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## Editorial

- **Waqf and Education: A Partnership Required for Building Communities of Knowledge.**

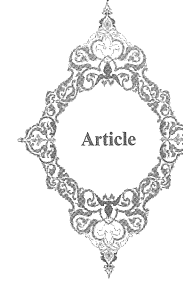
## Articles in English

- **The Alienation of Waqf Property in Al-Andalus.**  
Ana María Carballeira Debasa
- **The Role of Cash Waqf as a Financial Instrument in Financing Small and Medium Sized Enterprises (sme).**  
Ahcene Lahsasna

## Articles in Arabic

- **Encroachments in Wadi Numan and their Effect on Ain Zubaida, Arafa and Um el Qurra University.**  
Siraj Omar Abu Ruziza
- **The Role of Waqf in Safeguarding Architectural Legacy and Realizing Sustainable Development.**  
Mu'awiya Saidouni
- **Women Waqf in Istanbul in the First Half the 16<sup>th</sup> Century.**  
Faruk Bilici

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## The Alienation of Waqf Property in Al-Andalus<sup>(\*)</sup>

By: Ana María CARBALLEIRA DEBASA<sup>(\*\*)</sup>

Few institutions have left such a deep impression on Islamic society throughout the centuries as the institution of *waqf* did. Progress registered in terms of knowledge of this subject has unquestionably been significant. The different perspectives from which this subject has been approached have contributed to bringing into focus a multiform reality, providing information that leads towards a global and, at the same time, specific understanding of the institution. Nonetheless, despite the existence of these works, we certainly cannot claim that the institution of *waqf* has been sufficiently explained within the context of Islamic civilisation. It is to be hoped that work currently being developed by researchers of different nationalities will contribute to clarifying the least known aspects of this classical institution and to dispersing the unknown quantities that still cloud our perception in this area.<sup>(1)</sup>

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(\*\*) Escuela de Estudios Árabes (CSIC, Granada).

(1) It is precisely within this framework that the line of research I have been developing over recent years is situated. One of the aspects I have dealt with is the role played by the institution of *waqf* within the context of Andalusí society. See, among others, the following publications: A.M. Carballeira Debasa, *Legados pios y fundaciones familiares en al-Andalus (siglos IV|X-VI|XII)*, Madrid, 2002; *idem*, "Pobres y caridad en al-Andalus", in C. de la Puente (ed.), *Estudios Onomástico-Biográficos de al-Andalus. XIII (Identidades marginales)*, =

Arabic legal sources are to be found among the documents that make it possible, to a certain degree, to palliate the archival impoverishment of Western Islam in the Middle Ages. These are collections of legal opinions or edicts<sup>(2)</sup> for the elucidation of obscure points in the law or to provide guidance for new cases, collections of legal dicta<sup>(3)</sup> adopted by cadis (judges) in the development of judicial processes; models of documents (*watha'iq*),<sup>(4)</sup> that lay down the guidelines that notaries must be oriented by when writing documents. Although the exploitation of texts from this genre provides a high yield for the study of diverse legal aspects that characterise the institution of *waqf* in al-Andalus, the lacunas that are evident in this documental base should not be obviated. Juridical sources, although they are the most explicit with regard to this question, only furnish a fragmentary description of this type of foundation because most of them concentrate on particular technical features of this institution, disassociating them from their context and dispensing with other information that is not relevant for the legal matter they are tackling, including the dates and proper names of founders and beneficiaries, which are only known in some cases.

- = Madrid, 2003, p. 53-91; *idem*, "Pauvreté et fondations pieuses dans la Grenade nasride: aspects sociaux et juridiques", *Arabica. Revue des Études Arabes* 52 (2005), p. 391-416; *idem*, "The Role of Endowments in the Framework of Andalusian Society", in M. Borgolte (ed.), *Stiftungen in Christentum, Judentum und Islam vor der Moderne. Auf der Suche nach ihren Gemeinsamkeiten und Unterschieden in religiösen Grundlagen, praktischen Zwecken und historischen Transformationen*, Berlin, 2005, p. 109-121; *idem*, "Caracterización de los pobres en la literatura paremiológica andalusí", *Al-Qantara*, XXVII (2006), p. 105-135; *idem*, "Forms and Functions of Charity in al-Andalus", in Y. Lev and M. Frenkel (eds.), *Charity and Giving in Monotheistic Religions*, Berlin-New York, 2009, p. 189-202. Regarding *waqf* in al-Andalus, see also A. García Sanjuán, *Hasta que Dios herede la tierra. Los bienes hábices en Al-Andalus (siglos X-XV)*, Huelva, 2002; *idem*, *Till God Inherits the Earth. Islamic Pious Endowments in al-Andalus (9-15th Centuries)*, Leiden-Boston, 2007.
- (2) See Ibn 'Iyad, *Madhahib al-hukkam fi nawazil al-ahkam*, ed. M. b. Sharifa, Beirut, 1990 and trans. D. Serrano, *La actuación de los jueces en los procesos judiciales*, Madrid, 1998; Ibn Rushd (al-Jadd), *Fatawa Ibn Rushd*, ed. al-M. b. al-T. al-Talili, 3 vols., Beirut, 1987; al-Sha'bi, *Al-Ahkam*, ed. S. Haloui, Beirut, 1992; al-Wansharisi, *Kitab al-Mi'yar al-mu'rib wa-l-jami' al-mugrib 'an fatawi ahl Ifriqiya wa-l-Andalus wa-l-Magrib*, ed. M. Hajji *et alii*, 13 vols., Rabat, 1981-1983.
- (3) See Ibn Sahl, *Al-Ahkam al-kubra*, ed. R. al-Nuaimy, *Diwan al-Ahkam al-kubra: al-nawazil wa-l-'lam li-bn Sahl*, 2 vols., Riyadh, 1997.
- (4) See Ibn al-'Attar, *Kitab al-Watha'iq wa-l-sijillat*, ed. P. Chalmeta and F. Corriente, Madrid, 1983 and trans. P. Chalmeta and M. Marugán, *Formulario notarial y judicial del alfaqú y notario cordobés Ibn al-'Attar, m. 399/1009*, Madrid, 2000; Ibn Mugith, *Al-Muqni' fi 'ilm al-shurut (Formulario notarial)*, ed. F.J. Aguirre Sádaba, Madrid, 1994 and partial trans. S. Vila, "Abenmoguit. Formulario notarial", *Anuario de Historia del Derecho Español*, 8 (1931), 5-200; al-Jaziri, *Al-Maqsad al-mahmud fi talkhis al-'uqud (Proyecto plausible de compendio de fórmulas notariales)*, ed. A. Ferreras, Madrid, 1998.

Furthermore, in the immense majority of cases a complete transcription of the endowment deed (*waqfia* or *waqf deed*) is not provided, so that what is lacking, *inter alia*, is a more thorough description of the administration of this kind of property, as well as of the different commercial transactions that affected it. Although all these factors do not diminish the importance of this type of documentation, it is not advisable to disregard other sources (historical<sup>(5)</sup>, biographical<sup>(6)</sup>...) which provide additional information and reinforce that contained in the legal texts, so that they prove mutually complementary.

As is well known, the reason for setting up a *waqf* is to perpetuate the pious work to which it is dedicated.<sup>(7)</sup> Perpetuity not only entails the immutability of its founder's stipulations, but is also implicitly accompanied by the conditions of immobility, inalienability, intangibility and imprescribability of the objects donated. As a general

- (5) See Ibn Hayyan, *Muqtabis II. Anales de los Emires de Córdoba Alhaquem I (180-206 H./796-822 J.C.) y Abderraman II (206-232/822-847)*, ed. M.'A. Makki, *Al-Sifr al-thani min Kitab al-Muqtabas*, Riyadh, 2003 and trans. M.'A. Makki and F. Corriente, *Crónica de los emires Alhakam I y 'Abdarrhman II entre los años 796 y 847 [Almuqtabis II-I]*, Saragossa, 2001 (*Muqtabis II/1*); Ibn Hayyan, *Al-Muqtabis min anba' ahl al-Andalus*, ed. M.'A. Makki, Beirut, 1973 (*Muqtabis II/2*); *idem*, *Al-Muqtabis fi ta'rikh rijal al-Andalus*, ed. M. Martínez Antuña, Paris, 1937 (*Muqtabis III*); *idem*, *Al-Muqtabas V*, ed. P. Chalmeta, F. Corriente and M. Sobh, Madrid, 1979 and trans. M.J. Viguera and F. Corriente, *Crónica del califa 'Abdarrhman III an-Nasir entre los años 912 y 942*, Saragossa 1981 (*Muqtabis V*); *idem*, *Al-Muqtabis fi akhbar balad al-Andalus*, ed. 'A.'A. al-Hajji, Beirut, 1965 and trans. E. García Gómez, *El Califato de Córdoba en el Muqtabis de Ibn Hayyan. Anales palatinos del califa de Córdoba al-Hakam II, por 'Isa Ibn Ahmad al-Razi (360-364 H. = 971-975 J.C.)*, Madrid, 1967 (*Muqtabis VII*); Ibn 'Idhari al-Marrakushi, *Al-Bayan al-mugrib fi akhbar al-Andalus wa-l-Magrib*, ed. G.S. Colin and É. Lévi-Provençal, vol. 2, Leiden, 1951 and trans. É. Fagnan, *Histoire de l'Afrique et de l'Espagne intitulée Al-Bayano'l-Mogrib*, vol. 2, Algiers, 1904 (*Bayan II*); *idem*, *Al-Bayan al-mugrib fi akhbar muluk al-Andalus wa-l-Magrib*, ed. É. Lévi-Provençal, Paris, 1930 and trans. F. Maillou, *La caída del Califato de Córdoba y los Reyes de Taifas*, Salamanca, 1993 (*Bayan III*); *idem*, *Al-Bayan al-mugrib fi akhbar al-Andalus wa-l-Magrib*. Vol. IV: *Qit'a min ta'rikh al-murabitin*, ed. I. 'Abbas, Beirut, 1967 (*Bayan IV*).
- (6) See Ibn Bashkuwal, *Kitab al-Sila*, ed. 'I. al-'A. al-Husayni, Cairo, 1955; Ibn al-Faradi, *Ta'rikh 'ulama' al-Andalus*, ed. F. Codera, Madrid, 1891-1892; Ibn Harith al-Khushani, *Akhbar al-fuqaha' wa-l-muhaddithin (Historia de los alfaquíes y tradicionistas de al-Andalus)*, ed. M.L. Ávila and L. Molina, Madrid, 1992; *idem*, *Qudat Qurtuba*, ed. and trans. J. Ribera, Madrid, 1914; 'Iyad b. Musa, *Tartib al-madarik wa-taqrib al-masalik li-ma'rifat a'l'am madhhab Malik*, ed. M. b. Sharifa *et alii*, 8 vols., Rabat, 1983.
- (7) The characteristic of perpetuity of this institution implicitly suggests that the donation of real estate properties is preferable, these being, by nature, imperishable. The perishable condition of personal properties, on the other hand, renders the endowment temporary. This is why some legal doctrines of Islam have expressed their opposition to the donation of personal property. However, documentation regarding this institution in al-Andalus reveals the existence of this practice. This is due to the fact that the Malikis (the dominant doctrine in

rule, the affected goods become immobilized, since they cannot be alienated, this being one of the limitations which characterise the foundation. In this regard, they cannot be sold, inherited, bequeathed or donated. However, although one can conceive, in juridical terms, of an immobilised good, its material immobility is unlikely due to the changing conditions of the circumstances surrounding it.

The documental base being used makes it evident that, in the immense majority of cases, the inalienable and intangible nature of these goods, to a great extent, conditions the legal consultations that arise in relation to this type of property. This aspect explains the fact that, with relative frequency, cases that are dealt with involve a violation of the characteristics of inalienability, intangibility and immobility inherent in these goods. In this connection, the main aim of this article consists of determining the circumstances in which Andalusí jurists authorise the modification of the legal rules that govern the institution of *waqf* and, consequently, the legal criteria that were employed in order to justify the alienation of goods so established. Likewise, cases will be examined in which this act is deemed to be unlawful in the absence of justifiable causes. From this point of view, legal sources can point to the way in which legal doctrine in al-Andalus adapted to the needs of society. To carry out this task, I concentrate my attention on the chronological period encompassed by the 10<sup>th</sup> and 12<sup>th</sup> centuries.

## 1. LAWFUL ALIENATION

It must be borne in mind that, as much as the alienability of *awqaf* is concerned, prohibition is the rule and authorisation is the exception. The *cadi* or judge is responsible for taking the most important decisions in relation to these foundations, especially in the area of alienation.<sup>(8)</sup> Although the alienation of this type of property has had its detractors, who displayed a hostile attitude towards this kind of procedure, Andalusí jurists, in general, considered it to be lawful in really extreme and duly justified cases.

### 1.1. Sale of *waqf*

To judge by the information recorded in juridical sources, the most common procedures by which *awqaf* property was alienated in al-Andalus were purchase transactions, but they could only be executed in particular circum-

= this geographic area) were more flexible in this sense, for they recognised the temporary nature of *waqf*, accepting the donation of all kinds of goods. See J. Schacht, "Early Doctrines on *Waqf*", *Mélanges Fuad Köprülü*, Istanbul, 1953, p. 448-449.

(8) Concerning the role played by the *cadi* in relation to the institution of *waqf* in al-Andalus, see Carballeira Debasa, *Legados pios y fundaciones familiares*, p. 290-296; García Sanjuán, *Hasta que Dios herede la tierra*, p. 263-273; *idem*, *Till God Inherits the Earth*, p. 304-327.

stances: in the case of an unproductive or ruinous *waqf*; in the event the *waqf* formed part of an undivided property; in the case of an urgent need to amplify a Great Mosque; in the event of the impoverishment of the founder or the beneficiaries, prior authorisation granted by the former or in the case of a debt incurred by the beneficiaries. I shall refer to all these cases below.

#### 1.1.1. Sale of unproductive or ruinous *waqf*<sup>(9)</sup>

We have already seen that, from the legal point of view, the endowed goods are immobilized and withdrawn from circulation. However, from an economic perspective, this immobility may become unviable, since real estate, in general, is perishable in the sense that buildings can fall into ruin and land can cease to be productive. This means there may come a time when the *waqf* cannot fulfill the purpose for which it was established. In that case, it is preferable to substitute it with a property of a similar kind which is in good condition and which may be destined as a *waqf*. This practice is known by the name of *istibdal*.<sup>(10)</sup>

Through the sale of real estate property constituted as *waqf* it is possible to permit the continuity of the objective that accompanied this kind of foundation. It is strictly prohibited to replace *waqf* property as long as it is productive, even if better property may be obtained in its stead. In general, the exchange of goods is allowed on the express condition that income from the *waqf* property is undergoing constant decline. Thus, when the real estate ceases to be productive, it can be replaced by another that produces ample income. Yet this circumstance calls into question the inviolability of the endowed good and implies the inevitable modification of the endowment contained in the foundational act. It might be said that it is basically a matter of rectifying an error or a lack of foresight on the part of the founder, who thought that the most effective way of imbuing his action with longlasting consequences was to immobilise the property. However, reality demonstrates that it is necessary to get rid of this property, replacing it with another, the purpose being to safeguard the founding act that set up the *waqf*, so that the good in question does not cease to fulfil the function that was assigned to it. Andalusí jurists generally accepted this alternative solution for it was necessary to choose between the inalienability of the *waqf* and the ruin of the endowed property.

(9) For more information regarding the sale of unproductive *awqaf*, see Carballeira Debasa, *Legados pios y fundaciones familiares*, p. 312-315; García Sanjuán, *Hasta que Dios herede la tierra*, p. 295-301; *idem*, *Till God Inherits the Earth*, p. 345-353.

(10) This operation could come about through a simple exchange or through a formal contract of sale. The sale of an unproductive or ruined *waqf* was the most common procedure to resolve this problem in al-Andalus in the period under study. For an example of exchange, see section 2.2 of this article.

The *cadi* had to verify the situation of unproductiveness of such a property. Once he had ascertained that it had become totally or scarcely profitable and that the situation was irreversible, the next step was to replace this good with another of the same kind and of the same or higher value, located in the vicinity. The operation was executed as follows: the *waqf* good became alienable property and the other good that it was replaced by became *waqf*. Although, from the material viewpoint, there was an exchange of two objects, from the juridical perspective, the *waqf*, as such, did not cease to function as it had been intended. If the sale actually took place, a deed was required recording the replacement of the old property by the new and the complete re-establishment of the endowment.

We have several statements in this regard. Andalusí mufti Ibn Zarb (d. 991), for instance, echoes the opinions of the first Maliki jurists concerning the sale of both real estate and personal property established in a *waqf*. In this connection, he indicates that Malik b. Anas (d. 796) and his disciples categorically prohibited the sale of real estate if it was productive. But they gave their approval when such property was in ruinous condition unless the contrary was stipulated in certain legal works. In addition, they authorised the sale of personal property, provided that the founder had not otherwise stipulated. Whatever the case might be, with the money obtained in the sale a good equivalent to the previous one had to be acquired in order for it to be established as a *waqf* in its stead.<sup>(11)</sup> Andalusí Ibn al-ʿAttar (d. 1009) also expressed his opinion in this respect, without making any distinction between real estate and personal property, preferring the sale of *awqaf* that have no use.<sup>(12)</sup>

### 1.1.2. Sale of *waqf* in an undivided property<sup>(13)</sup>

Other cases where the licitness of the sale of *waqf* was envisaged arose when they formed part of an undivided property, because the property rights were shared by the *waqf* and a private entity.<sup>(14)</sup> In such a case, the administration of the good became complicated because of the detriment that its common use could entail.

(11) See Ibn Sahl, *Al-Ahkam al-kubra*, ed. al-Nuaimy, p. 986-988; al-Wansharisi, *Mi'yar*, VII, p. 421-423

(12) See Ibn Rushd, *Fatawa*, n° 581; al-Wansharisi, *Mi'yar*, VII, p. 75-76. See also Ibn Sahl, *Al-Ahkam al-kubra*, ed. al-Nuaimy, p. 979; al-Wansharisi, *Mi'yar*, VII, p. 454-455 (cfr. V. Lagardère, *Histoire et société en Occident musulman au Moyen Âge. Analyse du Mi'yar d'al-Wansharisi*, Madrid, 1995, p. 257, n° 163).

(13) For further information about the sale of *awqaf* that constituted a part of properties that were undivided, see Carballeira Debasa, *Legados pios y fundaciones familiares*, p. 315-320; García Sanjuán, *Hasta que Dios herede la tierra*, p. 302-304; *idem*, *Till God Inherits the Earth*, p. 353-357.

(14) In the opinion of M. Shatzmiller, this circumstance is the direct result of hereditary laws, which divided property into small parts. See "Islamic Institutions and Property Rights: The Case of the «public good» Waqf", *Journal of the Economic and Social History of the Orient*, 44 (febrero 2001), p. 51-52.

Various questions are considered in the legal documentation on *waqf* in this area. One detects a certain divergence of opinions among the Andalusí jurists with respect to which procedure to follow. Some seem to favor giving priority to dividing it and opting to sell only in the case that the division would prove to be unprofitable. So, in a question put to the Cordovan mufti Ibn al-Hajj (d. 1134) regarding an individual who endows part of a house, the jurist rules that, if it is possible to divide the house, it should be divided up; otherwise the whole property will be sold and with the price obtained in the sale of the endowed part a property will be bought and established in turn for a *waqf*. His line of argument for this is based on the opinion of Ibn al-Majishun (d. between 827-829) and of Ibn al-Qasim (d. 806) with regard to this question.<sup>(15)</sup>

Other jurists, however, favoured proceeding directly to the sale. This is the posture adopted by Andalusí Ibn al-Fakhkhar (d. 1028), who holds that an undivided property, part of which is established as a *waqf*, must be sold in their entirety owing to their slender return, so that with the price obtained from the sale of the endowed part, a good similar to the latter is bought in order to allocate it for the same purpose.<sup>(16)</sup>

The two procedures adopted in al-Andalus in relation to *awqaf* that formed part of a collective property are based on the division and sale of this asset. But the jurists in favour of the sale of the communal property are unanimous in that, with the amount obtained from this transaction from the part established as *waqf*, another property must be acquired and set aside for the same end.

### 1.1.3. Sale of *waqf* for the enlargement of mosques<sup>(17)</sup>

When the amplification of a mosque was imposed by force in al-Andalus, the procedure was to expropriate neighbouring properties, regardless of whether or not they were *awqaf*, since this circumstance was considered to be a greater need than the observance of the inalienability and intangibility of these pious legacies. In this case *awqaf* were united with the other inviolable property.<sup>(18)</sup>

In the legal documentation, all the questions that are dealt with in relation to this subject converge on the same objective since the aim is to clarify under

(15) See al-Wansharisi, *Mi'yar*, VII, p. 446. See also Lagardère, *Histoire et société*, p. 273, n° 219.

(16) See al-Wansharisi, *Mi'yar*, VII, p. 454-455. See also Lagardère, *Histoire et société*, p. 257, n° 163.

(17) More detailed information on this question can be obtained in Carballeira Debasa, *Legados pios y fundaciones familiares*, p. 96-104; A. Carmona, "La expropiación forzosa por ampliación de mezquita en tres fetuas medievales", in P. Cressier, M. Fierro and J.-P. Van Staëvel (eds.), *L'urbanisme dans l'Occident musulman au Moyen Âge. Aspects juridiques*, Madrid, 2000, p. 141-151; García Sanjuán, *Hasta que Dios herede la tierra*, p. 316-319; *idem*, *Till God Inherits the Earth*, p. 370-380.

(18) With regard to the regulations governing mosques and other buildings of public utility, see section 1.2 of this work.

what conditions the enlargement of a mosque may be undertaken and the repercussions (expropriation of buildings) this may have on the surrounding area, when this circumstance is imposed due to imperious necessities. In one case there was a proposal for the enlargement of the Great Mosque of Ceuta at the expense of the shops around it, a question that aroused some polemic because of the refusal of the shop owners to sell their property. The great Cordovan jurist Ibn Rushd (d. 1126) replied that if the Great Mosque had become small and needed enlargement, the owners of the shops would willy-nilly be forced to sell because of the vast benefits that would derive from this action for the faithful who went there to pray. He goes on to add that, were the shop owners to argue that they were constituted in a *waqf* in their own favour and be unwilling to sell them, the same procedure should be adopted.<sup>(19)</sup>

This legal opinion is classified within jurisprudence (fiqh) against private individuals and in favour of the public good. This was perhaps the underlying reason that led owners of buildings adjoining important mosques to endow them in the hope that they would not be forced to sell them in the event of their being enlarged. However, the latter circumstance was deemed to constitute a greater need than respect for the inviolability of pious endowments, and the procedure to follow in the expropriation of the properties adjoining the Great Mosque at Ceuta proposed by Ibn Rushd set a legal precedent.

The same procedure nonetheless was not followed with minor mosques. In this regard, in the 10<sup>th</sup> century Ibn Zarb considered it lawful to enlarge Great Mosques with endowed houses, arguing that what is assigned to the service of God can lawfully be allocated to another purpose, whilst it continues to be in God's service. He adds, however, that, when there is an excessive agglomeration of people in the minor mosques, they should be transferred to a more spacious building.<sup>(20)</sup> Andalusī mufti Ibn 'Attab (d. 1070) also expresses a similar opinion, admitting alienation of *awqaf* for the enlarging of a Great Mosque, but not of a minor mosque, in which case it could only be extended with a house that was not *waqf*, using part of the road or the surrounding space. If neither of these options were possible, it should either be transferred to another building or a new mosque would be built.<sup>(21)</sup>

(19) See Ibn 'Iyad, *Madhahib al-hukkam*, ed. p. 306-309 and trans. p. 494-497; Ibn Rushd, *Fatawa*, n° 46.

(20) See Ibn Sahl, *Al-Ahkam al-kubra*, ed. al-Nuaimy, p. 990-991; al-Wansharisi, *Mi'yar*, VII, p. 424-425. See also Lagardère, *Histoire et société*, p. 256, n° 156; M. Marin, "Documentos jurídicos y fortificaciones", in *Actas del I Congreso Internacional de Fortificaciones en al-Andalus (Algeciras, Noviembre-Diciembre, 1996)*, Cadiz, 1998, p. 81.

(21) See Ibn Sahl, *Al-Ahkam al-kubra*, ed. al-Nuaimy, p. 992-995.

#### 1.1.4. Sale of *waqf* in case of poverty<sup>(22)</sup>

In al-Andalus the procedure of selling *awqaf* was also applied under other special circumstances, as in cases where the founder or beneficiaries fell into a situation of destitution. In this event there had to be a clause in the endowment deed where the founder explicitly stipulated this possibility. The income obtained from selling the *waqf* was used to the benefit of the founder or of the beneficiaries. In general therefore in cases in which the founder considered the sale of *waqf* due to the imperative of poverty, the jurists tended to admit the validity of the clause in the foundational act in which this stipulation is recorded.

We find an example of this in a question addressed to Ibn Rushd in the 12<sup>th</sup> century. It poses the case of an individual who sets up a family endowment, imposing as a condition that, if he himself ends up in a situation of economic necessity, he will be able to sell goods that are the object of *waqf* and benefit from the income secured in this operation.<sup>(23)</sup> Ibn Rushd's silence in this regard provides eloquent testimony of the validity of this stipulation.

In other cases, the condition imposed by the founder, when setting up the *waqf*, envisages the possibility of selling it should the beneficiaries fall into poverty. Cordovan mufti Ibn Sahl (d. 1093), for once, expresses approval in this regard. To argue his position, he cites the favourable opinion of Malik b. Anas concerning the sale of *waqf* in case of need, in connection with an individual who establishes a family foundation in benefit of his descendents, authorising them to sell it for the reason referred to above.<sup>(24)</sup>

Although this was the most frequent situation alluded to in most of the questions dealing with the sale of *awqaf* in case of poverty, another case could also be considered, namely the sale of property established in a *waqf* when the beneficiaries suffered from material need, without the existence of any prior stipulation by the founder in this respect. This is evident in a legal consultation addressed to Sevillian mufti Ibn al-Makwi (d. 1010). However, in the fatwa he issues on the question, he decrees rescission of the sale despite the need of the beneficiaries.<sup>(25)</sup> It is very likely that the absence of the stipulation mentioned explains the position taken by this jurist.

(22) For more information about the sale of *awqaf* in case of the beneficiaries' poverty, see Carballeira Debasa, *Legados pios y fundaciones familiares*, p. 320-323; García Sanjuán, *Hasta que Dios herede la tierra*, p. 314-316; *idem*, *Till God Inherits the Earth*, p. 370-380.

(23) See Ibn Rushd, *Fatawa*, n° 148.

(24) See Ibn Sahl, *Al-Ahkam al-kubra*, ed. al-Nuaimy, p. 956-961.

(25) See al-Sha'bi, *Ahkam*, n° 184; al-Wansharisi, *Mi'yar*, VII, p. 432.

In the remaining cases, admission of the sale of *waqf* in response to a plea of poverty is probably due to the pious motivation that underlay an action of this kind. But, in this case, the property was neither replaced by another, nor went on to form part of a public good, which means that the sale implicitly involved the total alienation of the *waqf*.

#### 1.1.5. Sale of *waqf* in case of debt<sup>(26)</sup>

Debts could constitute a reason for revoking a *waqf* and selling the property in order to settle a debt incurred by the beneficiaries. This is another case in which the act of purchase involves the total alienation of the foundation. That is how Ibn Sahl expresses it in the 11<sup>th</sup> century in response to a question addressed to him dealing with the case of an individual who endowed a house for his two daughters, recognising their right to sell it should they so desire. Ibn Sahl, following the opinion of Malik b. Anas, goes on to add that in the event that the daughters incur a large debt, their creditors will have the right to execute the sale of the house in order to pay off that debt.<sup>(27)</sup> In this question, what is striking is that the founder authorises his daughters to sell the house without a justifying reason.

Likewise, a debt contracted by the founders before or after the constitution of a *waqf* is admitted to constitute sufficient reason for the *waqf* to be declared null and void. Perhaps the fact that the debtor is the founder or beneficiary is precisely what defines the difference in the criteria adopted by Andalusí jurists in relation to a debt incurred in such circumstances because the procedure in the first case was to nullify the *waqf*<sup>(28)</sup> and in the second to sell the property that had been established in this way.

#### 1.2. Transfer of *waqf*

Andalusí jurists had not only to confront the thorny question of the lack of economic productivity of *awqaf*, but also the opposite case, i.e., the excess of productivity in relation to the income from this kind of property, which called into question the decision that had to be taken with this surplus<sup>(29)</sup>. Likewise, some legal questions consider the possibility of changing the purpose the *waqf* was devoted to in case the primary objective of this property had disappeared. In these cases Andalusí jurisprudence reveals that the jurists were sometimes in favour of defining another use for the property donated or for the surplus in

order to cover different needs from those initially stipulated by the founder<sup>(30)</sup>. In the documentation that have been analysed these questions affect religious buildings and other constructions of public use.

Regarding pious endowments and the issue of the rubble of ruined mosques, the legal sources illustrate that the general tendency among the jurists was characterized by the inviolability of both elements in view of their possible future reconstruction. Mufti Abu Ibrahim al-Andalusí (m. 963), among others, expressed this attitude, choosing not to divert the *awqaf* from ruined mosques to other mosques currently in use<sup>(31)</sup>. A similar attitude was adopted regarding the use which should be made of the *awqaf* left over from mosques. In general, the Andalusí jurists opted to reserve the surplus income of a mosque for the necessities that could arise, even if this meant an agreement to transfer it to other mosques in case of necessary. There are, however, those like 'Iyad b. Musa (d. 1149), who emphasise that while it is lawful to act in this way, it is preferable for this transfer not to take place.<sup>(32)</sup>

Meanwhile some texts discuss the inviolability of Andalusí cemeteries with regard to the reutilization of the land of the cemetery which falls into disuse and to the use of the building materials proceeding from the abandoned tombs. In these cases, while the Andalusí jurists, such as Ibn al-Salim (d. 978) and Ibn Zarb, approved of the re-use of the terrain of the cemetery in disuse in order to amplify or build mosques<sup>(33)</sup>, they did not authorise the "recycling" of the building materials of abandoned tombs under any circumstances. In this regard, Cordovan Ibn Lubaba (d. 926) argues that it is forbidden for cemeteries to be left exposed.<sup>(34)</sup>

On occasion, the terrain upon which mosques are built and where burials take place is the object of a pious endowment, but this is not always the case. Yet this latter circumstance does not impede attributing to mosques and cemeteries a status similar to that of pious endowments which are founded upon their inviolability. In reality, public goods designated for the benefit of a Muslim community represent a status similar to that of *awqaf* and they acquire a status similar to them.

(30) See Carballeira Debasa, *Legados píos y fundaciones familiares*, p. 90-92; García Sanjuán, *Hasta que Dios herede la tierra*, p. 321-330; *idem*, *Till God Inherits the Earth*, p. 380-391.

(31) See al-Wansharisi, *Mi'yar*, VII, p. 226. See also É. Amar, "La pierre de touche des Fétwas. Consultations juridiques des Faqihis du Maghreb", *Archives Marocaines*, 13 (1909), p. 364-365.

(32) See Ibn 'Iyad, *Madhahib al-hukkam*, ed. p. 304 and trans. p. 491.

(33) See al-Wansharisi, *Mi'yar*, VII, p. 19, p. 425.

(34) See al-Wansharisi, *Mi'yar*, VII, p. 103. See also Amar, "La pierre de touche des Fétwas", p. 375; M. Fierro, "El espacio de los muertos: fetuas andaluses sobre tumbas y cementerios", in Cressier, Fierro and Van Staëvel (eds.), *L'urbanisme dans l'Occident musulman*, p. 173; Lagardère, *Histoire et société*, p. 254, n° 149.

(26) See Carballeira Debasa, *Legados píos y fundaciones familiares*, p. 324.

(27) See Ibn Sahl, *Al-Ahkam al-kubra*, ed. al-Nuaimy, p. 956-961.

(28) Regarding the nullifying of *waqf*, see Carballeira Debasa, *Legados píos y fundaciones familiares*, p. 335-338.

(29) See Carballeira Debasa, *Legados píos y fundaciones familiares*, p. 93-96; García Sanjuán, *Hasta que Dios herede la tierra*, p. 304-313; *idem*, *Till God Inherits the Earth*, p. 357-380.

In the same way, fortifications located on the Christian-Muslim frontiers were the objects which absorbed the greatest maintenance costs, which required the most care and which had the most pious endowments established for their maintenance. Regarding the use which should be accorded to the *awqaf* to reinforce fortifications that later fell into enemy hands, the two jurists who pronounce on the question, Ibn Zarb and Ibn Dahhun (d. 1039), coincided in responding that the *waqf* should be applied to other similar fortifications and in assigning the income of the *waqf* to a purpose analogous to that stipulated previously by its founder<sup>(35)</sup>. This contrasts with the immobilization of the usufruct of the *awqaf* established for the benefit of mosques when the latter fell into ruin as we have seen. Perhaps this difference in criteria resides in the fact that a mosque is a religious edifice, while a fortress is a civilian structure. In any case, one appreciates the existence of a juridical doctrine that is not applied equally.

## 2. UNLAWFUL ALIENATIONS

### 2.1. Unlawful alienations carried out by founders and beneficiaries

The fact that the sale of a *waqf* was not authorised unless a powerful reason existed is cited therefor. In case a sale took place and was carried out by the founder or the beneficiaries without complying with any of the reasons mentioned above, the transaction was rescinded and the *waqf* was restored to its pre-sale state, thus respecting the inalienability of an endowment of this nature<sup>(36)</sup>. From the abundant references contained in the legal documentation on this question, we can deduce that this phenomenon was relatively frequent in al-Andalus. It also shows that cases of the irregular sale of *awqaf* affected family foundations to a large degree.

This situation raised doubts as to the use that should be allocated to the income obtained by the buyer from the exploitation of these properties, while they had remained in his possession. The Andalusī muftis based their *fatawa* on whether the buyer and the seller were fully aware of the existence of the *waqf* at the time of executing the purchase. That is, if the buyer was unaware of the existence of the donation, he was not obliged to restore the income obtained from

(35) See Ibn Sahl, *Al-Ahkam al-kubra*, ed. al-Nuaimy, p. 990; al-Sha'bi, *Ahkam*, n° 1082; al-Wansharisi, *Mi'yar*, VII, p. 64, 424, 218. See also A. García Sanjuán, "Frontera, *Yihad* y legados piadosos en Al-Andalus (siglos X-XV)" in F. Toro Ceballos and J. Rodríguez Molina (coords.), *III Estudios de Frontera. Convivencia, defensa y comunicación en la frontera*, p. 325; Lagardère, *Histoire et société*, p. 256, n° 156; Marín, "Documentos jurídicos y fortificaciones", p. 81; Shatzmiller, "Islamic Institutions and Property Rights", p. 66.

(36) For detailed information on this subject, see Carballeira Debasa, *Legados pios y fundaciones familiares*, p. 324-333.

exploitation of the property in question in favour of the beneficiaries, as he would be considered a victim of the bad faith of the seller of the *waqf*. But if the buyer was aware, he would have to pay back the value corresponding to all the income from which he had made a living during the time of exploitation. Whatever the situation might be, the buyer was forced to give up the property and be duly compensated for his ignorance of the *waqf*, if such were the case, as a means of compensating him for the transferred property, but should the seller be a usurper, the purchaser could only call him to account whilst this individual were alive. If it was clear that the seller was insolvent or if he was not a usurper, the purchaser was granted the right to a share in the income from the foundation alongside the beneficiaries until he recouped the value of what he had invested in the *waqf*. Finally, when the executor of the sale was the *waqf*'s beneficiary, he would completely lose his right to enjoy the part of the endowment that corresponded to him due to the simple fact that he had committed a fraudulent act.<sup>(37)</sup>

We can generally observe that the tendency is to concede priority to the foundation, granting preferential treatment to the beneficiaries to the detriment of the buyer, even if he has no knowledge of the *waqf*. Nevertheless, the latter's rights to receive compensation for the money invested in acquiring and exploiting the property in question are recognised in exchange for renouncing the good that he has purchased. One must also point out that the immutability of a *waqf* does stand out in the replies of some muftis, when it is indicated that the property must be restored to its pre-sale state.

### 2.2. Unlawful alienations carried out by members of the Andalusī administration

As we have just seen in the legal material I have used, there are records of fraudulent acts committed by founders and beneficiaries of *awqaf*. As might have been expected, the legal sources do not contain allusions to fraudulent management by the individuals responsible for the administration of such goods, particularly in relation to embezzlement by cadis. From an early period, however, the biographical literature is instructive in this regard. The oldest reference that I have located on this question concerns *cadi* 'Amr b. 'Abd Allah (d. 886), who confiscated ten thousand gold coins delivered as *waqf* to a person of his trust and gave him the corresponding receipt before sixteen witnesses. The judge denied having received this amount and even swore on the Koran that he

(37) See, for instance, Ibn al-'Attar, *Watha'iq*, ed. p. 588-594 and p. 620-625; trans. p. 860-866 and p. 931-936; Ibn Sahl, *Al-Ahkam al-kubra*, ed. al-Nuaimy, p. 964-965, p. 983-985; Ibn Rushd, *Fatawa*, n° 70; al-Sha'bi, *Ahkam*, n° 27, 51, 52, 54; al-Wansharisi, *Mi'yar*, VII, p. 224-227, p. 427-428, p. 430-431, p. 452-454.



was innocent. In spite of the existing testimony and proof against him, Muhammad I (r. 852-886) absolved him of the offence imputed to him.<sup>(38)</sup>

On other occasions, some scholars could be victims of their own rectitude, by not favouring the material pretensions of the Andalusi monarchs when it came to *awqaf*, as against others who put their own personal interests before those of the foundations. There are various cases of the way in which rulers manipulated this kind of property, with or without the blessing of the scholars. Nevertheless, the fact that they did not dare to expropriate them without the issue of a fatwa authorising the transaction is certainly significant, as we shall see in the following example I have chosen. It is an anecdote involving the Cordovan caliph 'Abd al-Rahman III (r. 912-961), which throws into relief the degree to which the inalienability of *awqaf* was at the mercy of the whims of the rulers. The monarch in question expressed a desire to buy a country house belonging to the pious endowments established for the lepers of Cordoba. But the majority of the jurists opposed this transaction because of the *hurma* of this kind of property. Only Ibn Lubaba, basing his judgement on the people of Iraq (that is, on the Hanafi doctrine) issued a fatwa favourable to the sovereign by virtue of which the monarch gave the lepers some of his properties in the countryside in exchange for the country house.<sup>(39)</sup> It is necessary to frame this conflict within its political context since the position taken by Ibn Lubaba in this affair has much to do with his evident interest in recovering the posts in the Andalusi administration of which he had previously been divested.

Lastly, one must not forget that, on other occasions, it was the rulers themselves who urged the cadis to take money from the pious legacies and spend it on useful objectives<sup>(40)</sup>, and who called the administrators of these goods to account regarding the missing money.<sup>(41)</sup>

(38) See al-Khushani, *Qudat Qurtuba*, ed. p. 144-146 and trans. p. 178-181. See also Carballeira Debasa, *Legados pios y fundaciones familiares*, p. 291.

(39) See 'Iyad b. Musa, *Tartib al-madarik*, VI, p. 87-91. See also Carballeira Debasa, *Legados pios y fundaciones familiares*, p. 187-188; García Sanjuán, *Hasta que Dios herede la tierra*, p. 343-346; *idem*, *Till God Inherits the Earth*, p. 410-414. Sometimes, the establishment of a *waqf* was due to the founder's desire to secure his patrimony against confiscations by the rulers during periods of turbulence. But we saw in the previous example that this circumstance did not prevent the magnates from seeking satisfaction for their desires.

(40) See 'Iyad b. Musa, *Tartib al-madarik*, VIII, p. 87.

(41) See Ibn 'Idhari, *Bayan III*, ed. p. 148 and trans. p. 129.

### 2.3. Unlawful alienations: preventive measures

The main means of exploitation of real estate established in a *waqf* was renting or leasing, since this was the system often used for achieving a return on this type of property<sup>(42)</sup>. The legality of this procedure is evident through the abundant legal texts that allude to it. In some cases it is expressly indicated that the rent from the lease of a *waqf* property formed part of the latter's income<sup>(43)</sup>. This is why the Andalusi legal texts do not actually associate the lease of such property with alienation since the fact that it was leased did not prejudice the interests of such a foundation, but rather increased its benefits.

Nonetheless, on certain occasions this operation could have negative repercussions on the functioning of the *waqf* to a point where its very existence was jeopardized. This occurred in cases where the term of the lease was so prolonged that it could prove seriously detrimental for the pious foundation. *Awqaf* subjected to excessively long lease periods ran the risk of manipulation at the hands of the lessees who might try to become the owners of the property they were leasing; so the question was to preserve the intangibility and inalienability of such property and to prevent it from falling into oblivion. This is one of the reasons that explain why Andalusi jurists generally expressed support for the establishment of short-term leases.

Most of the information contained in the juridical sources regarding the lease of *waqf* focuses on clarifying the duration and limit of the lease period. Consequently, the different classes of beneficiaries in whose benefit the foundation had been set up were taken into account, as well as the kind of property that was the object of the donation. Thus, the legal documentation informs us that if the *waqf* was constituted to the benefit of private individuals, there was a maximum period of two years during which the lease was in force. *Awqaf* instituted for the destitute, lepers and mosques were subject to a four-year renting period, especially where farm land was concerned, as this land depended on the fertilising function that the lessees applied. The maximum period for buildings was one year. Likewise, the possibility of renewing the lease on *awqaf* property existed when the stipulated period expired, although we are unaware of the exact procedure that had to be followed in such cases<sup>(44)</sup>.

(42) For more information about the lease of *waqf* in al-Andalus, see Carballeira Debasa, *Legados pios y fundaciones familiares*, p. 297-309; García Sanjuán, *Hasta que Dios herede la tierra*, p. 131-137; *idem*, *Till God Inherits the Earth*, p. 132-141.

(43) See al-Sha'bi, *Ahkam*, n° 54.

(44) See Ibn Mugith, *Muqni'*, p. 224-225; Ibn Rushd, *Fatawa*, n° 55; Ibn Sahl, *Al-Ahkam al-kubra*, ed. al-Nuaimy, p. 973-974; al-Sha'bi, *Ahkam*, n° 467; al-Wansharisi, *Mi'yar*, VII, p. 437 (see also Lagardère, *Histoire et société*, p. 257, n° 159).

### 3. CONCLUSIONS

The information that comes from the Andalusí sources offers a general view of different aspects of the juridical regulations by which the inhabitants of al-Andalus were governed in their relations with the institution of *waqf*. Among other things, the documentation we have studied gives an insight into the way that *waqf*, which theoretically consists of an immobilisation of property, also serves as a factor of change. This aspect leads me to examine the degree to which the immobilisation of these foundations was real. While in some cases the alienation was the product of fraud or of ignorance, in other circumstances it was justified. From the data recorded in the sources consulted, it is not possible to gauge the dimension of the economic impact that this institution had. But it may be supposed that it must have been quite considerable owing to the repercussions arising from the immobilisation of property, although these effects were partially counteracted by a series of economic activities, such as leases, purchase and sale transactions...

The legal sources in particular focus on a series of conflicts stemming from the greater or lesser respect demonstrated towards the inalienability of the *waqf*. The alienation of these kinds of goods is among the acts that are most criticized by Muslim jurists as it called into question the intangibility of the object of a donation, as well as the founder's stipulations embodied in the *waqf* deed. The cases of alienation of *awqaf* highlight the fact that in al-Andalus, during the period under study, there existed a general tendency to privilege the inviolability of the properties so established except in extraordinary and duly justified cases, motivated by the real changing circumstances, in which the sale or transfer of the *waqf* was imposed. This was the principal problem affecting the management and administration of such property. In general, the *fatawa* issued in this regard attempt to respond to the new economic and social needs posed in society. These needs constituted legal justification for the partial or total alteration of the foundation. In this sense, throughout this work it can be confirmed that the *muftis* attempted to adapt the legal regulations to a series of basic principles, chief among which were the degree of need and a general interest for the Muslim community to the detriment of the characteristics of immobility, inalienability, intangibility and imprescribability upon which rested the nature and status of the institution of *waqf*. Some of these aspects provoked a divergence of opinions among Andalusí jurists, which reflected a logical tension in the application of the principles of law. Consensus, however, existed around specific questions, such as when alterations were due to economic reasons or to a general interest for the society.

The cases analysed in this work constitute a good example of the dysfunctions associated with the practical application of theory within the framework of Islamic law. From this point of view, the corpus of *fatawa* concerning the institution of *waqf* transmits to us a picture of the Muslim juridical system in a process of permanent evolution.