the extreme inflation of the Israeli currency over the years has made most of these rents valueless at current prices.[266] As the Israeli law prohibits any updates in leases or the eviction of tenants for the purpose of raising the rent, the landlords failed to repair or refurbish their properties.

In provision of the Law, a tool is found in Articles 20-36, whereby the right to the protected rent is passed on to the family of the tenant upon death. This is to ensure the continued use of the property by the protected tenant and his/her family for a long time – in the Old City the staying period is 70 years.

My fieldwork found that this aforementioned point is the main reason for the decline of the *waqf* in Jerusalem. The continued use of the property by the relatives of the original protected tenant means that owners, on the one hand, understand that gaining the ownership of their *waqf* property is severely impossible, but that on the other hand, the rent that they generate in return for letting the property is extremely low and sometimes not worth the effort of collection. The Israeli law is not enforced in such situations.

Bagaeen also discusses the problem of subletting facing landlords in the Old City. Generally, leases in the Old City contain a clause known as *'sakan wa iskan'* that entitles tenants to sublet some or all of the property they are renting. This clause prevents the landlord from prohibiting the choice of the subtenant. It also provides that the tenant pays the nominal controlled rent to the owner, while he himself can charge the subtenant market rates. This results the fact that, neither tenant nor subtenant has any repair obligations while the landlord does. This practice adds further complications to the issue of *waqf* properties in Jerusalem. Landlords prefer not to take their tenants to an Israeli court when they do not pay the rent, or if they sublet illegally, or when they change the use of the property. While on the other hand, tenants claim that due to the fact that the living conditions are so poor and that repairs are neglected by the landlords, the low rents are a remedy and they justify their existence in the property.[267]

Bagaeen draws further attention to another leasing practice affecting property in the Old City – 'key-money'. The 1972 Law provides the protected tenant the entitlement to transfer the rights of protected tenancy to another tenant, who is prepared to pay 'key-money' for the right of occupancy.

[266] Qupty, M. (1998) "The Legal Situation of Property in the Old City and its Implications for its Restoration," unpublished paper presented to the Welfare Association (second Draft, 3 November), pp.15-16.
[267] Bagaeen, S.G.S. (2006) "Evaluating the Effects of Ownership and Use," *op. cit.*

The 1972 Law also provides that in case the owner does not accept a new tenant, the old tenant can take the owner to a tribunal for his refusal where he must give reasonable grounds for his objections to the amount of the key-money or the proposed tenant. If there are no reasonable grounds and the owner still objects to letting the premises to another person, a tribunal "shall declare the outgoing tenant's right to the key-money or determine the amount or apportionment of the key-money, whichever matter is in dispute" (Article 95a). This practice is widespread and has also assisted Jewish settlers in occupying homes in the Old City, including *waqf* properties.

5.9 Christian *Awqaf* in Jerusalem

When looking at Christian endowments through the *waqifyat*, social groups that endowed the funds, such as patriarchs, monks, priests, women, and the general public, can be identified. The Christian endowments also list the places of their distribution, as they were confined to the following areas: the Christian Quarter, Bab Al-Khalil, the Armenian Quarter, Bab Hatta, the Jewish Quarter, and some villages outside of Jerusalem such as Ramallah, Bethlehem, Al-Malha, Al-Tur, Jifna, and Beit Jala.

Information on Christian *Awqaf* is found in Jerusalem *Shari'a* Court Records No. 202 from Shawwal 10, 1115 AH/February 7, 1704 AD[268], from which Madani quoted the extent of Christian *waqf* ownership as follows[269]:

Table 1: Distribution of Christian Endowments by Sect

Percentage	Number of Endowments	Sect
37.5 %	21	Greek
35 %	20	Armenian
8.92 %	5	Catholic
7.14 %	4	Latin
8.92 %	5	Habesha (Ethiopian/Eritrean)
1.78 %	1	Protestant

Source: Adapted from Madani (2010).

When tracing the Christian family *awqaf*, the *waqif* is the guardian or appoints one of his sons as guardians after his death. He can grant guardianship to one of his sons provided that he is a sane adult, "for the sanest to the sanest" from the endowed, or after his death, to *al-arshad*, i.e., the most deserving of the endowment.[270]

The *waqif* could also appoint a patriarch, a monk, or the head of the sect to which he belongs to take over the endowment after his death. For example, *waqif* Daoud Simon

[268] "Al-Quds Sharia Court Records No. 202," Microfilm, Documents and Manuscripts Center: University of Jordan, Shawwal 10, 1115 AH/February 7, 1704 AD, p. 186.
[269] Madani, Ziyad (2010) *Christian Endowments in and around Jerusalem in the Eighteenth and Nineteenth Centuries AD,* Amman, Jordan.
[270] "Al-Quds Sharia Court Records, No. 395," 13 Rabi' al-Awwal 1319 AH / 18 June 1901 AD, p. 247-248.

appointed the Latin sect to be in charge of his endowment after his death.[271] Another *waqif* appointed Gerges Yohanna Al-Habashi, the head of the Abyssinian monks in Jerusalem, to take charge of the endowment after his death.[272]

The other important type of Christian *waqf* is the guardianship over large endowments with multiple properties. It is assumed by virtue of a patent from the Sultanate of the Ottoman authorities in Istanbul.[273] This jurisdiction includes endowments for monasteries, churches and monks. This job included Christian clergymen from different Christian denominations in Jerusalem and from non-local residents. For example, Nicodemus took over the endowments of the Greek Orthodox community in Jerusalem through the Greek Orthodox Church. Patriarch Hariton was in charge of the endowments of the Armenian community in Jerusalem, just as Patriarch Hariton was in charge of the endowments for the poor. The Armenian monks in Jerusalem and its dependencies, and the priest Peter Mikhail bin Abd Al-Masih Al-Habashi, the head of the monks of the army, took over the endowments of the Abyssinian community in Jerusalem.

What is remarkable about the Christian *awqaf* in Jerusalem and of social concern is that the endowment belongs to the poor of the sect to which it belongs after the termination of the original beneficiaries. For example, the endowments of the Frankish sect stipulated that the endowment should return after the demise of the *waqif* to the poor of the Frankish monks' sect.[274] This also includes the rest of the Christian denominations of the Greeks, Armenians, and Copts.[275] The endowments were concerned with the visitors to the Holy City and sought to secure a refuge for them during their stay in Jerusalem. One of the conditions of the endower, Antoine John Looney, was that the endowment after him be an endowment for poor Greeks belonging to the state of Russia with the intention of visiting Jerusalem.[276]

Christian *awqaf* were also divided into charitable and family *waqf*. Here is an example of their distribution[277]:

Table 2: Distribution of Christian Endowments by Type of Endowment

Percentage	Number	Type
51.78%	29	-1 Charitable
48.21%	27	-2 Family

Source: Madani (2010).

[271] "Al-Quds Sharia Court Records, No. 342," 84.
[272] "Al-Quds Sharia Court Records, No. 395," Muharram 24 1318 AH / May 1, 1900 AD, p. 19.
[273] "Al-Quds Sharia Court Records, No. 373," Safar 10, 1302 AH / November 20, 1884 AD, p. 34.
[274] "Al-Quds Sharia Court Records, No. 322," p. 15.
[275] "Al-Quds Sharia Court Records, No. 367," Dhu'l-Qa'dah 1293 AH / 11 October 1874 AD, p. 132.
[276] "Al-Quds Sharia Court Records, No. 378," 26 Muharram 1307 AH / 28 August 1889 AD, p. 189-191
[277] Madani, Ziyad (2010) *Christian Endowments in and around Jerusalem, op., cit.*

5.10 Dispute Over Jurisdiction Between the Israeli Courts and the *Shari'a* Court in Jerusalem

The issue of the dispute over jurisdiction between the Israeli courts and *Shari'a* court can be clearly seen in the case of Izhaq Aref Al-Khatib who petitioned the Israeli Jerusalem Central Court to annul a *waqfiyya* he had registered with the Jerusalem *Shari'a* court and its Israeli counterpart in 1981. The judge in charge ruled that the Civil Court has, in principle, the power to annul such documents. The *waqf* claimed, through its lawyer, that the power to issue such an annulment is only at hands of the *Shari'a* court.

The facts of the case were that a Palestinian from Jerusalem who endowed part of his property to the Islamic *waqf* (endowment) in 1981 decided to retrieve that property, but under *Shari'a* law, such an action is illegal. "You cannot have people granting their property to the Islamic *Waqf* and then demanding that property back because this causes a huge mess and chaos and kills the spirit and sense of granting property for religious communities," said Jamal Abu Toameh, the Islamic *waqf* lawyer who desired that a settlement be reached between the two parties before the Israeli court intervenes. Still, Izhaq Aref Al-Khatib decided to claim his property back. He told his son Daoud to live inside the house, but was informed by the *Waqf* Council that such a move is illegal according to Islamic religious rulings.

Conciliation was initiated between Khatib and representatives of the *awqaf* for the purpose of finding a solution to the dispute, but Khatib insisted on petitioning the Israeli courts. Then PA Minister of Religious Affairs and the Islamic *Waqf* Sheikh Hassan Tahboub said that the *waqf* and the Khatib family had agreed to settle the dispute internally, but unfortunately, the family did not comply. This case opens the door in front of many problems in which *Waqf* lands and real estate might be lost. He added that it is not only condemnable for Muslims to appeal to Israeli courts against the Islamic *waqf* but it is also a very serious phenomenon that should be brought to a halt at once. He said that the real estate under question in the Mount Scopus area of East Jerusalem had already been documented as part of the Islamic *waqf* by the religious courts both in Jerusalem and in Jaffa. Tahboub expressed disappointment for the move taken by the Khatib family which referred the issue to the Israeli courts because they have given those courts the right to interfere in cases between the Islamic *waqf* and the Palestinian Muslim citizens of Jerusalem.[278]

The Israeli district court then issued an initial decision allowing itself the right to review and issue verdicts in cases related to Islamic *waqf* property in Palestine. The Palestinians warned this may create a legal precedent which will empower the Israeli government in the future to take over Islamic *waqf* property in Palestine. Legally speaking, the Islamic *waqf* argued that their absolute right to deal with these cases is based on Article 52 of the British Mandatory Regulations of 1922 and Article 7 of the Civil Regulations of Islamic *Shari'a* (Religious) Courts of 1933. Israeli courts have

[278] Palestinian Ministry of Awqaf: Archive, 2008.

tended not to interfere in cases involving the Islamic *Waqf* in Palestine since 1967 and the decision taken in the Khatib case by the district court may result in a legal precedent that would allow Israel to control more Islamic property in the future.

The Islamic *Waqf* Council in Jerusalem warned that the latest Israeli interference is interpreted as an attempt to control not only Islamic property in the city but all over Palestine. The Council decided to follow up on the developments of this case, warning that all Islamic and Christian endowment properties in Palestine are in danger of being confiscated and taken over by Israel.

Adnan Husseini, then director of the Islamic *Waqf* in Jerusalem, said that petitioning the Israeli court is "just like walking into a dark tunnel. Nobody can tell what is waiting for him at the other end."[279] He added that the major concern is the fact that Israeli courts are now granting themselves the right to issue rulings in cases that were dealt with exclusively by the Islamic religious courts. When Khatib endowed his property, said Husseini, he obtained a religious ruling approving his action from the Islamic *Shari'a* court in East Jerusalem and later from the Jaffa religious court which reaffirmed the Jerusalem court decision. Husseini at the time warned that this is not only a case of a certain property in East Jerusalem but could lead to a large-scale campaign by Israel to take over Islamic properties all over Palestine and not only in Jerusalem. He said a legal precedent set by the Israeli district court will serve the Israeli authorities in the future to claim the right to take over properties that fall within the religious endowment, whether it is Islamic or Christian. Therefore, the decision was very serious to Muslims all over the world. It showed there was a deliberate campaign aimed at taking over Islamic property in Palestine and it coincided with the Israeli attempts to appropriate Islamic properties in Jerusalem.

Palestinians approximate that up to 90 percent of property within the walls of the Old City of Jerusalem is registered as Islamic or Christian *waqf*. If the Israeli court intervenes and issues a decision, most of this property will become vulnerable and threatened by Israel's attempt to seize control.

Sheikh Ikrima Sabri, Mufti of Jerusalem and the Holy Land, said that Israeli courts have no right to look into cases relevant to the Islamic *Waqf*. He stated:

> "The Islamic Supreme Council of Fatwa (religious decree) has issued a decree pertaining to a piece of land belonging to the Islamic *waqf*. Cancelling a grant to the Islamic *waqf* from a religious perspective is against the principles of Islam and endangers Islamic *waqf's* properties. Decrees by Israel are not applied to us since Jerusalem is part of the *waqf* lands ...The Islamic *waqf* and the Supreme Council of Fatwa will adopt appropriate measures to stop the phenomenon of Muslims appealing to Israeli courts for solving disputes with the *waqf*."[280]

[279] *Ibid.*
[280] *Ibid.*

5.11 Summary

The literature, as well as the comparison with what is actually happening, points to the application and exception of Absentee Property Laws in Israel in Jerusalem. Although Jerusalem is part of Israeli law, this exception has a political basis. Jiryis described the 1970 law as “absorption law,” which was designed to achieve a political goal,[281] namely the annexation of Jerusalem to Israel. Dumper questioned the fact that Israel allowed legal and political flexibility in Jerusalem, which it considers its "eternal capital," and actually took an alternative measure to absorb Jerusalem. This policy has had contradictory effects. On the one hand, commercial and cultural activities flourished as the Palestinians lost complete control of Jerusalem, on the other hand, investment and development in real estate was neglected due to uncertainty and ambiguity regarding the jurisdictions of the *waqf* system, accountability and enforcement [see Figure 4 above].[282]

In an interview, a *mutawalli* from a family *waqf* revealed that he was facing a difficult situation regarding the management of the endowment for which he is responsible. In the event of resolving a dispute over a particular ownership of endowments, the *mutawalli* was on the one hand keen to solve the problem, but unable to do so through the Islamic court because their decision cannot be implemented. On the other hand, he could have taken action in the Israeli *Shari’a* court to implement this decision, but avoids using the Israeli courts as this could be seen as recognition of the authority of the Israeli legal system over Jerusalem [see Figure 5].[283]

Figure 5: Multiple Legal Forums

[281] Jiryis, S. (1976) *The Arabs in Israel*, *op. cit.*
[282] Dumper, M. (1994) *Islam and Israel, op. cit.,* p. 110-115.
[283] Saad Eddin Nashashibi – Interview with the researcher, March 2020.

CHAPTER 6:

CASE STUDY: MAMILLA CEMETERY IN JERUSALEM

6.1 Introduction

This is the case of a graveyard property called Mamilla (Ma'mun Allah in Arabic), located in West Jerusalem [see Image 4], over which a dispute arose between the Muslim community and the government of Israel. The dispute was brought before the Israeli *Shari'a* and civil courts, which passed two conflicting judgments. This case study will examine what is obeyed, what is overridden, and other issues relating to the cemetery.

Mamilla is a Muslim cemetery dating back to at least the 13th Century. Muslim tradition holds that companions of the Prophet Mohammad are buried there. It is a historical and archaeological treasure, as well as a holy place for Muslims. Mamilla Cemetery is located west of the Old City of Jerusalem, 2 km from Bab Al-Khalil [see Image 5]. It is the largest Islamic cemetery in Jerusalem, spreading over an estimated area of 200 dunums. The cemetery was registered in the Palestinian Lands Department as *tabu* on 22 March 1938 with an area of 134,560 dunums. It gained a land registration document, a *kushan tabu*, within the lands of the Islamic endowment, without counting the remaining part of the *waqf* land on which a *waqf* building was erected in the early 1920s, and the Jabaliya cemetery, which is separated from Mamilla cemetery by a street.

Israel did not care about the sanctity of the Mamilla Cemetery nor the feelings of the Palestinians. Meron Benvenisti, a former deputy mayor of Jerusalem, wrote:

> "All of this, and we have not yet touched upon the graves of Al-Saleh Al-Shuyoukh, which have turned into holy tombs for Jews such as the Tomb of Dan, which replaced the tomb of Sheikh Gharib, or the tomb of Sitt Sakina in Tiberias, which miraculously turned into the Tomb of Rachel, the wife of Rabbi Akiva."[284]

Fewer than 40 Islamic cemeteries remain out of a total of 150 that were in the abandoned villages in Israel. These abandoned villages are also neglected and in permanent danger of attacks and confiscations. The demolition of Islamic cemeteries was not the result of pressures from development needs or public interest, but occurred in pursuance of a process of ethnic cleansing of the dead, as the presence of these cemeteries was evidence of Muslim ownership of them.[285]

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[284] Benvenisti, Meron, *Haaretz*, September 9, 2005; "Israel destroys the Ma'man Allah cemetery in Jerusalem" (Arabic), http://poica.org/2006/02/.
[285] *Ibid*.

As Mamilla cemetery is located in what became West Jerusalem after the establishment of Israel, it was declared "absentee property." In 1955, when the first changes in the status of the graveyard were proposed, no public notice of the plan was issued in Arabic, which was contrary to Israeli law. Gradually, over the next 30 years, the municipality of Jerusalem expropriated the area and acquired ownership of the property. Objections were filed along the way, but to no avail. In 2006, the Mamilla case was considered in both *Shari'a* and civil courts.

The author interviewed experts on the case and monitored the events and surrounding factors, drawing, *inter alia,* on *Shari'a* and civil courts rulings, experts' opinions, and other related sources.

Image 4: Muslim Graves in the Mamilla Cemetery (Source: Bukvoed, 2017 CC BY 4.0)

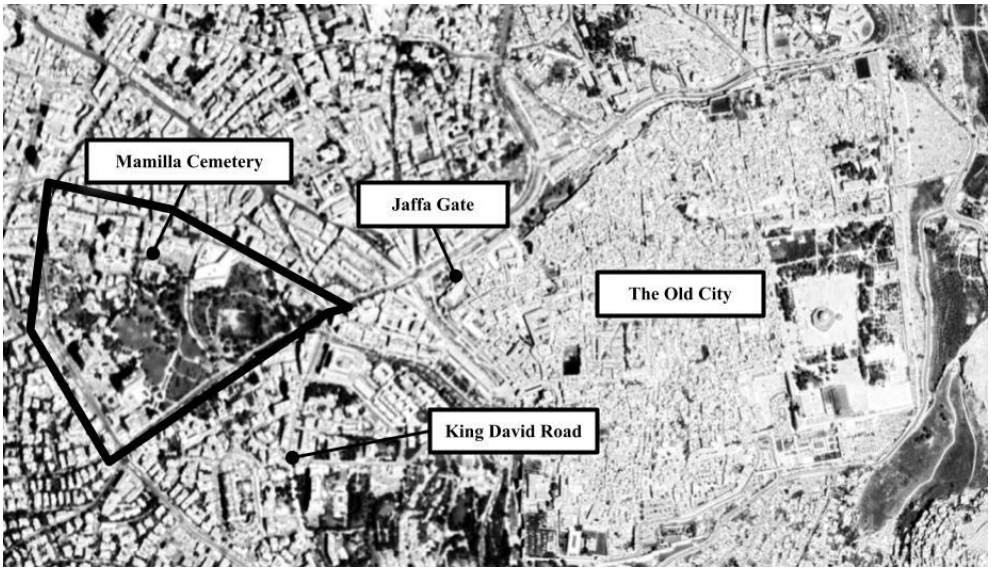

Image 5: The location of Mamilla Cemetery in Jerusalem
(Source: Google Maps 2022, CNES/Airbus imagery)

6.2 Israeli Court of Appeal: Facts and Decision

In late 2004, the US non-profit Simon Wiesenthal Center began constructing the Museum of Tolerance on a portion of the large Muslim Mamilla Cemetery. Construction began with a highly publicized ground-breaking ceremony attended by then California Governor Arnold Schwarzenegger, Israeli President Moshe Katsav, then-Vice Prime Minister Ehud Olmert, Jerusalem Mayor Uri Lupolianski, then Foreign Affairs Minister Silvan Shalom, then Finance Minister Benjamin Netanyahu, former Prime Minister Shimon Peres, then Internal Security Minister Tzahi Hanegbi, then Jerusalem Affairs Minister Natan Sharansky, then US Ambassador Daniel Kurtzer, the museum's architect Frank O. Gehry, and scores of dignitaries and guests from around the world.

The stated goals of the museum were to fortify the value of tolerance between peoples and between man to man; the idea of human dignity; to educate mutual trust brotherhood in society, promote the goals of education fundamental values of democracy, the bridge over disputes between nations and between different sectors of population, and enhancing people's consciousness about peace and value human life.[286]

Not surprisingly, the Simon Wiesenthal Center (SWC), which was responsible for the implementation of the museum's concept, chose to implement the idea with Jerusalem, regarded as the 'capital of Israel' and the Jewish people.

[286] *Ibid.*

When work on the museum began, human remains were found in graves at the cemetery. In January 2006, the Al-Aqsa Foundation (belongs to the banned Islamic Movement in Israel), which was (unofficially) responsible for developing assets of the *waqf*, first petitioned Israel's High Court asking for an order to immediately stop building the museum due to discovery of the human remains. They argued that there is an absolute prohibition to carrying out any work in the field on the grounds that it is in a Muslim cemetery, that all the work involves abuse of graves and an attack on a holy place for Muslims, and therefore the work is absolutely forbidden. As explained above, the *Shari'a qadi* issued a temporary prevention. The *Shari'a* court order issued against the Wiesenthal Centre asked the Israeli Police to enforce the writ of temporary order to stop the construction work. After the filing of this petition, other petitions were filed (HCJ 1331/06 HCJ 1671/06), which dealt with the powers of the *Shari'a* court and a debate about the construction at the museum after the discovery of graves. The hearing of three petitions united within the framework of this procedure.

The Wiesenthal Center and the Moriah Company, a municipal development corporation which was responsible for the museum's implementation, argued that long before the excavation work at the site began, the *Shari'a* court had issued a ruling that because the Muslim cemetery was abandoned, it was no longer sanctified and that the excavations were being carried out in complete coordination with the Antiquities Division. That ruling, which was issued in 1964 at the request of the city of Jerusalem, held that because the cemetery was *mundrasa* (abandoned), as no one had been buried there for decades, it had lost its sanctity under Islamic law. Thus, the remains in the graves could be moved so that the land could be used for other purposes – in the case of the 1964 ruling, to build the Independence Park.

The Al-Aqsa Foundation argued that constructing the museum on the *mundrasa* cemetery land violated *Shari'a* law as "it is prohibited to change the purpose of a cemetery to any other purpose." To strengthen their claim that the cemetery was violated, the appellant (Al-Aqsa Foundation) provided expert opinions on *Shari'a fiqh* regarding the violation of Muslim bones. Experts included the president of the *Shari'a* Court of Appeal *qadi* Ahmed Natour; Dr. Elbaseet, Dean of Faculty of Islamic Studies at Umm Al-Fahm in Israel; then Mufti of Jerusalem, Sheikh Hussein; Professor Husam Aldeen Musa Afaneh, a lecturer at the University of Al-Quds; and the Mufti general of the Jordanian kingdom. Each of them expressed the opinion that any action other than burial of the dead in a Muslim cemetery is strictly prohibited. The appellant also provided the expert opinion of Dr. Ahmad Kaa'dan, lecturer at Al-Qasemi College, who stressed the sanctity of the cemetery and prohibited the sale or exchange of *waqf* property.

In light of all these, the appellant contended that there is an absolute prohibition to carry out work, develop, build on, move the bones buried, or take any other action that harms the sacred place. The appellant stressed the importance of the principle of equality, arguing that this protection is granted to Jews in Israel and abroad, and presented the expert opinion of Dr. Hassan Sana'Allah dated December 12, 2006, who surveyed the extension of protection given to Jewish burial places in the Islamic world

and the general protection of places that have a religious character in international law. The appellant refuted claims made by the respondents that building in the cemetery already happened in the past, which was part of Israel's opinion, due to the construction of the "Palace" hotel complex. The appellant presented the opinion of the specialist engineer Alaa Kabha, who proved that this building was not on the actual cemetery, refuting Israel's opinion.

The Al-Aqsa Foundation argued that the transfer of rights in land ownership to the museum project, and procedures for the registration of rights, were inconsistent with the Absentee Property Law. The custodian's rights should be transferred to the Ministry of Religious Affairs, and, therefore, the custodian cannot transfer the *waqf* property to the Development Authority. The appellant argued that a distinction must be made as part of the question of absentees. The assets of a public property that have religious sanctity cannot be considered as absentee property. This distinction is based on the argument that ownership of the properties that have religious sanctity is not by flesh and blood, but by God, who cannot be considered as absent. Even if it is assumed that the property is absent, the very nature of sanctity does not allow the transfer to a third party. The appellant raised issues related to aspects of transferring property rights. There is no documentation to confirm the sale of the property, contrary to sections 30 (a) and 30 (b) of the Absentee Property Law; there was no certificate that indicated the sale of property to development, which happened at a price that was lower than it should have been, as required according to Article 19 (a) of the law. In addition, the appellant raised that eventually the substance of the property required the transfer of management into the hands of trustees, pursuant to section 29 (a) (c) of the Absentee Property Law. Alternatively, the appellant indicated that monetary sales of property are required to use the money for the same purpose and the money from the sale of property may be transferred to the trustees, set in paragraph 29 (g) of the law, which did not occur in this case.

Respondents claimed that the cemetery was used for the last 30 years as a field for parking cars, without any argument raised about it. Furthermore, road infrastructure work took place in the past. These facts indicate that the area was withheld and no burial was done for many years.

However, the claim that Arabs and Muslims failed to oppose previous projects undertaken on the grounds of the cemetery is totally incorrect. It is an attempt to discredit Muslim attachments to the site – efforts that are simply not convincing. Throughout the British Mandate and in the years following the establishment of the State of Israel, Muslim leaders indeed contested attempts to violate the integrity of the cemetery. The fact that there was not a vociferous outcry from Muslims in the 1960s and 1970s, when Israel began construction on parts of the cemetery, is not proof of Muslim indifference. More likely it reflects the fact that from 1948-1966 most Arab citizens of Israel lived under martial law, unable to travel freely or organize. One wonders how they would have managed to protest or launch legal action. The then physical division

of Jerusalem meant that the Arab and Muslim world, including residents of East Jerusalem, would have had little idea of what Israel was doing.

A number of opinions were presented to the Court opposing the project in very harsh terms. For example, Amir Cheshen, who was the Arab affairs advisor to Jerusalem Mayor Teddy Kollek and his successor from 1984 to 1994, submitted an opinion to the court that noted:

> "After 1967… the Arab residents of East Jerusalem and their leadership were exposed to the condition of the cemetery. The *Waqf* Authorities displayed increasing interest in the subject. After the matter was placed on the local and international agenda there were a number of encounters with the *Waqf* authorities and the Municipality decided to make minor improvements to the cemetery… a one-time effort to remove the weeds and to build fences around some of the tombstones… but this was a one-time effort… On a number of occasions, the Islamic *Waqf* saw fit to raise the state of the cemetery, or more precisely its desecration, on the public and international agenda. When the municipality decided to expand an underground public parking lot on Hillel Street it was at the expense of the cemetery. During the excavation human remains were uncovered and this brought about considerable distress and a public uproar among the Arab residents of East Jerusalem. In addition, the Steering Committee of Israeli Arabs found it appropriate to file a protest. They came to Jerusalem in order to examine the matter, cooperating with the *Waqf* officials… from the aforesaid it is clear that Islamic stakeholders, particularly in Jerusalem, also among the Muslim community both in Israel and abroad, never abandoned their interest in what transpired in the cemetery, nor their sensitivity in this regard. And they always viewed construction that damaged the tombs and human remains as a violation of sanctity and their religious sensibilities...".[287]

Especially important was the criticism of the former rector of the Hebrew University, Professor Yehoshua Ben-Arieh. He is perhaps Israel's most prominent expert on the geographical history of Jerusalem. Ben-Arieh has cast doubt on the claim that Muslim authorities permitted construction on the grounds of the graveyard in the past.

After the High Court authorized the building of the Museum of Tolerance in Jerusalem on the Muslim cemetery of Mamilla, Gideon Suleimani, the chief archaeologist who conducted the excavations there said that this concerns a historical site of tremendous significance. The office report that he had prepared asserts that it is forbidden to build in this area, but the Antiquities Authority hid this from the High Court and instead claimed that there is no reason not to build the Museum. Suleimani added that representatives of the SWC came every day and pressured for the excavations to

[287] Ir Amim (2010) *Absentees Against Their Will – Property Expropriation in East Jerusalem under the Absentee Property Law,* Jerusalem, July 2010, available online at: https://www.ir-amim.org.il/sites/default/files/Absentees_against_their_will.pdf.

advance as they feared that Muslims would make the project get stuck. The sense that they gave us was that it's Arabs against Jews.[288]

Respondents further claimed that there is recognition from Muslim *fuqahaa* of the human bone transfer, and legitimacy to build on areas of graves. According to Islamic Law, the cemetery is *mundrasa* which means its sanctity has ceased to exist and it is permitted to do whatever is permitted in any other land that was never a cemetery.

Professor Aaron Leish, Orientalist on Islamic law, brought forward his expert opinion on January 5, 2006, confirming the existence of situations in which the Islamic religion allows construction on a cemetery, which is when doing so fulfils the needs of the public. Along with this opinion, Muslim professor Dr. Said Bouheraoua from the Islamic School of International University of Malaysia emphasized two important conditions ignored by the court: that the work in question must benefit the Muslim community and that the local interpretations of Islamic law (*fatwas)* must apply. In the Mamilla case, this meant the opinion of local Muslim scholars in Israel, i.e., the opinion of Ahmad Natour, the *qadi* of the *Shari'a* Court of Appeal in Israel. Professor of Middle Eastern History at Tel Aviv University Shimon Shamir commented that the High Court was correct to suggest that construction in the past was conducted in Muslim cemeteries, however, there was no precedent to legitimize the building of the Museum of Tolerance on a Muslim cemetery. This is based on Jewish interpretations of the *Shari'a* law, contrary to the ruling of state appointee *Shari'a* court judge Ahmad Natour, who disapproved these works.

Below is a translation from Arabic of the opinion of Qadi Natour regarding the Mamilla cemetery. Natour explained many complicated issues regarding the legal and *fiqh* perspectives of *waqf,* questioning and contrasting opinions of Israeli scholars. He detailed his opinion as follows:

1. Our religious *Shari'a* judgment according to the *Shari'a* regarding the sanctity of cemeteries is that this sanctity is eternal, and this is an inseparable part of Muslim faith and belief. Accordingly, its sanctity has not been suspended by the passing of time and its sanctity cannot be changed until Judgment Day. Therefore, it is stated that there is an absolute prohibition on digging up graves and this is according to the learned opinion of *Shari'a* scholars without exception. Accordingly, and for many years, *Shari'a* judgments *(fatwas)* issued by the Islamic courts in Israel emphasize this point. Additionally, a letter of judgment issued by all of the *qadis* (*Shari'a* judges) in Israel in 1994 states unequivocally that the sanctity of all cemeteries is eternal until the end of time.
2. Any attempt to present the issues as if the *Shari'a* determines differently is a false one that removes the issue from its proper context. The Israelis misinterpreted one of the Hanafi school books that allowed the use of the

[288] "Israeli confessions of destroying the historic Mamallah cemetery… and the Jerusalem Endowment calls for stopping construction and returning the cemetery," *Hon.ps*, March 14, 2016 (Arabic).

mentioned case so as to consider the basic obligatory conditions of those sayings, which present reservations. However, this is false and also com¬pletely ignores all other schools of thought and the many other righteous schol¬ars. Furthermore, the Muslim population of Israel adheres to the Shafi'i school of thought and not the Hanafi.

3. Regarding the claim that the official land registry does not recognize the area as a cemetery, there is no one who disagrees that it is a cemetery and this fact was raised by the initiators themselves on many occasions, including in front of the courts. The claim that the sanctity of the cemetery has been removed contradicts their own claim as well. Also, when the excavations in the area commenced, it was found full of graves and human remains, also in contradiction to their claims, and every person with a sound mind would realize that it is an area filled with graves and that the excavations must cease immediately.

4. Evidence that burial in the Mamilla cemetery continued until 1948 is provided by letters from the management of the *waqf* dated 4 and 7 November 1948.

5. Taking into consideration the level of control and involvement of the British Mandate authorities in the activities of the Supreme Muslim Council (which even led to the dispersion of the Council by a government order in 1937 and its replacement with a British council) and furthermore the wishes of the British to use the land of the cemetery for secular uses (see the letter of the *waqf* representative of Jerusalem dated 16 September 1947 regarding the takeover of the area by British Army units), it is very strange that they base their claims on these documents of Hajj Amin Al-Husseini, the Mufti of Jerusalem, whom they called pro-Nazi and relied on, as a precedent for legitimizing an inhumane act such as damaging the honor of the dead.

6. Even if assuming that something immoral had in fact happened, one must ask if from an injustice any good can come; as it is said: two wrongs don't make a right.

7. Regarding the judgment of the *qadi* of Jaffa in 1964 which intended to be the legal judgment of the Muslim court, it seems that there is no choice but to clarify the matter as follows:

    a) The procedure was defective in that it stood completely against the *Shari'a* procedures and against the substantive law of the w*aqf*. The procedure was opened by someone who has no standing before the court (the mayor) and who was not a *mutawalli* of the *waqf*.
    b) No one was present at the procedure as a "side" to the case, not even the one who petitioned or someone in his place. The side (mayor) did not but sent a letter, which is completely against the procedures of the *Shari'a* courts.
    c) Neither the petition nor the decision show the benefits to the *waqf*, which is essential and obligatory regarding any change in the status of any *waqf* property.
    d) Even the basic assumption on which the above *qadi's* decision was made – i.e., that the bones had disintegrated and the remains had become ashes

(dust) only 16 years after the last burials in the place – is even today, 42 years later, completely false. Now it is clear to all that whole skeletons have been uncovered as was publicized and photographed in the *Haaretz* newspaper. It should also be indicated that the representative of the Antiquities Authority announced to the Knesset Interior Committee that more than 200 graves have been dug up and the bones placed in boxes.

e) The decision of the above *qadi* (of Jaffa from 1964) that the graves had disintegrated was not based on anything real, and apparently, he had not even checked the area himself. Therefore, and for other reasons which are too detailed to explain, it is clear that the former procedure is completely null and void.

f) It is especially sad to say that we have been informed that the former *qadi* was convicted of felonious acts of fraud against the public. The Tel Aviv District Court's sentence was upheld by the High Court (see judgment 822/64 and 22/66 of the High Court). It should be mentioned that the criminal process of these accusations appeared at the same time as his judgment regarding the cemetery was done.

8. The formal claim raised as if there were no objections to the licensing process ignores the fact that following the establishment of the state of Israel – and different from other religious communities in Israel – there were no more institutions which could have followed up (supervised) developments concerning the *waqf*. The Supreme Muslim Council was dissolved by law in 1961 and the institution of the Mufti also ceased to exist. This situation, which was not caused by the Muslims themselves, turns these claims into immoral ones.

9. Furthermore, it is shocking to our minds that Muslim dead which are buried in their graves are only buried temporarily and that they should know that after a number of years the remains of their graves will be put in boxes. Why is this? Is it because they do not deserve the same honor and respect as the rest of humanity? Could this be?

   We are also stunned by the cheap claim that the revulsion from damaging graves when dealing with Muslims is considered a political position and even an extreme one. For us, the honor of the dead, all of the dead, is a Jewish, Christian and Muslim value. Therefore, we should all cooperate, in the name of these preserving universal values. This is our belief regarding Muslim and non-Muslim cemeteries as well. Therefore, we are right to expect that others will relate to our dead as if their own, with one standard, just as the Jewish and Christian faiths demand as well. In conclusion, we hope that the initiators of the Tolerance Museum project will understand that they cannot build the museum while trampling on the feelings of millions of Muslims in Israel and around the world and that they themselves will decide to cancel the project in this location.

6.3 The Israeli Shari'a Court Ruling in the Case Dajani, Nusseibeh & Badr Al-Zayn vs. Simon Wiesenthal Center & others (2006)/254

The applicants appealed to the *Shari'a* court against the Simon Wiesenthal Center – an American institution which supported the building of the Tolerance Museum on the Mamilla cemetery, which is registered in the Jerusalem Land Registry as *waqf* land.

The Applicants Claim

The applicants, who all had relatives buried in the Mamilla cemetery, claimed that the defendants illegally acquired the land and therefore appealed through the *Shari'a* court to redeem the *waqf* land and appoint a trustee to look after it. They also asked the court to hold accountable the custodian of the *waqf* who acted inappropriately against the wishes and purposes for which the *waqf* was intended. They said that the appointment of the custodian according to 1950 Absentees' Property Law was invalid, and therefore, the whole subsequent procedure in relation to the *waqf*, i.e., the sale of the land, was too. The applicants requested an immediate court order to prevent the construction companies from continuing their excavating work in the cemetery. The court considered the request and looked at the initial evidences, for example the document showing that the graveyard was indeed a *waqf* registered in the Jerusalem Land Registry (during the British Mandate) on February 5, 1938, and a letter provided by the applicants which was issued by the Supreme Muslim Council on February 23, 1925, referring to the fact that Muslims were buried in that graveyard. Moreover, the applicants supported their claim by photos of the Muslim graves and a document proving that the land was registered in the Israeli Land Registry.

The Defendants Response

The defendants argued at first that the *Shari'a* court had no jurisdiction to rule in such cases as the land in dispute was put under the custody of the custodian as per the 1950 Absentees' Property Law, and the custodian had sold the land. They referred to Decision 6452/96 of the Israeli High Court (also known by its Hebrew acronym BAGATS), according to which the *Shari'a* court has no jurisdiction to rule in cases where the custodian was appointed and sold the land. This decision mentioned the historical development of the 1965 amendment to the Absentees' Property Law, stating that one of the reasons for its modification was to determine the ruling in this area and to clear the ambiguity of the High Court's decision 69/55. Furthermore, the defendants claimed that there was no reason to appoint a trustee on a *waqf* which was transferred to the custodian through the Absentees' Property Law and referred to Israeli High Court Decision 332/52.

In response, the applicants reaffirmed that the custodian was not permitted to acquire *waqf* nor to sell the land as the ownership belongs to the *waqf*. They also said that Israeli High Court Decision (6452/96) cannot be applied to this case, although it supports the view that the *Shari'a* court has the jurisdiction and is the suitable body

to rule in such cases. Moreover, they pointed to the fact that High Court Decision 69/55 only referred to family *waqf* while the case in question was a public *waqf*, and that the amendment to the 1965 Absentees' Property Law (S. 4 1(a) 1) cleared the ambiguity over family *waqf* by making a distinction between family and public *waqf.* Also, the law did not abolish the public *waqf*, nor did it come to nullify the existence of *waqf* as a *waqf*.

The Court Judgment

- Firstly, the jurisdiction of the *Shari'a* court on *waqf* cases: Article 52 of Palestine's Constitution provides that the sole body to rule and to have jurisdiction in *waqf* cases is the *Shari'a* court. Moreover, Israeli High Court has approved such independent sovereignty of the *Shari'a* court over *waqf* matters in Decision 256/71, and of custody over absentees' properties in Decision 6452/96.
- The land in question is a Muslim cemetery, which is sacred according to Islamic law. *Shari'a* judges have confirmed in a legal declaration on June 21, 1994 that Muslim cemeteries are sacred and must be eternally considered as belonging to *waqf* lands.
- To clear the ambiguity over the conceptual meaning of *waqf,* the court found that it is necessary to give a clear definition to the ownership of *waqf* lands. Thus, it approved that the *waqf* once endowed is transferred from the *waqif* to the ownership of God, therefore, the *waqif* himself cannot sell the land nor can the custodian. This also is confirmed in the Jewish law where the '*Hekdesh'* (equivalent to *waqf),* once endowed, is transferred to the ownership of God.
- As the *waqf* is regarded in *fiqh* as a separate legal entity it is independent and does not belong to the *waqif* nor to the *mutawalli.* This was also approved in Jewish law.
- Israeli laws referring to *waqf*: Article 52 of Palestine's Constitution provides that *waqf* is established under Islamic *Shari'a* law, which considers the *waqf* as a separate legal entity. As Israeli law recognizes *Shari'a* law, this land should be registered as *waqf* and treated as an independent legal body. Thus, the concept of "legal entity" is established under both *fiqh* and law, and is one of its purposeful features; it can litigate and be litigated.
- While the *waqf* as a separate legal entity can bring an action, it can only be done through the *mutawalli* who is acting through the *Shari'a* court on behalf of the *waqf*. This was approved in Israeli High Court Decision 1307/59. Moreover, Section 126 of Israel's Land Law Act of 1969 approved the ruling in relation to *waqf* and did not abolish it.
- Section 2 of the 1950 Absentees' Property Law defined an absent asset as belonging to an absent person, and stipulates that this asset should be transferred to the custodian, which was reaffirmed in the 1965 amendment to the law. However, as the asset in question is a cemetery and, irrespective of whether the *mut-*

walli is absent, the role of the *Shari'a* court in such situations is to act on behalf of the *waqif* and appoint a new *mutawalli*. The role of the *mutawilli* is restricted only to manage the *waqf* for which he is receiving remuneration, but is not the owner. The *waqf* cannot be transferred from the custodian; therefore, the above law cannot be applied.

- As for the custodian's sale of the waqf land, the court can reconfirm that his action was illegal and the land cannot be regarded as an absentee's property, so Section 2 of the Absentees' Property Law is mistakenly applied. The transfer of the land in the *mutawilli's* name according to Section 4 of the same law is invalid. Therefore, each subsequent procedural step he has done is also invalid. The acts of selling and transferring the cemetery *waqf* by the custodian are invalid. Also, the trustees cannot be regarded as absentees, as they do not own the property in question. The ownership belongs to God, and where the trustees are absent or failed to act, the *Shari'a* court can act on their behalf. Furthermore, beneficiaries are the living and dead Muslims who cannot be regarded as absentees according to the 1950 Absentees' Property Law. Consequently, the custody is invalid, the court can disregard it, and all subsequent action done by the custodian is also invalid. The court has the authority according to Section 52 of the Palestine Constitution to appoint a *mutawalli* who will look after the cemetery *waqf* in accordance with *Shari'a* law.
- The judge added that even if the custodian had under the 1950 Absentee Property Law the right to acquire *waqf* and therefore may sell or transfer the land, it would contradict Part 7 of the Penal Law of 1977, which provides that no one can cause any harm to sacred places, and anyone who does so will be prosecuted under the law's sections 170, 172, 174. Therefore, even if the custodian had been given the right to act on behalf of Muslim cemeteries and sold the *waqf* this would be in violation of sections 170, 172, and 174.

6.4 Conflict of Laws and Jurisdiction: *Shari'a* vs. Civil Court

The jurisdiction of the *Shari'a* court is laid down in the *Shari'a* Courts Law of 25 October 1917, which still applies in Israel. Under Section 7 (a) the *Shari'a* court can deal with and adjudicate cases concerning *waqf,* as follows:

> "authorizing a change in the entitlement of *waqf*, such as *ijaraten* (long lease) and *mukataa* (short lease which permits the leasee to build on the *waqf* land, but does not give him ownership of the *waqf* land itself); issues with regard to the *waqf's* board of trustees, special rights concerning the principal (*asl*) of the *waqf*, conditions of the *waqfiyya*... but excluding litigations on *ijaraten* and *mukataa* cases."

Moreover, Section 52 of the Mandate Law (1922-1947) granted the *Shari'a* courts special legal jurisdiction over "issues of *waqf's* creations and in the internal manage-

ment issues which are for the benefit of the Muslim community before the Islamic *Shari'a* court."

According to Section 8 (2) of the Constitution of the Supreme Muslim Council of 1921 which defined its jurisdictions, "the *Shari'a* courts are not allowed to deal in litigations concerning the types of *waqf* of *hikr*, *ijaraten* and *istibdal*, these types are solely within the jurisdictions of the council." One can notice that the extreme restrictions imposed on the *Shari'a* courts are because of the important features of the *waqf.* This was to protect the asset, *asl*, of the *waqf*. However, the jurisdiction of the council was removed in Section 25 of the Qadis Law of 1961, which created a gap with regard to this issue.

Benvenisti notes that when the SMC's jurisdiction was cancelled, the *Shari'a* courts could not deal with cases of releasing *awqaf*. Therefore, this jurisdiction was passed to the civil courts, under Section 40 (2) of the Courts Law of 1984.[289] However, Berkovits disagrees, saying that the practice shows that *Shari'a* courts dealt with all types of cases.[290] This was approved by the civil courts and even by the Supreme Court, and such jurisdiction was not debated anywhere. In the opinion of Qadi Natour, Section 7 of the amended *Shari'a* Courts Law of 1918, which is still valid in Israel, can fill the gap as it states that any action against *waqf* (e.g., improper release of *waqf*) must have the authority of the *Shari'a* Court of Appeal without appealing to the court.

It can be said that when the legislator restricted the jurisdiction of the *Shari'a* courts in cases of releasing *waqf*, or changing the *asl* of *waqf*, it was because such acts are extremely prohibited under the Islamic law and considered as "extreme exceptions" to the general rule which prohibits such types of changes to the *waqf's* original purpose. In the case where the SMC was abolished, such entitlement shall transfer to the higher Muslim legal body, which is the *Shari'a* Court of Appeal, in order to protect the main characteristic of the *waqf* (keeping up the *asl*). With regard to mosques and cemeteries, as they are *waqf* and at the same time sacred, Section 5 of the Civil and S*hari'a* Courts Adjudication of 1925, which is still valid in Israel, holds that "any case or other procedure concerning the ownership or the right of a land title will be decided by the civil courts, even though a party or person claims that the alleged land is *waqf*." At the same time, Section 2 of the 1924 Mandate Law states that the decision of whether a place is sacred is *not* within the jurisdiction of the courts, as such decision is dealing with the ownership of and rights in the place. Therefore, the 1924 Mandate Law has restricted the jurisdiction of the courts to dealing with disputed cases of sacred places, where the dispute is about the ownership of the place. However, Section 5 of the 1925 Law clearly granted such a right to the civil courts and literally included the cases where the disputed property was a *waqf*.

[289] Benvenisti, M. (2002) *Sacred Landscape*, University of California Press.
[290] Berkovits, S. (2006) *"How dreadful is this Place!" op. cit*.

As for mosques and cemeteries, besides the fact that they are sacred, they also cannot be regarded as *waqf* properties and therefore decisions on them shall be referred to the civil courts under Section 5 of the 1925 Law.

6.5 Conclusion

Decisions taken by *Shari'a* court *qadis* between 1948 and the late 1980s regarding the sacredness of cemeteries were mostly incorrect due to several reasons which were emphasized in my interview with Qadi Natour. Almost all Muslim *fuqahaa* observed that the sacredness of cemeteries is eternal and this characteristic should never change. Assuming that all Muslim scholars have agreed on a certain issue, the opinion of the minority cannot be relied upon. If the minority has a different opinion than the majority, it should not be legally binding from a judicial perspective. Even if the *Shari'a* court *qadis* have ruled differently in the past, they should, if they or future *qadis* reviewed the rulings and discovered that they mistakenly applied the minority opinion, correct that wrong decision. A decision should also be considered as judicial precedent, and therefore legally binding, if that decision was held by the *Shari'a* Court of Appeal. If a scholar issued a *fatwa* in the best of his knowledge that a cemetery is *mundrasa* but then discovered that there were graves there, he can order to remove these graves. This is the only situation where graves can be opened.

Referring to the Hanafi school of thought, Reiter argued that once a cemetery is not in use as it was intended, its sacred characteristic can be nullified and its original purpose can be changed. Such a claim is incorrect from several points:

- Almost all of Hanafi school of thought scholars differ with this argumentation, saying that the sacredness still exists, even if people stopped using that place for its original purpose.
- Reiter mistakenly argues that the *Shari'a* courts in Israel are using the Hanafi school in the judicial system and thus should be legally bound to follow such school. This is wrong as, firstly, the Palestinian Muslim community in general follows the Shafi'i school, while *Shari'a* courts follow the Hanafi school because the Ottoman legal system followed it. Secondly, one must clear the distinction and the overlap, from the Islamic perspective, between a *fatwa* and a court judgment, whereby the former is only a scholarly opinion which is up to the *qadi* at the *Shari'a* court to comply with, though once a decision is taken by the *qadi* it will be legally binding and considered a judicial decision.
- Section 29C of the 1965 Absentees' Property Law only forbade the board of trustees to transfer the ownership of mosques. The law, however, has impliedly also precluded any transfer of any other *waqf* properties, especially the *waqf* of cemeteries, which are considered as sacred.
- Section 29A (a) stated that a *waqf* other than family *waqf*, which vested to the custodian, is permitted to transfer the ownership to "the appointed board of

trustees" under sections 29B and 29H. Therefore, the law does not give the custodian an absolute right to freely transfer the ownership of any *waqf* property.

- Section 29F reaffirmed this, stating that in the case of any *waqf* which was vested to the custodian and was not released, the custodian "shall use them, their incomes and any substituted *waqf*, to the same purposes which the board of trustees was given under section 29E" (which named a number of objectives which all must ultimately cover the Muslim community needs).
- Regarding the *waqf* of cemeteries, the law has not given an absolute right to transfer 'any' *waqf* to a board of trustees, rather to "an appointed board of trustees" in the municipalities declared in Section 29B. Nevertheless, Section 29A (b) stated that a transferred *waqf* should be free of any restrictions. However, it is absolutely incorrect to assume that Section 29A (b) has given an absolute right to the custodian, i.e., to transfer "any *waqf*." Rather, it literally stated in Section 29A (a) that "he is permitted to transfer the ownership to an appointed board of trustees under sections 29B and 29H." Therefore, when Section 29A (b) stated "*waqf* transferred as aforesaid" it has clearly meant only the *awqaf* transferred from the custodian to the appointed board of trustees under sections 29B and 29H. Obviously, the law did not mean to "any board of trustees."

Therefore, any reliance on Section 29A (b) to argue that the custodian can freely transfer the ownership of 'any' *waqf* is incorrect.

Assuming that the transfer is lawful, Section 29E made it clear that any action undertaken concerning the *waqf* must be in accordance with both *Shari'a* law and the *waqf's* document instructions. Therefore, the sale of the cemetery by the board of trustees contradicted the *Shari'a* law principles and the *waqf* document itself.

An argument that Section 4A (2) 1965 gave the custodian the entitlement not to be restricted is also controversial. Section 29J clearly stated that the custodian shall use any *awqaf* vested to him which were not released, their incomes and any substituted *awqaf* to the same purposes which the board of trustees was given in Section 29E. Section 29J therefore made it clear that "all other unreleased *awqaf*" must be used in same manner the board of trustees can use them.

Applying section 29J on the facts of the foregoing cases, it can be seen that the custodian had clearly breached his duty for two reasons: first, he used the *waqf* for purposes other than the ones given to him in Section 29E (1), i.e., building a museum cannot be regarded as one of the objectives listed in this section; and second, the museum also cannot be regarded as satisfying "the needs of Muslim community" under section 29E (2).

CHAPTER 7:

DISCUSSION & CONCLUSIONS

7.1 Results

Whilst investigating the reasons for the *waqf's* decline, a great many participants have shared the view that there is a prevalent difficulty with regard to the enforcement of *Shari'a* courts' judgments and this has caused a very real problem. As one the *mutawalli* of a *waqf dhurri* in Jerusalem observed in an interview: "if you have a rent problem with a tenant, and you take a legal action against him, the court decision hardly can be enforced." Another example is that a conflict of laws exists at least in the Jerusalem district, where both the Israeli and Jordanian laws are applied.

Moreover, one *Shari'a qadi* pointed out in an interview "that there is a problem with court jurisdiction," citing an example where his *Shari'a* court should have decided in a dispute on *waqf* cases, but his decision was not accepted and the case was transferred to the civil courts.

As a result of the difficulty with regard to jurisdiction and enforcement, there is confusion for the *mutawallis* who want to take legal action to protect the *waqf*. As one *mutawalli* stated, "you have to search for the proper court, so that you will be able to enforce the court decision. Often you need to choose between *Shari'a* court (either the Palestinian or the Israeli) or civil courts (Israeli)."

Furthermore, the results show that Israel, through its land policy, is still confiscating *waqf* properties and preventing access to them, as the case of the Mamilla cemetery has demonstrated.

My fieldwork further revealed that contemporary management practices were commonly developed to improve the efficiency of collecting revenue. For example, a family *mutawalli* of a huge *waqf* in Jerusalem is using a highly sophisticated computer program to divide the profits among the beneficiaries. By contrast, one *mutawalli* observed that "corruption and maladministration led to conversion of some *awqaf* to privately owned property, this is of course due to the legal system's lack of enforcement that doesn't hold accountable *waqf* players who misappropriate their position."

The fieldwork indicates that there is an absence of definite figures on the extent of *awqaf* in Israel. The Israeli government is still holding the records which show the extent and quantity of *awqaf* at least inside Israel. Previous studies are based on insufficient data and thus there are contradictory results.

Moreover, the literature review showed that the historic role of the *waqf* is considered by Israel as a threat to its physical integrity. This is despite the physical occupation of the Palestinian community as well as its administrative and legal system. The

results show that Israel still fully controls the *waqf* properties. There are different degrees of control: Israel controls the *waqf* administration in terms of payments of their salaries, making appointments and the incumbents always have to demonstrate their loyalty to the Israeli state.

The state has also re-established *Shari'a* courts and replaced the *Shari'a* Court of Appeal in Jerusalem, which has left Muslim *qadis* and officials with no legal authority over the administration of the *waqf* system; they were given only an insignificant advisory role. The Ministry for Religious Affairs established a department in charge of the Palestinian religious community. Other communities in Israel were given a greater autonomy over the administration of their respective religious affairs. For instance, the Absentees' Property Law exempted some church properties from confiscation as the Greek Orthodox Patriarchate was not considered an absentee as defined by the law, though in fact the Patriarchate was located in the Jordanian-ruled part of Jerusalem. The Druze were given relative independence over their *waqf* properties, with authority over personal status and endowment properties laid down in the 1962 Druze Religious Courts Law.

The main piece of legislation that has influenced the *awqaf* is the 1950 Absentees' Property Law, which facilitated the confiscation of almost all *waqf* properties in Israel. Amendment No. 3 to the Law in 1965 - described as a "reform" of the *waqf* in Israel - has effectively implemented Israeli policy priorities, namely, controlling the entire *waqf* system in Israel. Amendment No. 3 has freed the remaining *waqf* from the restrictions of *Shari'a* law, i.e., sale, and restricted the political use of funds generated from those *awqaf*. Furthermore, it granted the state a further tool to transfer the remaining *waqf* properties from Muslim hands to the Jewish community through the use of a Muslim board of trustees of "state's appointees", on which Qadi Natour commented:

> "If we assume that such a change was correctly made, one may ask whether the *mustawalli* in fact has purchased another *waqf* instead of the original one? If he has done so, where is it? And what is its price? And has the *mutawalli* been brought to an account as the Islamic law require."

Due to the 1965 'reform' many mosques and cemeteries were sold contrary to the principles of *Shari'a* law.

7.2 Revisiting the Research Questions

The literature indicates that the foundational and operational character of the *waqf* system provided broad freedom and flexibility. Through *ijtihad*, the *fuqahaa* established and ascertained *waqf's* legal parameters. These were articulated throughout Islamic history depending on the changing circumstances of each different period. The operational issue was greatly dependent on powers and regimes and impacted the performance of the *waqf*.

"Perpetuity" can be treated as both a foundational and operational issue and was principally formed to preserve the *waqf* asset and overlaps with the related concept of "inalienability." For instance, where a *waqf* deteriorated or stopped being devoted to its original purpose, it can be revoked. "Perpetuity" as a foundational issue therefore can be invalidated if it is not operating in a healthy way.

Islamic *Shari'a* law has determined and outlined certain principles and rules to follow, though it places weight on the matter at hand in its judgement. For instance, if a *mutawalli* foresees that a certain *waqif's* condition can thwart the performance of this *waqf,* he can apply to the court and the *Shari'a* court *qadi* is entitled to exercise his discretion to modify such an obstacle. Both the *mutawalli* and the *qadi* are, however, bound by the general law to fulfil and accomplish the wishes of the *waqif* as specified in the *waqf* deed. The literature and the practice from periods where the *waqf* was performing well shows that Muslim *fuqahaa* have clearly recognized the flexibility regarding foundational and operational issues. Yet, some literature indicates that a few orientalists still, with no legal or practical substance, insist that perpetuity is 'static' and cannot be challenged.

The nature of *waqf* legal doctrine may, indeed, be divine or sacred. This philanthropic basis of the *waqf* is very important and helps explain the institution's role throughout the centuries as a method of disposing of property for what would be perceived in the common law as "charitable purposes." Practical accommodations alongside established legal explorations by Muslim jurists for more than a millennium and a half have created detailed operational rules for *awqaf*. These particularly had a responsive impact on the *waqf's* utility as wealth management tool in Islamic societies.

Thus, competent accommodations have been made to allow long-standing *awqaf* to cope with altered social, political, and economic conditions. In numerous instances and at various times in history this has occurred. The absence of *Quranic nus* gave a rise to *ijtihad* among Muslim jurisprudential scholars (*fuqahaa*), therefore, over time a certain set of rules establishing the character of the *waqf* and determining its legal parameters were established and mutually agreed upon by the different schools of Islamic law. These principles were articulated to protect the pious and sacred nature of a *waqf* and to ensure that the wishes of a *waqif* are established and implemented.

Subsequently, *waqf* law should be able to efficiently and properly respond to changed circumstances. There have been various explications of the detailed rule regime of the *waqf*. However, no rigorous effort was made to establish how the legal doctrine (including foundational and operational issues), along with the process of enforcement, played an influential role in the success of the *waqf*.

The premise of this study was doctrinal matters. Although reforms and adjustments may sustain the system for some time, it must eventually decline if it is not systematized. This is not the case, however, if the legal process itself permits adaptation to inevitably changing conditions and needs. Efforts have been made to accommodate

the differences among the various schools and legal forms have been written to satisfy the requirements of all. In addition, Muslims can apparently assign the rules of one school or another as governing law in agreements, including *waqf nama* (the instrument of creation). Thus, in recent times, Arab states have unreservedly accepted principles from schools predominant in other countries and incorporated them in statutes.

The literature has pointed out some difficulties and declines regarding foundational and operational issues. These critiques have treated each situation disjointedly and have not linked each decline to the entire surrounding atmosphere, nor have they examined the entire legal system of the time. For example, Schoenblum stated that "attempts were made to bypass the restrictive succession laws through the use of a family *waqf*, Islamic jurisprudence approved of it, so long as the ultimate beneficiary was a religious, pious, or charitable purpose."[291] He further argued that "the *waqf*, therefore, affords a means of avoiding the undesirable division of property resulting from application of the succession laws, which tends to produce inefficient fractionation of family wealth in the Islamic world."[292] Moreover, Powers claimed that the *waqf* was mainly a reaction to an escape from rigid Islamic inheritance rules, which tended to dissipate family wealth.[293]

I contend, however, that although there have been many attempts to use the *waqf* as a circumvention tool over the centuries, the truth is that the vast majority of Muslims did not seek to stray from the *Qur'anic* system of inheritance. It cannot be denied that the principles regarding inheritance were laid down as essential and explicit (clear *nus*) principles. They are religious rules conveyed by the Prophet himself, although attributing these principles to the Prophet does not mean that they are in fact his creation, rather they are compulsory and binding religious rules.

Furthermore, in most Muslim countries, Muslims are not governed by secular law in wealth and family matters. In all family matters, they are clearly subject to *Shari'a* law, of which inheritance is an important component.

In his study of Jerusalem *waqf* since the beginning of the 16th Century, Reiter noted that the *waqif* must have great and particular intentions to challenge the principles and rules of the inheritance law by forming a *waqf*. Therefore, despite the importance of the *waqf* as such and of the large properties involved, a small number of people founded *awqaf* to circumvent the *Shari'a* rules: "the number of family *waqf* founders has been small compared to the great majority who stayed within the bounds of the inheritance law."[294] The orientalists have misunderstood this issue, as the property owner has the right to dispose of his property while he is alive in the way he wishes – by passing a will, giving a gift, or endowing a *waqf* (within the limits of *Shari'a*).

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[291] Schoenblum, J.A. (1999) "The Role of Legal Doctrine in the Decline of the Islamic Waqf," *op. cit.,* p. 1193.
[292] *Ibid.*
[293] Powers, D. S. (1999) "The Islamic Family Endowment (*waqf*)," *op. cit.*
[294] Reiter, Y. (1996) *Islamic Endowments in Jerusalem under the British Mandate*, *op. cit.*, p. 75.

The *waqf* has also been used for other wealth preservation purposes, including the protection of property in times of insecurity from unprincipled rulers and the defeat of creditors. With respect to the latter objective, *fatwas*, as the general law, of *fuqahaa*, forbids this, but it still has been pursued. The sole purpose of the *waqf* is to acquire merit in the eyes of God; all other purposes are subsidiary. Therefore, every purpose considered by the Islamic law as 'religious, pious or charitable' would be considered valid. The *waqf* derives from religious authority and advanced what are perceived to be religious, pious, and charitable goals. While there have been differences in the interpretation and practice by various schools of Islam, primarily, the general parameters were agreed upon.

The *waqf* law was considered a fundamental social, financial, and technological change in the Islamic world. As discussed, *waqf* is considered to have been authorized directly by the Prophet Mohammad (PBUH). However, the actual law of *waqf* was developed in the two or three centuries after the Prophet's death. Despite the fact that there are variations depending on each particular school of Islam, the law of *waqf* has evolved for more than a thousand years. It is interwoven with the entire religious life and social economy of Muslims. As a result, the *waqf* had to remain a changing construct for the disposition and management of wealth. Until the last century, it continued to evolve due to its sacred doctrinal structure while retaining the flexibility of its original concept. Indeed, the underlying premise of *waqf* as a solid tool of financing Islam was extraordinarily established.

7.3 Flexibility v. Perpetuity

An essential effective principle of *waqf* law is that declaring a *waqf* for only a limited period of time is invalid. The *waqf* must bear perpetuity. The necessity that the property be held in perpetuity (*mu'abbad*) is a logical consequence of the application of the fundamental principle that property in *waqf* is dedicated to Allah. Having been granted to Allah, it cannot easily be reclaimed. Schoenblum observed that the consequences of this mandatory rule of perpetuity were disastrous from an economic standpoint. He claimed that the Ottoman Empire had to tie up three-quarters of arable land in *waqf*.[295] During the 19th Century, half of Algiers was held in *waqf*, and in Tunisia it was one-third. In 1935, one-seventh of the cultivated soil in Egypt was held in *waqf*, while in Iran it was 15 percent as of late as 1930. One Indian commentator noted that if the income from these properties were appropriately used, there would be a sea-change in the social, educational and economic conditions of Muslims in this country.[296]

Some western writers, particularly, orientalists such as Schoenblum and Kuran interpreted Islamic principles wrongly, as perpetuity does not mean tying up the land and

[295] Schoenblum, J.A. (1999) "The Role of Legal Doctrine in the Decline of the Islamic Waqf," *op. cit.*
[296] Kader, S. A. (1999) *The Law of Waqfs: An Analytical and Critical Study*, New Delhi, Eastern Law House.

prohibiting its use. Rather, it ties up the asset in order to disallow certain usage of the property and to preserve it to constantly produce revenue.

Schoenblum also found that there is a contradiction in family *waqf*, asking, "how can the underlying commitment of the property to Allah and, thereby, religious, pious, or charitable use for the Muslim community be squared with private benefit." Yet, he himself stated that "Indeed, the Prophet Mohammad said (in *hadith*), 'one's family and descendants are fitting objects of charity, and that to bestow on them and to provide for their future subsistence is more pious and obtains greater 'reward' than to bestow on the indigent stranger.'"[297] Islamic law is clearly promoting the act of charity, and if it is to an individual's own family, still he is rewarded even to a greater degree. At the same time, the *waqf* property, economically speaking, is producing revenue which can provide a profit for the community.

Contrary to the interpretation by orientalists, earlier Muslim *fuqahaa* and contemporary western and Muslim researchers are impressed by the *waqf's* flexibility. The Islamic principle which requires the perpetuities has the positive effect of actually inflating value. The rationale for this is that, as a logical conclusion of the perpetual mandate, the law imposes a fundamental, though not absolute, prohibition on the sale or other disposition of property in *waqf*. Indeed, this prohibition is directly attributed to the Prophet, who is reported to have declared that "You must bestow the actual Land itself, in order that it may not remain to be either Sold or Bestowed, and that Inheritance may not hold in it." However, there are certain strict exceptions to this. In cases where *waqf* property has fallen into "ruins or ceases to produce any benefit, so that the objects of the *waqf* cannot be fulfilled," the *mutawalli* can apply to the *qadi* for permission to sell it. Nevertheless, the *mutawalli* is only allowed to sell the property and reinvest the proceeds in other properties or exchange properties. Undeniably, a sale or exchange of properties is permitted, even if property is not in a ruinous or unproductive state if the *waqif* originally authorized the sale or exchange when the *waqf* was established. Some founders seem to have approved a power of sale for a diversity of reasons. In the absence of explicit authorization, the power to sell or exchange is very strictly exercised and *waqf* property may not, generally speaking, be sold in exchange for another property merely because the resulting increase in corpus would be beneficial to the *waqf*.

While some *fuqahaa* have recognized the right of sale purely for gain, most have not, and orthodox theory clearly disapproves of this practice. As for new property acquired in an exchange or through investment of the proceeds of the sale of the original property, all the incidents of *waqf* would attach to the new property which will be subject to the same conditions as the original property. Moreover, through an inspired interpretation of the founder's directives, a *mutawalli* could make large transformations that the founder would barely have expected, let alone permitted. Where such

[297] Schoenblum, J.A. (1999) "The Role of Legal Doctrine in the Decline of the Islamic Waqf," *op. cit.,* p. 1199.

changes are made, they must be strictly supervised by the *Shari'a* court *qadi*, as the usufruct or income is under considerable limitations. For instance, income must be used first for the preservation of *waqf* property and only the surplus can benefit the beneficiaries. The *waqif* can exercise such discretion in the *waqf-nama*. Therefore, there is a duty to maintain the principal imposed on the *mutawallis* to keep up the property. It is important to note that in the distant and near history, many adjustments have been made in practice to overcome unjust or uneconomic circumstances.

7.4 Waqf in Wider Context

Waqf law could not be differentiated geographically. Although conditions of Muslims differ dramatically from one country to another, the doctrine is largely uniform and unvaried from one region to another. This book considered one country with Islamic populations but under a non-Islamic power, namely, the Israeli rule.

A unique characteristic of the *waqf* from the time of its origins is the embodiment of a distinctly defined legal construct, able to address practical wealth management and disposition requirements of property owners. Its evolution and juridical recognition were directly linked to the adequacy of formal legal structures that were employed to accomplish the goals of certain individuals.

The flexible nature of *waqf* law and the history of its pragmatic evolution are sharply discernible from the present statute-based, relatively inflexible *waqf* legal position in Israel. My fieldwork in Jerusalem has revealed that due to the absence of an enforcement system, Israeli law has facilitated for the beneficiaries to own the *waqf* property, whereas such events were rarely found in Islamic history. As Schoenblum put it, "the common law process of lawmaking and evolution of doctrine was largely, if not completely, foreclosed in the case of Islam."[298]

However, the traditional orientalist view (like that of Schoenblum) of Islamic law as stationary and static in time for a millennium has been challenged. The statement of "closing of the gates" *(insidad bab al-ijtihad)* and the dominance of *taqlid* (imitation) was not approved by the *fuqahaa*. This suggests the possibility of a more varied and flexible jurisprudence, generally, and with regard to *waqf* law in particular, which is more responsive to actual conditions of the continuous economic changes.

A central element that influenced the *waqf* is the modern practice within sovereign regulations in Muslim countries. The family *waqf*, at least, has largely been regulated out of existence in a number of predominately Muslim countries, for example through Egypt Law No. 180 of September 1952. Also, prior to the new military regime that took power in Syria in the early 1950s, a serious effort had been made to "reform" the *waqf* per the Legislative Decree No. 762 of May 16, 1949. The *waqf dhurri* is no longer permitted there and there was no grandfathering for pre-existing *awqaf*.

[298] *Ibid.*

Schoenblum claims without any theoretical, let alone practical, evidence that:

> "The utilization of legislation to address *waqfs* in modern society is a direct response to resistance of many Islamic authorities to significant change in the traditional law. It is an outgrowth of the failure of that law to adapt naturally in prior periods to radically different social and economic realities."[299]

Earlier in the same text, he had claimed otherwise, i.e., that the 'reforms' in Arab countries had caused the prohibition and reining in of the *waqf* through an imperative stage "in the consolidation of power by new governing elites, such as the military, and the elimination of potentially alternative power centers of accumulated wealth and prestige that could challenge their hegemony." He added that, "the legislations have not served as a liberalizing influence with respect to *waqf* law but as a prohibitory or constraining, 'reformist' one."[300]

I argue that the foundational and operational impacts discussed earlier explain well why the present *waqf* has suffered a different fate than the early *waqf*. Present regulations diminished the status of the *waqf* by claiming that it would not be able to adapt to current economic complexes. This raises the question, as posed by Layish, what, then, are the grounds and reasons that the institution of the *waqf* has survived, and even flourished, in East Jerusalem, when it has been on the decline in Israel and in some Arab countries?[301] Reiter noted that making widespread use of the *waqf* in Jerusalem ran counter to its decline in other Islamic countries in the 20th Century.[302]

My fieldwork suggests that the independence and autonomy attached to the *waqf* were vital components for its sustained existence. The decline, therefore, may not be attributable to the character of the doctrinal *waqf* law. Even though there is inadequate and even uncertain empirical data on *waqf*, at least in Israel, the argument here is that while it may have served efficient purposes in its earlier development, such as the consolidation of land for agricultural use, it has been unable to accommodate the demands of a modern structural state.

Once again, there were many reforms made to address these conditions that could not compensate for the absence of a systematic legal doctrine in harmony with the modern structural state. The main reason for the decline of the *waqf* is the absence of an independent Islamic rule that can hold accountable any of the *waqf* participants who misuse their duty or abuse the *waqf*. Indeed, the *waqf* is proficient to adapt itself and even live on under non-Muslim powers (examples being the *waqf* in India today and the Palestinian *waqf* under the British Mandate), which provides a strong justifi-

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[299] *Ibid.,* p. 1197.

[300] *Ibid.*

[301] Layish, A. (1994) "The Muslim Waqf in Jerusalem after 1967: Beneficiaries and Management," In: *Le Waqf dans le monde musulman contemporian (XIXe-Xxe siecles)*, ed. By Faruk Bilici, Varia Turcica, Istanbul: Institute Francais d'etudes Annotoliennes, 26, p. 146-48.

[302] Reiter, Y. (1997) *Islamic Institutions in Jerusalem, op. cit.*

cation for the successful performance of *awqaf* and the development of their properties in Muslim countries and non-Muslim economies.

7.*5* Jerusalem

The *waqf* is neither finite nor static. Contemporary management methods were constantly developed to improve the efficiency of collecting revenue. By contrast, corruption and maladministration led to conversion of some *awqaf* to privately owned property due to the absence of an enforceable legal system that holds *waqf* players misusing their position accountable.

One way of observing the role of *waqf* in Jerusalem is examining the extent of *waqf* lands, however, the estimate is uncertain and contradictory. The results from previous studies are based on insufficient data as the Ottoman land structure was not adequate and the British started organizing a land registry that was not completed before the end of the Mandate. Dumper (1994) noted complications regarding contradictory units of measure.

Combining the literature with fieldwork, it can be argued that the historic role of the *waqf* is considered by Israel as a threat to the political stability of the state and the institutional dominance of the Jewish majority. Israel exerted varying degrees of control that have significantly affected the performance of *waqf*, including 'co-optation of leadership,' replacing the *Shari'a* Court of Appeal in Jerusalem, and forcing new *qadis* to swear allegiance to the president of Israel. Many of the *waqf* properties lost between 1960-1994 were on the account of these state-appointed *qadis* who tended to rule against *Shari'a* principles to prove their commitment to Israel. Israel also introduced a peculiar distinction between so-called "religious" and "secular" *awqaf*, which cannot be approved in *Shari'a* law, where endowed commercial *waqf* is still regarded as religious, in the same meaning, as a cemetery is religious. Integration of the *waqf*, controlling its internal administration, and monitoring and hindering the establishment of new *waqf* were and are common practices by the Israeli government. State interference stands in stark contrast to the independence and autonomy that are basic foundational aspects of *waqf*.

7.6 'Reform' of *Waqf* in Israel

Amendment No. 3 to the 1965 Absentees' Property Law as described by Israeli scholars as "reform" of the *waqf* in Israel has effectively served of Israeli policy interests. It freed the remaining *waqf* from the restrictions of *Shari'a* law and thus granted the state a further tool to transfer those remaining properties from Muslim to Jewish hands. My fieldwork has revealed that the amendment cannot in no way be regarded a "reform" of the *waqf* system, and was strongly resisted by the Muslim community.

However, several Israeli researchers continue to interpret these amendments in a constructive manner. In examining the influence of the amendment upon the *waqf,*

Eisenman claimed that it afterwards "emerged much the same as it had been in the later days of the mandate and not very different from that in the Ottoman Empire." Moreover, he argued that the 1965 amendment did not interfere much with *waqf* law itself but rather was an advantageous practice by the Israeli government towards the needs of the Muslim community.[303]

Israeli scholars in general argued that Israeli legislation granted the Muslim community a substantial degree of control over the *waqf* system through the board of trustees, which 'expectedly' administered to benefit the interests of the Muslim community. Moreover, Israeli scholars observe that Israeli policy did not contravene *Shari'a* law, unlike reforms implemented in other Muslim countries.

However, I argue that the assertion that the 1965 amendment did not violate the *Shari'a* law and only interfered with the *waqf* management and administration is inaccurate. Incontrovertibly, the amendment increased the exclusion of *waqf* from the jurisdiction of the *Shari'a* law and extended the practice that emerged during the Mandate of allowing administrators to discount the principles of *Shari'a* law and the conditions of the *waqf* deed (*waqfiyya*). Transferring the ownership of *waqf* properties from Muslim hands to a Custodian who, on behalf of the Israeli state and through "legal fiction," conveyed them to Jewish hands, surprisingly, cannot be regarded as violating *Shari'a* law. But behind the veil, effectively, such policy was directed towards diminishing the social, economic and political status of the Muslim community in Israel. Although the *waqf* was not fully autonomous during Ottoman and British times, it at least served the interests of the Muslim community. My fieldwork has shown that the Muslim community did not gain any considerable benefit from these so-called reforms.

7.7 Comparison with Muslim States

As far as the situation in other Muslim countries is concerned, Eisenman observed:

> "There is very little in the reforms that can be said to be inimical to their interests by comparisons with the previous state of affairs. Through interference has occurred in the law applicable to property fallen under the control of the secular government… unlike neighboring Muslim states, no interference was made in the law of *waqf* itself, in effect in the Muslim community. In this regard Israel turned out to be one of the most conservative countries in the Middle East."[304]

Another orientalist, Layish made comparisons between Israel and the Arab states, arguing that the 1965 amendment was part of a spectrum of "*waqf* reforms" implemented in the Arab world and contending that the Israeli legislators followed the ex-

[303] Eisenman, R. H (1978) *Islamic Law in Palestine and Israel: a History of the Survival of Tanzimat and Shari'a in the British Mandate and Jewish State,* Leiden: E.J. Brill, p. 159-60.
[304] *Ibid.*

ample of several Arab states, particularly Syria and Egypt, in introducing *waqf* 'reforms'. He compared the abolition of family *waqf* in Egypt to the Israeli Custodian's release of family *waqf* to their beneficiaries and argued that the amendment was a liberal and progressive reform.[305]

In fact, the reforms that took place in Syria, Egypt, Jordan and Lebanon mainly affected the family *waqf*, while *waqf khayri* was incorporated into the state's structure on several occasions, benefitting the Muslim community. Whereas the Israeli government neither redistributed *waqf* lands to benefit the Palestinian community, nor did it incorporate *waqf khayri* into the state structure as other Arab countries had done. Instead, it confiscated and administered these *awqaf* and restricted Muslim jurisdiction over them, thus depriving the Muslim community to benefiting from them - which is the principal purpose of establishing *awqaf*.

7.8 The Real Reason for the Decline of the Waqf in Jerusalem

The British colonizers committed several violations towards the *waqf* and did not care about their sanctity. The municipality of Jerusalem under the British occupation administration purchased *waqf* lands and properties to build institutions on them, such as the East Jerusalem Post Office (a family endowment for the Khalili family), and deducted a portion of the Asali endowment at Damascus Gate (Bab Al-Amud) to set up a police station.[306]

The steps taken by the British set a precedent that the Israeli occupation government resumed in 1948 and again after the 1967. Many properties that were an important economic tributary to charitable and family endowments within the holy city were lost, including the Mamilla cemetery, the Palace Hotel established by the SMC on Jaffa Street in 1929, many lands and real estate that were endowed for *waqf* institutions in the Old City, and lands in Sheikh Jarrah endowed by Jerusalem philanthropist, Amina Al-Khalidi for the construction of a hospital.[307] In 1967, the Israeli occupation proceeded to demolish the entire Mughrabi Quarter with all its *awqaf* and other Palestinian properties. Jerusalem families lost ownership of their lands and real estate, which were confiscated for the benefit of Jewish settlement. One example includes the Jewish cemetery in the East Jerusalem neighborhood of Ras Al-Amud, which is a conglomeration of charitable *awqaf* that were endowed by Salah Al-Din Al-Ayyubi in the year 1188 AD.[308]

The Jerusalemites refused to submit to the Israeli Ministry of Religions in 1967, so after only about three weeks of occupation, they established the Higher Islamic Council, which took over the management of Muslim affairs in the city until the situation

[305] Layish, A. (1966) "The Muslim Waqf in Israel," *Asian and African Studies,* Vol. 2, pp. 41-76.
[306] Reiter, Y. (1997) *Islamic Institutions in Jerusalem, op. cit.*, Dumper (1992) *Israel's Policy towards the Islamic Endowments in Palestine, op. cit.,* p. 194.
[307] Ghosheh, M., (2009) *The Islamic Endowments in Jerusalem*, *op. cit.,* p. 20.
[308] *Ibid.*, p. 21.

stabilized with the return of the Jordanian administration to the administration and guardianship of the Jerusalem *waqf*. During the past years, the conflict over Jerusalem's property has continued as an existential struggle related to the identity, importance and character of the city. Either it will remain a mixed Arab, Islamic and Christian city, or it will turn into a solely Jewish city.[309] The Israeli occupation has carried out many violations on Jerusalem's Old City *awqaf*, including the following:

- Seizure of endowments under various security pretexts, such as of the *Shari'a* court in the Tankazi school overlooking Al-Buraq Wall.
- Confiscation of a number of houses in the Old City.
- Confiscation of rooftops, shops, and real estate, under various pretexts.[310]
- Classifying some *waqf* lands as 'green areas' to erect biblical gardens on them, depriving their owners of the means of benefiting from them, and obliterating their Arab-Islamic identity. The most recent example is the Yusufiya cemetery.[311]
- Confiscation of *waqf* lands through declaring the area on which it was built as of security importance for military purposes.
- Declaring *waqf* properties as abandoned lands, because the custodian, the *mutawalli*, or the family that owns it had become absentee according to Israeli regulations.
- Declaring the endowed lands to be *miri* lands, and later re-registering it as an invalid endowment. This type of expropriation applies specifically to large areas of Miri agricultural land that have been endowed.

Through these means the Israeli occupation managed to control 80 properties inside the Old City between 1967 and 2018, raising the number of settlers there to 1,700.[312] The appropriation of *awqaf* in Jerusalem began in the Mandate era and continued after the 1948 War. Many of the Palestinians who died in the War had been in charge of their family endowments or had extensive experience and knowledge in *waqf* matters, real estate and borders. Numerous other owners were displaced, their tracks disappeared, or contact with them was lost. The Mandate was also a politically turbulent period which led to the loss of many of *waqf* properties, for example, that of Hajj Amin Al-Husseini who was expelled to Lebanon in 1937.[313] Among those who were liquidated during that period were trustees of family *awqaf,* including Najm Al-Din Argab Quttainah, trustee of the Quttainah family endowment and their property

[309] *Ibid.*, Dumper, M. (1992) *Israel's Policy towards the Islamic Endowments in Palestine*, *op. cit.,* pp. 24-25.
[310] Ghosheh, S. & A. Al-Abadi (2014) "Islamic Endowments in Jerusalem," *op. cit.,* 105-106.
[311] Fakhr El-Din, Munir and Salim Tamari (2018), Jerus*alem Endowments and Properties*, *op. cit.*, 38-39.
[312] Kaddoura, Mahmoud (2018) "Association for the Preservation of the Waqf and Jerusalem Heritage," in Family Endowments in Al-Quds Al-Sharif, reviewed and edited by Nadia Saadeddin, Amman: Arab Thought Forum, p. 50.
[313] See "Amin Al-Husseini", *Encyclopedia*, Vol. 4, 1st. ed. 1984, The Palestinian Encyclopedia Authority, Damascus, pp. 138-142.

agent, who was martyred in 1947. This has had a negative impact on the family endowments in Jerusalem, many of which became vacant after the martyrdom or displacement of these people or the *waqf* guardians. Sometimes families did not even know the locations of their real estates, or the limits that were assigned to their endowments, because they did not receive from the previous trustee. For example, many members of the Al-Tabji family, which owns a famous endowment near the neighborhood of Bab Al-Khalil in the Old City of Jerusalem, migrated to Lebanon. Other Jerusalemite families lost their commercial businesses and shops in western Jerusalem, for example on Jaffa Street and Mamilla.[314]

Some of the holders of these *awqaf* took advantage of the state of chaos left by the wars. They denied the *waqf* title and hid the *hikr,* or lease contracts, that bind them to the endowment. Some of them also registered these properties in their name in the settlement records at the Land Department to claim ownership.[315]

Other *awqaf* were legitimately lost in the war, as some families found real estate in their hands that they had inherited from their fathers, who had died in the war, but that did not have any documents showing the nature of the real estate. In these cases, some *awqaf* were recorded as real estate belonging to these heirs. Still, there are properties that were monopolized for long periods of time, as their holders claimed that it is private property due to the conditions caused by the wars in the city, and the loss of original *hikr*.[316]

What complicates the issue is that at the present time in the city of Jerusalem, there is no complete definitive *tabu* register that divides all the lands therein into basins and plots, or separates the ownership of the properties of the Old City and its environs that surround the blessed Al-Aqsa Mosque. What is currently available from the land registry, if anything, are copies of the Turkish, British and Jordanian title deeds. There are definitive title deed records only for some areas. Even if the records included a division of lands into basins and plots, the division all depends on the area of the property, its coordinates, and the borders adjacent to it. Sometimes, in an effort to seize them, the new basins and plots were manipulated by the official authorities, changing the boundaries of the property so that it would be difficult to identify them in the *awqaf* claims, which have changed with the passage of time. As some of the boundaries were old, determining the modern boundaries is often very difficult unless the property is a well-known landmark.

As mentioned above, the Israeli government has also legislated racist laws that allowed it to confiscate and expropriate *awqaf*. These laws were numerous, including the Absentees' Property Law, the Israeli inheritance law, which was not commensurate with the Islamic inheritance system, laws that gave family affairs courts or civil

[314] Zabarka, Khaled & Hamza Quttineh (2017) *The Legal Reality of the Islamic Endowments in Jerusalem,* International Forum of Endowments Jerusalem Shaban 1438 AH/May AD, Istanbul, p. 6.
[315] *Ibid.*, p. 7.
[316] Sabri, Ikrima (2011) *The Islamic Endowment Between Theory and Practice*, Dar Anfas, p. 293.

courts a jurisdiction parallel to *Shari'a* courts, and laws that aimed to limit the powers of *Shari'a* courts in the country.[317]

Jordan has an explicit guardianship in the management of *waqf* properties in Jerusalem. The Oslo Accords stated explicitly that Jordan has custodianship over the Islamic *waqf* in Jerusalem from a legal and administrative point of view, which was confirmed in the Jordanian-Israeli Peace Treaty of October 26, 1994 (also known as Wadi Araba Agreement). In Article 9-2, Israel pledged to respect Jordan's sovereignty over the holy sites in Jerusalem. Jordan exercises its legal and administrative role through various bodies within the framework of the Islamic Endowments, Affairs and Holy Sanctuaries Law of 2001, namely, the *Shari'a* court on Salah Al-Din Street and in its branch in Wadi Al-Joz in Jerusalem, the Court of Appeal and the Department of the Judge of Judges, both located at Al-Aqsa, as well as the Islamic Waqf Department with its headquarters at Bab Al-Nazir, and the Islamic Waqf Council.

The *Shari'a* courts were transferred to the Israeli Ministry of Religions, and later, in 2001, to the Ministry of Justice. The jurisdiction of the *Shari'a* courts in *awqaf* affairs and their internal management was restricted in this way. Amendment No. 5 of the Family Affairs Court Law of 2001 further reduced the powers of the Israeli *Shari'a* courts. Thus, cases related to proving the ownership of the *waqf* or confirming the existence of *waqf* came under the jurisdiction of the regular, civil courts. There were also several civil laws adopted by Israel to reduce reliance on the *Shari'a* laws. For example, the Law of Trusts of 1979 allows the establishment of a *waqf* not in accordance with *Shari'a* rules but with Israeli civil laws. There is also the 1980 Law of Corporations which allowed the establishment of a charitable institution in accordance with civil laws but not according to *Shari'a*. Likewise, the 1965 Inheritance Law made it possible for a will to be set not in accordance with *Shari'a* regulations.[318]

Among the problems that the *Waqf* in Jerusalem suffers from is the danger of resorting to the Israeli courts for *waqf* issues. Israeli judges are ignorant of the provisions of the *waqf* in giving and moving out. An example of this was a ruling that did not affiliate parts of a mosque that was adjacent to a *waqf* because it was not mentioned in the *waqf* deed.[319] Another example is the issue of protected rents in the city of Jerusalem. According to Article 10 of the Israeli Tenant Protection Law of 1972 and its amendments, a lease is protected if the property was leased before August 20, 1968, whether or not a preliminary payment was paid for the leased property. Whereas the lease is protected after this date only if the preliminary payment was paid by the lessee. One of the negative effects of this law is to enable the tenant to stay in the en-

[317] Zabarka, Khaled & Hamza Quttineh (2018) "The Legal System of the Islamic Endowment in the City of Al-Quds Al-Sharif," Paper presented to the Islamic Endowment Conference in Jerusalem under the supervision of the Supreme Islamic Council of Jerusalem, Jerusalem.

[318] Zabarka, Khaled & Hamza Quttineh (2019) "The Danger of Going to the Israeli Courts in Disputes Related to Islamic Endowments," Research Paper presented to the 5th Islamic Endowment Conference, Jerusalem.

[319] Decision of the Jerusalem Magistrate's Court in the case (T-A-13-06-27344) on August 18, 2018

dowment property for a long period of time and at a low rent, contrary to the terms and conditions of the *waqf.* This has led to the decline of the *waqf* and ultimately its termination in accordance with the instructions of administrative laws.[320]

On the one hand, commercial and cultural activities thrived as Palestinians escaped from complete control by Israel. On the other hand, investment and development of properties in Jerusalem has been neglected due to uncertainty and ambiguity regarding the *waqf* system and judicial enforcement. An interview with the *mutawalli* of a family *waqf* revealed a difficult situation regarding the management and organization of the waqf. Although the he is keen to solve the problem, he is unable to do so through the Jordanian court because their decisions cannot be implemented. He also can't turn to the Israeli *Shari'a* court as this would imply that he recognizes the jurisdiction of the Israeli legal system over Jerusalem.

Israeli occupation authorities seek to Judaize the city through "development" plans. One ongoing example is the Bab Al-Rahma cemetery, located outside the southeastern wall of Al-Aqsa Mosque, where they try to take control on the pretext of building a 'national park', with the goal to prevent Muslims from burying their dead there. The Islamic Mamilla cemetery was also not spared - a large number of graves was demolished in that historic cemetery and a museum erected on its grounds – nor was the Yusufiya cemetery, whose lands were also confiscated under the pretext of 'public interest.'

Image 6: The seizure of the Yusufiya cemetery, Jerusalem (2021).
(Source: Bahnfrend CC BY-SA 4.0)

[320] Khaled Zabarka – Hamza Quttaineh (2019), "The Danger of Going to the Israeli Courts in Disputes Related to Islamic Endowments."

7.9 Conclusion

The *waqf* system succeeded for a millennium in financing Islamic societies for a number of reasons, the primary one being its solid foundation based on the development of jurists who benefitted from the flexibility of *ijtihad*. This allowed the *waqf* to be compatible and adaptable to substantial economic changes. I argue that the decline of the *waqf* thus cannot be attributable to its foundational basis, nor to its legal doctrine, but rather to factors unrelated to its legal theory. The decline can strongly be linked to other issues, first and foremost the absence of a comprehensive Islamic legal system that can accommodate the *waqf* and sustain it.

Another crucial factor are the political impacts. There were many political incentives to change the *waqf*. For instance, in Muslim countries, the main reason to control *waqf* was to control its assets in order to strengthen one's existence. In Israel the grounds were different: the need to acquire land and constrain Palestinian political aspirations overrode the need to address Muslim demands that the *waqf* system be given some form of representation. Israel considered the *waqf* as "a fundamental challenge to the Israeli state and its territorial and ideological hegemony."[321]

At the beginning of the 1990s, the Palestinian community in Israel started 'unofficially' to play an important role in protecting and developing the *awqaf* properties in Israel that were deserted and vulnerable since 1948. The Al-Aqsa institution based in Umm Al-Fahm started to visit *awqaf* properties in order protect them and petitioned the Israeli civil courts to re-use them for the benefit of the Muslim community. However, Al-Aqsa's requests were rejected and Israel even closed the institution down.

Moreover, in 1994, when the *qadi* of the *Shari'a* Court of Appeal Ahmad Natour was appointed, he emphasized and requested on many occasions that the Muslim community should manage and benefit from their *awqaf*. However, to win a legal battle is an extremely difficult practice in the Israeli judiciary system. Unfortunately, the Israeli confiscation policy of the Muslim *awqaf* continues, driven by the political incentives. Thus, the main reasons for the decline of the *waqf* in Palestine/Israel are political due Israel's continued desire to control and acquire more land.

Whereas the *waqf* should have expanded its province in the modern state, it has experienced an unreasonable decline throughout the Islamic world. A number of Muslim and Western writers argue that the decline was not due to deficiencies with respect to the legal doctrine of the *waqf* but rather a result of the impacts of political powers.

As a legal regime, *waqf* law has been largely responsive, particularly in light of changing classifications of wealth, socio-economic conditions and state structure. My field study revealed a number of explanations to the success of the *waqf's* legal doctrine in adapting to changing economic situations. However, the tradition of creating new

[321] Dumper, M. (1994) *Islam and Israel, op. cit.,* p. 128.

awqaf in Palestine, specifically in Jerusalem, has vanished due to Israeli confiscation policies.[322]

My study showed that a substantial cause of the *waqf's* decline are the inappropriate statutory reforms. Legislative 'reforms' in countries with substantial Muslim populations (Muslim and non-Muslim) affected the performance of *waqf*. *Waqf* legislation should have instead gradually eliminated the significant impediments that hindered the efficiency of the *waqf*. Instead, legislation addressing the *waqf* has tended more to its overregulation or absolute prohibition, and in several occasions has been accompanied by confiscation of property held in existing *awqaf*, as the case of the Jerusalem *waqf*.

During the Ottoman Empire's rule, the *waqf* was treated as sacred and was regulated by Islamic *Shari'a* law. Indeed, during those times, there were several attempts to control or confiscate *waqf* properties, but this was greatly resisted. Such practices were regarded as violating *Shari'a* rules. In contrast, practices of nationalization of the entire *waqf* system by contemporary Muslim states are principally in denial of *Shari'a* law. This has greatly affected the performance of *waqf*.

Muslim *fuqahaa* have clearly recognized the flexible characteristic of the *waqf* system regarding the foundational and operational issues, in contrast with the few, mostly Western scholars with no legal background who still insist that the *waqf's* perpetuity characteristic is 'static' and cannot be challenged. In reality, the traditional *waqf* system was flexible enough to remain the principal basis for social services across Islamic history.

The present study argues that the *waqf* has played an essential role in preventing expropriations by the state and forced the recognition of unchallengeable property by placing it into a sacred legal code. Through its codification in *Shari'a* jurisprudence, the *waqf* provided a symbolic and legal guard against encroachment by the state of such endowment. The *waqf* and the state in the past were mutually reinforcing, such as during the long period of the Ottoman era.

The *waqf* has managed to restructure its operational role through legal flexibility, and has, in practice, reoriented its mission through various means. While the modern *waqf* has become mainly a stagnant institution, the earlier *waqf* proven to be remarkably flexible and responsive to changing conditions affecting public endowments and management of family wealth and its preservation. Indeed, contemporary *waqf* has continued to lose position. A victim of political influences that have left it unable to adapt to modern conditions due to the absence of an adequate legal system or adjudicatory mechanisms to support it.

[322] The remaining traces of the 'sacred culture of the *waqf*' can be found in this author's village, on a plot of *waqf* land (one of dozens of plots of *waqf* lands that, surprisingly, were not confiscated), planted with olive trees. Volunteers from the village tend to 'clean off' their clothes from the soil of the olive orchard after they finish picking the olives, fearing they might take home traces of soil from "sacred *waqf* land."

While the *waqf* has successfully functioned for long periods under different conditions; its modern decline seems predictable. Its overregulation alongside obstacles of enforcement made any different outcome unfeasible without the retention of the *waqf's* autonomy and independence. The decline is due to absence of autonomous local (*Shari'a)* law that can embrace the development and reform of the *waqf* system. Therefore, this study has concluded that a high-level official and political intervention is necessary to limit the dispossession of more *waqf* lands in general, especially the *waqf* in Jerusalem.

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APPENDICES

APPENDIX NO. 1: INFORMATION SHEET FOR PARTICIPANTS

30/06/2021

Title: The Islamic Waqf in Jerusalem:
Status, Legal Challenges, and Possibilities for Revival.

I would like to invite you to participate in a research project. Before you decide whether to take part, I would like to explain why the research is being carried out and what it will involve. Please take the time to read the following information carefully and discuss it with others if you wish. Please ask me if there is anything that is not clear or if you would like more information.

Thank you for reading this.

What is the purpose of the study and who is conducting it?
My name is Haitam Suleiman. I am a researcher in Law. I am undertaking this research as part of project on the Waqf in Jerusalem managed by PASSIA and funded by the EU. The main objective of this study is to explore the reasons behind the decline of *waqf* in Jerusalem and how the State rules influence the *waqf*.

Why have I been approached?
I am asking anyone involved with the legal and administrative aspects of *waqf* and/or knowledgeable about the *fiqh* of *waqf*.

What does the study involve?
The research will consist of two phases:
Phase 1: Participants in the first phase are "practitioners, i.e., those who are involved with the administration of *waqf* as well as with its legal aspects (e.g., managing directors at *waqf* institutions, *mutawallis* of *awqaf; Shari'a* court *qadis*).
Phase 2: In the second phase, scholars on *waqf* will be involved.

If you do not wish to answer some questions or you wish to leave the interview early, you are free to do so. I will tape-record the interview so that I am able to concentrate on listening to you instead of writing lots of notes. This way I also will not miss anything or forget what you said. I will be the only person to have access to these tapes. The interviews will be transcribed and once the study is finished, I will destroy all tapes and transcripts.

What are the possible benefits of taking part?
Taking part in the first and/or second phases will contribute to get a clear understanding about the current situation of *waqf* in Jerusalem and draw a picture about possible success in the future.

The information gathered from the interviews will also be very useful to others researchers in this area.

Will the information I give remain confidential?
All information you provide will remain confidential. This means that I will not discuss the content of your interview with anyone else other than research team. Your identity and any other names mentioned in the interview will be protected in any analysis as well as in the final conclusions.

What happens next?
If you decide to take part in the first or second part of this study you will be asked to sign a consent form. You are free to change your mind and withdraw at any time and without giving a reason.

Thank you for your time.

YOU WILL BE GIVEN A COPY OF THIS TO KEEP,
TOGETHER WITH A COPY OF YOUR CONSENT FORM

APPENDIX NO. 2: CONSENT FORM FOR PARTICIPANTS

Name of researcher(s): Haitam Suleiman
Contact Tel. No: 00972-544777609
Contact Email: haitamsuleiman@hotmail.com
Name of Affiliation: PASSIA
Title of Study: The Islamic Waqf in Jerusalem: Status, Legal Challenges, and Possibilities for Revival.

Statement by Participants:

I confirm that I have read and understand the information sheet for this study. I know what my involvement will entail and all questions have been answered to my satisfaction.

I understand that my participation is entirely voluntary, and that I can withdraw from the study at any time without prejudice.

I understand that all information obtained will be confidential.

I agree that research data gathered for the study may be published.

Contact information has been provided should I wish to seek further information from the researcher at any time for purpose of clarification.

As part of this project, I am going to make audio recording of you. I would like you to indicate below to what uses of these records you agree. In any use of these records, name will not be identified.

- The records can be studied by the researcher for use in the research project.
- The records can be used for scientific publications and/or meetings.
- The written transcript and/or records can be used by other researchers.
- The records can be shown in public presentations to non-scientific groups.

Name of participant and his Signature

…….. Date: / /

Statement by Researcher:

I have explained this project and the implications of participation to this participant without bias. I believe that consent is informed and that he/she understands the implications of participation. I explain the potential benefits of current research.

Name of Researcher and his signature

Haitam Suleiman ……. Date: / /

YOU WILL BE GIVEN A COPY OF THIS FORM TO KEEP