

# THE LEGAL POSITION OF WAQF IN BOSNIA AND HERZEGOVINA: PAST, PRESENT AND FUTURE POSSIBILITIES

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## Abstract

This article aims to provide an overview of the historical origins of waqf in Sharia law and the development of waqf in Bosnia and Herzegovina, along with an overview of its legal position through different periods. It points to the problems that the waqf has faced in the past, but also to the problems it faces today, such as the failure to pass a law on restitution that would enable the return of property confiscated in the previous periods. This article also points to the significant role the waqf has played throughout the history of Bosnia and Herzegovina, especially in the development of urban areas. Waqf, as a legal concept based on Sharia law, has its own distinct characteristics, however, it shares many similarities with other legal concepts such as foundations and trusts. A positive attitude towards waqf can release its potential in the future as well. If approached with a positive and proactive attitude and if properly codified, waqf could also gain new life in the context of European integrations of Bosnia and Herzegovina. Through one of the basic legal principles in European Union law, the principle of mutual recognition, a potentially codified waqf could gain recognition within the legal space of the European Union law and represent a contribution that Bosnia and Herzegovina could make to the common legal culture of the European Union.

## Keywords

waqf, waqf property, restitution, Sharia, legal culture

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## 1. Introduction – historical development

The main topic of this article is an overview of the legal position of the waqf with a focus on the most significant issues that the waqf and waqf property faced in the past and still face in the context of the current legal/political framework of Bosnia and Herzegovina, as well as the potential possibilities it can offer, especially in the context of the integration process of Bosnia and Herzegovina into European Union (EU). Waqf, as a form of philanthropic disposition of one's property by placing it into the function of the common good, either to be used for religious, or, quite often, for purposes of general public usage, represents a form of private initiative with moral-religious motivation and background.<sup>1</sup> It has been used primarily to satisfy the needs a community might have, but which are not of interest or focus of other economic actors, who are primarily driven by profits. The importance of the legal and societal concept of waqf, which left a visible mark in the history of Bosnia and Herzegovina, can be seen in many aspects of life. Such a phenomenon certainly has a special place in the legal heritage of Bosnia and Herzegovina, and as such, can potentially represent an excellent contribution to the wider European legal heritage. However, such an outcome requires additional efforts and a positive approach willing to strengthen the understanding of the waqf, its legal nature and features. Primarily, acts aiming to protect and return the confiscated waqf property are needed. Further, a proactive legislative activity, like the possibility of the drafting of a new and separate codification for the waqf as a legal concept itself, together with similar legal concepts that can be found in other religious traditions of Bosnia and Herzegovina (such as endowment – “zaviještanje” belonging to Christian traditions. These modes of endowment, however, are outside the scope of this article, since the article's primary focus is on waqf, but the similarities could be identified), or, in a lesser scope, through amendments in the existing legislature (e.g. entity laws related to foundations), could be a positive step forward.

Waqf originated in the teachings and legal framework of the Sharia law, which primarily shapes and defines its legal regime.<sup>2</sup> Its historical traces lead to the original Muslim communities on the Arabian Peninsula. In Bosnia and Herzegovina, waqf is introduced with the expansion of Ottoman Empire<sup>3</sup> and exists since the 15<sup>th</sup> century.<sup>4</sup> The legal framework and rules defining the waqf belong to the regulations of Sharia law, and as such are closely intertwined with the structure and rules of various institutions administering Islamic religious matters in Bosnia throughout its history and more recently the internal regulations and procedures of Islamic Community of BiH (ICBiH), whose internal regulations and procedures related to waqf property revive and give life and existence, to a limited extent, to the rules of Sharia law in today's Bosnia and Herzegovina.

However, the basic principles of the waqf do not in any way contradict the positive legal regulations of both Bosnia and Herzegovina and the European *acquis*, therefore, at least from that

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<sup>1</sup> Čeman, Senad. „Vakufi i fondacije u svijetu i kod nas (sličnosti i razlike)“. *Glasnik Rijaseta Islamske Zajednice u Bosni i Hercegovini*. Vol LXX, no 7-8, 2008: 627 – 641, 637

<sup>2</sup> Hrvačić, Enes. *Vakuf – Trajno dobro*. Sarajevo: El-Kalem, 2001, 6

<sup>3</sup> See further : Imamović, Mustafa. *Historija Bošnjaka*. Sarajevo: Preporod, 1997, 107

<sup>4</sup> Čajlaković, Muhamed. “Nastanak i razvoj institucije vakufa s posebnim osvrtom na vakuf u BiH” *Glasnik Rijaseta Islamske Zajednice u Bosni i Hercegovini*. Vol LXXI, no 3-4, 2009: 239 – 257, 244

aspect, there are no obstacles to legislative shaping of the waqf as a separate legal institute, by the way of novel legislation or in the form of supplementing some existing solutions ( e.g.: supplementing the existing entity Laws on foundations, by introducing the waqf as a special type of foundation, together with similar concepts from other traditions), which would raise the waqf from the internal regulations of the Islamic religious community to a status of an integral part of the legal system of the state. A precondition for such an optimistic development certainly is the need to find solutions to the problems that the waqf faces, primarily related to the issues of reparation of still unrepaired waqf property destroyed and damaged in the recent war in Bosnia and Herzegovina, as well as other problems such as finding solutions to ensure legal protection and return of waqf property confiscated by state interventions during previous periods and political systems. The reduction, confiscation and legal expropriation of the waqf property, throughout various political systems, starting from the agrarian reforms of the State of Serbs, Croats and Slovans (SHS State), continuing with the dramatic reduction of the substance of waqf property, as a result of a series of legal solutions adopted during socialist Yugoslavia, had such an extremely negative effect, that in moments the very existence of the waqf as a phenomenon existing for centuries in Bosnia and Herzegovina was threatened. In the period after the independence of Bosnia and Herzegovina, which was followed by the destruction of the whole country and its society, as experienced during the war, waqf property was one of the specifically aimed targets of deliberate attacks and, as such, took a heavy toll. In the period after the war, which was marked by partial rebuilding and repair of the destroyed waqf property, the waqf is still facing a series of open questions and waiting for legal solutions that should solve the issues related to the return of property confiscated in the previous periods.

In this article, besides the legal overview of the concept of waqf and the problems it faced and still faces, the benefits that the waqf has offered throughout history, as well as the potential it carries, in the economic, cultural and legal sense, will be examined.

## 2. Historical development and Sharia law foundations

The word waqf originates from the Arabic word "waqafa" which can be translated as "to separate", or "to dedicate" something.<sup>5</sup> The term itself indicates the legal nature of the waqf, which represents the act of excluding someone's property from free market circulation. Such an act, which is prompted by moral and religious motives, puts certain property to the function of the common good.<sup>6</sup> The specific feature of the waqf is that the property, by the act of endowment, becomes "God's property" which results in the basic rule of the waqf, that it cannot be traded or inherited and must be used in the manner and for the purposes determined by the waqif (person giving the property) through the act known as waqfnama.<sup>7</sup> Waqfnama is an act by which a wakif, i.e. a person who gives part or all of their property for the purpose of waqf, specifies the information such as: identification of the property, the guidelines for its management, as well as the purpose for which its substance and profits derived from it, can be

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<sup>5</sup> Čeman, Senad. *Vakufi i Fondacije - Komparativna studija o položaju vakufa i fondacija u šerijatskom pravu i pozitivnim zakonskim propisima u Bosni i Hercegovini*. Sarajevo: El-Kalem, 2011, 21

<sup>6</sup> Mašović, Sulejman. "Značaj i uloga vakufa u razvoju islamske doktrine i danas". *Anali GHB*, IX-X, 1983., 121.-127, 125

<sup>7</sup> Mehmedalija Hadžić. "Vakufi i Vakufname – Definicija i Implementacija". *Vakufi u BiH - Zbornik radova*, Sarajevo, (2011), 18

used.<sup>8</sup> Those purposes can be religious, but can also be economic and cultural in nature, or they can be used for several purposes at the same time if the nature of the waqf itself and the circumstances allow it. The word waqfnama is a compound of the Arabic word "waqafe" and the Persian word "nama" or regulation.<sup>9</sup> Waqf and the endowment of property have their roots in Islamic legal culture and jurisprudence, and its beginning is linked with the emergence of Islam. Sharia, as an Islamic legal framework, determines the foundations and rules of waqf as a legal concept. As the most important sources of Sharia, the Qur'an (as a holy book) and the Sunnah of the Prophet Muhammad (as a practice that serves as a source and as an auxiliary tool when interpreting Sharia rules) treat waqf as a commendable act of charity, and it is believed that Prophet Muhammad himself gave part of his property for waqf purposes as well.<sup>10</sup> In the early period of its existence, waqf was extremely informal, however, with the spread of Islam and the growth of the complexity of social relations, various new questions and concerns arose and it became necessary to find an answer to them and to give a legal structure and framework to the waqf itself.<sup>11</sup> This is by no means an isolated case because many other issues of Islamic theology and religious practice also required more precise legal formulation. Such formulation happened simultaneously in various parts of the Islamic world leading to the formation of four legal schools (madhabs) in Sunni Islam (Hanafi, Hanbali, Maliki and Shafi'i).<sup>12</sup> Madhabs have certain differences in the answers and solutions they offer to many questions. However, all four madhabs are valid as conventionally accepted. Accordingly, just as there are differences between madhabs in various other questions, so in matters of waqf, there are differences between the four Sunni Sharia legal schools in questions such as the question of the possibility of the endowment of movable property, the question of the possibility of the waqf using the endowment property during his lifetime and many other issues, all of the interpretations being accepted as valid.<sup>13</sup>

Throughout history, various nations have known various forms of charitable giving of property for religious and other collective purposes. Many such different forms of charitable giving, both in the past and in the present, have similarities with waqf. The concepts closest to waqf in terms of comparability and content can be concepts such as legatus, foundation or trust. Trust, as a concept of common law tradition, separates the management of property and ownership or ownership entitlement over such property in a manner not very dissimilar to waqf. In the cases of trusts or foundations, certain property is given by a voluntary act with the intention to serve certain purpose or to be at the disposal of specified or unspecified beneficiaries. However, the waqf, although it can be considered a type of endowment, has its own specific features and special rules that set it apart as an independent legal concept which, although comparable, is by no means identical to the trust or a foundation or similar, but represents a sui generis legal concept.

The specific feature that sets the waqf apart is that the property belonging to waqf becomes goods *extra commercium*, and such property should not be traded, inherited, transferred

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<sup>8</sup> Čajlaković, "Nastanak i razvoj institucije vakufa s posebnim osvrtom na vakuf u BiH", 245

<sup>9</sup> Hrvačić, Vakuf, 6

<sup>10</sup> Čajlaković, "Nastanak i razvoj institucije vakufa s posebnim osvrtom na vakuf u BiH", 241

<sup>11</sup> Hrvačić, Vakuf, 9

<sup>12</sup> Ibidem

<sup>13</sup> Čeman, Vakufi i fondacije, komparativna studija, 80

or in any way be alienated to third parties.<sup>14</sup> A further specific feature of waqf is that its property must be used only for the purposes prescribed by the waqif (person giving the property), or in absence of such instruction, in accordance with the rules of Sharia law. The manner of using the substance of the property and the profits derived from it is also determined by the waqif, and any deviation from the instructions of the waqif is not allowed unless they are following the regulations of the Sharia and performed with the best interest of waqf property in mind.<sup>15</sup> The waqfnama determines, or at least makes it possible to determine, the person who will be in charge of managing and taking care of the waqf property (mutaveli). The waqf has similarities but also differences with the foundations. Unlike a foundation, waqf is usually managed individually, i.e. by the mutaveli designated by the waqfnama.<sup>16</sup> However, Sharia rules and legal practice recognize the possibility of supervision over the work of the mutaveli by a third party, which can also be included in the decision-making by giving prior consent for decisions (nazir). Also, judicial supervision of the waqf and the work of the mutaveli by the Sharia court (qadi) can be foreseen, so it can be concluded that the collective decision-making and management, which is a characteristic of the foundation, is not opposed to the concept of waqf.<sup>17</sup>

### 3. Conditions for the validity of the waqf in Sharia law

To better understand the nature of waqf we need to make a brief overview of the basic legal framework defining waqf. As the waqf is a legal concept belonging to the tradition of Sharia law, the legal framework for the validity and functioning of the waqf is determined by the interpretation of the sources of Sharia law (fiqh), which is done by Islamic theological jurists (Mualim) within one of the four legal schools (madhab). Historically speaking, the application of the Hanafi legal school of fiqh, which was the one applied in Bosnia and Herzegovina, starting from the early days of the Islamization of these parts of the Balkans which occurred during the enlargement of the Ottoman Empire, is the primary focus of the analysis, because this legal school was officially accepted and applied by the relevant authorities throughout the entire period of application of Sharia law in Bosnia and Herzegovina. The overview will follow the main points as defined by the Hanafi madhab, with additional comparisons from other madhabs.<sup>18</sup>

For the validity of the waqf, certain criteria must be fulfilled, related to the personality of the waqif (person giving the property to waqf), the characteristics of the object that is given to the waqf, the characteristics of the beneficiary of the waqf, and the form of the act of endowment itself.<sup>19</sup>

According to Sharia regulations, a person of male or female gender can appear as a wakif, regardless of their marital status and social status, if they are capable of freely disposing of their property. Necessary characteristics related to the personality of the wakif, i.e. persons who give part or all of their property for waqf purposes are:

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<sup>14</sup> Ćeman, Vakufi i fondacije, komparativna studija, 77

<sup>15</sup> Hrvaić, Vakuf, 7

<sup>16</sup> Ćeman, Vakufi i fondacije, komparativna studija, 185

<sup>17</sup> Ćeman, Senad. „Vakufi i fondacije u svijetu i kod nas (sličnosti i razlike)“. *Glasnik Rijaseta Islamske zajednice u Bosni i Hercegovini*, No. 7-8, (2008): 627- 641, 631

<sup>18</sup> Ćeman, Vakufi i fondacije, komparativna studija, 85

<sup>19</sup> Begović, Mehmed. Vakufi u Jugoslaviji. Beograd: SANU, 1963, 20

- 1) A free person, who at the time of endowment is healthy and conscious, mentally mature and capable, and able to dispose of their property;
- 2) An adult. Age for adulthood varies in interpretation and according to different interpretations of Sharia jurists, it is a range between fifteen and twenty-five years of age. The Hanafi Madhhab is of the opinion that a person is considered an adult when they turn 17;<sup>20</sup>
- 3) That the person makes the statement voluntarily and without coercion;
- 4) That the person is the legal owner of the object (mulk) at the time of endowment.<sup>21</sup>

There is disagreement among madhhabs about whether a non-Muslim can appear as a waqif, considering that a waqf is an endowment with a primarily religious character, and therefore, the very purpose for which a waqf property is used is often for religious acts.<sup>22</sup> Sharia jurists belonging to Maliki Madhhab, for example, allow a person who is not a Muslim to endow his property without restrictions, while the Hanafi madhab allows the endowment of property by non-Muslims for secular and purposes of general public use, but not for purely religious purposes (e.g. a mosque).<sup>23</sup> Further, in Sharia law, there is a specific legal institute of guardianship, that can be compared to the notion of limited legal capacity, found in the modern legal systems, which was applied to persons who were declared as reckless and excessive spenders (usually due to gambling or addiction issues) and thus, their property was put under the guardianship of a third person. In their case, any disposal of property, including to waqf, was restricted while the person was under guardianship. However, even in that case, a person declared a spendthrift can dispose of his property into waqf up to the amount of 1/3 of their property.<sup>24</sup>

Regarding the qualities of the object to be endowed, according to the Hanafi madhab, both movable and immovable property can be gifted, as well as consumable or non-consumable property. The property to be endowed must be:

- 1) Allowed according to Sharia regulations. Accordingly, things which are forbidden for Muslims to use, according to Sharia regulations, cannot be the subject of waqf (e.g. alcohol);<sup>25</sup>
- 2) The asset must have a market value which must be known or at least determinable. A useless thing or scrap or waste cannot be the object of the endowment. On the other hand, if the object of the endowment is insufficiently specified, the endowment cannot be implemented. In the same way, one cannot endow only the income, without the endowment of the main object that brings the income;<sup>26</sup>
- 3) That the property is free of encumbrances or other restrictions of its disposal. In history, however, the endowment of state property (erazi miri) that does not belong to the wakif's

<sup>20</sup> Ibrahim Džananović, *Vakuf u svjetlu islamskih propisa*, u: "Anali Gazi Husrev-Begove biblioteke", knjiga IX-X, Sarajevo, 1983, 10

<sup>21</sup> Ćeman, *Vakufi i fondacije, komparativna studija*, 86

<sup>22</sup> *Ibid*, 95

<sup>23</sup> *Ibidem*

<sup>24</sup> *Ibid*, 86

<sup>25</sup> Ćeman, *Vakufi i fondacije, komparativna studija*, 89

<sup>26</sup> *Ibidem*

private property (*mulk*) was accepted. However, that waqf was considered "incomplete" and was subject to the consent of the Sultan or other competent official.<sup>27</sup> Likewise, waqf property that is encumbered by the rights of third parties (e.g. a lien, hypothec etc.) becomes valid only when the third party's right to that property ceases.<sup>28</sup>

When it comes to requirements related to the beneficiary of the waqf, a named and specified person or persons who are known to the waqif may appear as a beneficiary of the waqf. However, waqf can, and usually was, given for general charitable purposes, to be used by the public i.e. where an unknown and unspecified person as a member of the general public may appear as a beneficiary. However, the madhabs differ regarding the right of the unborn child (*nasciturus*) to be a beneficiary of the waqf. While the Hanafi and Maliki schools allow it, the Shafi'i and Hanbali do not. Likewise, the Hanafi madhhab allows the waqif him/herself to be the beneficiary of the waqf, while the Shafi'i and Hanbali madhhabs do not allow this.<sup>29</sup>

When it comes to the form of an endowment, as already mentioned, in the first period of development, waqf was an informal act of charity. Due to the increase in complexity of the relationships in society, there was a need for more legal certainty and thus a need for a document with a precise specification of the object and necessary instructions, information and conditions of the waqf for the sake of its correct fulfilment. Thus, concerning the wakif's declaration of will, such a declaration must indicate whether the wakif wants:

1) Waqf to be unlimited in time. According to the interpretation of all madhhabs, except the Shafi'i one, the waqf must be unlimited in time. The Shafi'i Madhhab, on the other hand, allows a waqf to be established for a certain period, after which the property is returned to the person giving (waqif);<sup>30</sup>

2) The waqf must be irrevocable. The waqf property ceases to be the private property of the waqif through the act of endowment, although, according to the Hanafi Madhhab, he can be both its beneficiary and its manager (*mutaweli*) during his lifetime;

3) The waqf cannot be handed over under conditions and instructions that are contrary to the very purpose of the waqf (e.g. to request a return of the property under certain conditions). Furthermore, according to the interpretation of the Shafi'i Madhhab, the income that the waqf could generate (e.g. rent) and the manner of their expenditure must be determined by the waqf as well and Shafi'i Madhhab requires declaration in this regard as a condition for waqf's validity. Other madhhabs do not consider it necessary, and if the use of the waqf's income is not specified by the waqif, it can be used for charitable purposes.<sup>31</sup>

In the historical context, the act of giving property as a waqf appeared in the form of:

- a) Declaration of the last will, i.e. through a testament (*vasijjet*),
- b) Declarations of will in front of witnesses and the Sharia judge - *qadi* (*tesjil*).

<sup>27</sup> Ibid, 102

<sup>28</sup> Ibid, 90

<sup>29</sup> Ibid, 93

<sup>30</sup> Ćeman, *Vakufi i fondacije, komparativna studija*, 96

<sup>31</sup> Ibid, 98

If the endowment is made through a will (vassijet), it can be read and signed in front of witnesses. If the wakif has legal heirs, waqif can give as waqf only 1/3 of their property. More than 1/3 of the property can be disposed of as well, but on the condition that heirs agree to it.<sup>32</sup>

When the endowment is performed in front of the qadi (judge) and witnesses (tasjil), the historical practice required the waqif to make the declaration in the presence of the qadi and the mutaweli. The form itself was an interesting form of mock litigation. As the first step, the wakif would describe the property to be placed in the waqf, determine the mutaveli and the possible supervisor who would manage the property, determine the purpose and conditions under which the property must be used, and how its profits and costs must be distributed. After that, the wakif would declare that he was withdrawing his previous declaration and statement they have just made. This would then be opposed by the muteveli, who would request the waqif to stand by and honour the promise just given. That would result in a mock dispute between them in front of the judge (qadi). Finally, the qadi would give a ruling that the waqif cannot withdraw the promised endowment and decides in favour of the establishment of a waqf under the conditions previously specified, which results in a type of judgment that establishes the waqf, the status of the property and the conditions of its management and use.<sup>33</sup>

#### 4. Types of waqf

According to type, waqfs can be classified in accordance to several criteria with regard to the goal of their endowment, the way of using waqf's income and the way the property itself should be used.<sup>34</sup>

According to the use of their income, waqfs can be classified into:

- a) Independent (srf),
- b) Family (evladijat) and
- c) Mixed (mushtarak) waqfs.

Independent waqfs are those that were established to be used for benefit of the general public and to achieve the goals specified in the waqfnama, and anyone can be their beneficiary. This type of waqf is the most suitable when it comes to the fulfilment of the task of the waqf as a giving of property for the common good. Another type of waqf regarding the question of purpose and beneficiary is the family waqf (evladiyat). In this type, the beneficiaries can be the descendants of the wakif or some other persons designated by the wakif. Historically speaking, the purpose of this waqf was to keep the property within the family and to prevent its alienation and wasteful use by the descendants. Mixed waqfs are those whose parts are used for general charitable purposes, and the other parts are for the needs of the wakif's descendants or persons specified by waqif.<sup>35</sup>

According to the goal that the waqf should fulfil, which is determined by the act of endowment, waqfs can be divided into a) waqfs with a purely sacred and religious purpose; b)

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<sup>32</sup> Hrvačić, Vakuf, 26

<sup>33</sup> Ibid, 24

<sup>34</sup> Hrvačić, Vakuf, 27

<sup>35</sup> Ćeman, Vakufi i fondacije, komparativna studija, 101



waqfs with a scientific and educational purpose; c) waqfs with a general social purpose. In historical experience, waqfs with a purely sacred purpose represent objects and property which is used exclusively for individual and group performance of religious rites and pertinent objects and property which serves to maintain the main religious objects. In most cases, these are buildings such as mosques, tekke, masjids, musalas, etc. The second type, waqf designated for educational purposes, was in the past closely related to the first type of waqf, because facilities such as madrassas, schools, but also reading rooms, libraries and other facilities that may or may not have exclusively religious purposes were usually grouped together. The third type relates to waqfs which have a general social goal to benefit the whole population. Beneficiaries are usually designated as groups such as the poor, orphans, students, travellers, debtors, sick, etc. In the past, these were buildings such as hans, sarais, caravanserais, wells, waterworks, bridges, bezistans, hospitals etc.<sup>36</sup>

With regard to the way of using waqf, we can distinguish between the non-income-producing waqfs (*mu'asassa hayriyya*) and the income-producing waqfs. Waqfs that do not generate income are usually those that by their nature are not suitable to be used for some economic activity and are usually property used for religious purposes such as mosques, madrasas, etc. In the past, very frequently, it was the case of the establishment of a large waqf, where, in addition to the non-income producing objects and religious objects, there were pertinent dedicated objects that brought income (e.g. real estate and objects that can be leased), which would in some cases be close to each other and form an architectural unity and in others would be physically distant. The revenues from income-producing waqf property would then be used to maintain and cover the costs of those waqfs, which due to their purpose do not generate income, thus creating one societal and economical, as well as if suitable, one architectural unit.

## 5. Origin and importance of waqfs in Bosnia and Herzegovina

The expansion of the Ottoman Empire to the territory of Bosnia and Herzegovina, which took place in different stages and for which the fall of the medieval Bosnian kingdom and the occupation of Jajce in 1463 is taken as a key starting point is also crucial for the process for Islamization of this areas. Among the first bearers of this process, the travelling dervish groups can be identified. They began their long-term presence even before the Ottoman conquest and would reside in buildings (*tekkes*) usually procured through the waqf.<sup>37</sup> The Ottoman state, primarily a feudal state in terms of its social organization in that period, spent most of the state's resources on meeting military expenses and financing the military class of society. One of the key factors in establishing Ottoman rule and culture in the newly conquered areas was the foundations of new cities and towns, either by creating them anew or by building on already existing settlements. One of the key instruments in the formation of city cores, around which the cities themselves would later develop, were in fact, the waqfs established by wealthy and high-ranking feudal lords.

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<sup>36</sup> Ibid, 104

<sup>37</sup> Handžić, Adem. „Vakuf kao nosilac određenih državnih i društvenih funkcija u Osmanskom carstvu“. Anali Gazi Husrev-begove biblioteke IX-X, 1983, 114

Among the first such examples are the endowments from 1462, made by Isa-Beg Ishaković, to which the beginning of the city core of Sarajevo is linked. Guided by moral, economic and political goals, wealthy officials, who often originated from those very regions themselves, invested and endowed not only sacred buildings, but also a whole series of buildings used for economic benefits, such as *hans*, *bezistans*, bridges, and entire complexes of buildings around which towns would eventually spring up and cities would begin to develop.<sup>38</sup> Many toponyms in Bosnia and Herzegovina have the word waqf (Vakuf) in their name, which indicates that some of them were created in that way. Some are known with a certain level of reliability to have been created around the core of the waqf. In some cases, the process was one of the developments of settlements in the area with already existing settlements, but there were also cases of creation of the new settlements, towns and cities. For example, The town of Mrkonjić, or Varcar Vakuf, was founded by Hadži-Mustafa Aga, at the end of the 16th century, which started by building and endowing a mosque, a school, an inn with 20 rooms and 24 shops and a bakery, giving the settlement the status of *kasaba*.<sup>39</sup> Also, the development of already established settlements is often linked to the charitable endowment of property given by "their" respectful waqif. Such are, to name a few: Turali-beg for the development of Tuzla; Karađoz-beg and Koski Mehmed-pasha for Mostar; Ferhad-bey for Tešanj; Muhamed Pasha Kukavica for Foča; Ahmed Pasha Budimlija for Gračanica, etc.<sup>40</sup> One of the most important waqifs, to whom the development of Skopje (North Macedonia) and Sarajevo is linked is Isa-beg Ishaković. After being appointed as the Bosnian sanjak-bey, Isa-beg Ishaković built the Begluk-Sarai (Bey's palace) on the site near today's Emperor's Mosque in Sarajevo. The name Saraj-ovasi, which can be translated as the field around the court, appears in 1455.<sup>41</sup> The name is considered the precursor of today's name Sarajevo.<sup>42</sup> Another great waqif of Sarajevo, responsible for the urban development of the city certainly is Gazi Husrev-beg. His endowment numbered around 200 buildings, among which the most important are the madrasa, mosque, bezistan, imaret and several other buildings that created the core needed for the development of the urban settlement. Of the famous high-ranking Ottoman officials from the area of Bosnia and Herzegovina, Mehmed Pasha Sokolović, certainly stands out, since he, as a high-ranking Grand Vizier, serving under several Sultans, is the one who endowed the bridge in Višegrad. The importance of waqfs was crucial for the development of those cities, such as the ones left by Gazi Husrev-beg for Sarajevo, Ferhat-paša Sokolović for Banja Luka, who also left about 200 buildings, among them the most recognizable Ferhadija mosque. Likewise, endowments of Hadži Mehmed-beg Karađoz, were of great importance for the development of the city of Mostar.<sup>43</sup>

This all confirms the historical significance of waqfs for the very creation of urban areas in Bosnia and Herzegovina as well as the fact that some of the most recognizable objects and parts of cultural heritage and identity owe their existence to the waqf.

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<sup>38</sup> Durmišević, Enes „Vakufi u različitim političkim sistemima“. Vakufi u BiH - Zbornik radova, Sarajevo, (2011): 111-130, 112

<sup>39</sup> Hrvačić, Vakuf, 51

<sup>40</sup> Vakufska direkcija IZ BiH. Vakufi u Bosni i Hercegovini, Historijat, trenutno stanje i perspektive. Sarajevo: Islamic community of Bosnia and Herzegovina, 2018, 20

<sup>41</sup> Imamović, Historija Bošnjaka, 219

<sup>42</sup> Hrvačić, Vakuf, 52

<sup>43</sup> Ibid, 51

The decline of the Ottoman Empire also led to the decline of waqfs and waqf property, which will be discussed in the following text, but it is also worth noting that with the arrival of the Austro-Hungarian monarchy, the waqf continued to live and even thrive, under a completely new setting, and there were some new interpretations of the role of waqfs. So the fact that the first modern hospital in Bosnia and Herzegovina was built from the income generated by the property belonging to the Gazi Husrev Bey waqf, stands as a positive example. The hospital was built in Sarajevo, in the area of Kovači in 1866 and was used up until the construction of the new general hospital in Koševo, after which it continued to be used for the care of the mentally ill, which lasted until the construction of a special hospital with a psychiatric ward.<sup>44</sup>

All of that points to the conclusion that waqf has its moral strength as well as its function of wealth redistribution and a type of targeted investment in projects which are of great social and general social importance but which are not of primary economic interest for the profit-driven investors. Also, it shows that the concept of waqf is not only linked to the Ottoman state, with which it was introduced to the territory of Bosnia and Herzegovina and within which it played a significant role but is able to live and go beyond the original cultural framework, positioning itself as a phenomenon, capable of functioning and adapting to a different setting of Austro-Hungarian Monarchy.<sup>45</sup>

## 6. Legal arrangement of waqfs in Bosnia and Herzegovina throughout the history

Since the appearance of waqfs in Bosnia and Herzegovina, especially when Bosnia and Herzegovina was part of the Ottoman Empire, which is generally considered to be the period between cca 1463 and 1878, the legal political system was regulated by the principles found in the sources of Sharia law, i.e. primarily the Qur'an and the Sunnah.<sup>46</sup> Legal gaps generally and specifically those related to land law relevant to waqfs, were filled by specific laws (*canuns*) and imperial orders (*fermans*) and local customs. The trend of codification, starting from the 19th century and the period of reforms (*tanzimat*), led to an increase in legislative activity in the Ottoman Empire as well, which led to the passing of the Law on Waqf Administration in 1863.<sup>47</sup> Rules relevant to waqfs were also found in other adopted laws, primarily the Ottoman Land Law from 1858 and the Ottoman Civil Code (*Megelle*), whose regulations were adopted successively in the period from 1869 until 1876. At the end of the 19th century, a unified administration of waqfs was established in the Ottoman state, with the ministry of waqfs, with the aim of collecting surplus income from waqfs, supervising the *mutavelis* and trying to stop the abuses and mismanagement of waqfs that had become rampant.

Meanwhile, Bosnia and Herzegovina has already entered the Austro-Hungarian Empire, first by occupation and then by annexation. Austria-Hungary saw the importance of waqfs and waqf property and engaged in the activities of listing and organizing the management of waqf property, by adopting several temporary Regulations on the organization and management of

<sup>44</sup> Čajlaković, „Nastanak i razvoj vakufa sa posebnim osvrtom na vakuf u BiH“, 246

<sup>45</sup> Salkić, Muhamed, “Islamska zajednica i vakufi”. Vakufi u BiH - Zbornik radova, Sarajevo, (2011), 28

<sup>46</sup> Hrvčić, Vakuf, 29

<sup>47</sup> Čajlaković, „Nastanak i razvoj vakufa sa posebnim osvrtom na vakuf u BiH“, 244

waqf property dating from 1881, 1883, 1884, 1885 and 1894.<sup>48</sup> According to the government's temporary Regulations/orders, the waqfs were managed by the Land endowment commission, or later the Land endowment directorate. However, a major source of discontent among the local population was the influence and control that the Austro-Hungarian authorities exercised over the work of those bodies through their officials and representatives of the Ministry of Finance. For example, according to the provision of the Regulation from 1883, no decision could be made without the consent of the government commissioner for endowment issues, and from 1894, the directorate was under the direct management of government officials.<sup>49</sup> Perhaps, the most significant development, in addition to the detailed recording of waqf property, was the establishment of the waqf foundation in 1894, which enabled the management of surplus income by the waqf administration, which opened the way for significant investments and humanitarian actions.

Referring to the 1879 convention between the Ottoman and Austro-Hungarian empires (Constantinople Convention), Bosnian Muslims (Bosniaks) demanded certain autonomous rights and the possibility of managing religious, waqf and educational matters. This led to the beginning of the movement for waqf-mearif autonomy, initially led by the Mufti of Mostar, Ali Fehmi Džabi.<sup>50</sup> The movement began with the submission of the first petition to the occupation authorities in 1886 with a request to hand over the management of waqfs to the local population.<sup>51</sup> In essence, it was the first example of the political organisation of Bosniaks within the Austro-Hungarian monarchy, later leading to the creation of a movement demanding autonomy in matters most important for their identity, such as religious, waqf and education issues. Accordingly, it can be said that the waqf played the role of a catalyst for the first political and party organization and activities of Bosniaks in a modern political context.

Those efforts gave results and in 1909, the Austro-Hungarian Monarchy adopted the "Statute" (Štatut) for the autonomous administration of Islamic-religious and waqf-mearif affairs in Bosnia and Herzegovina. That Statute established that all movable and immovable waqf property is the sole property of the waqf, that it is managed on the basis of Sharia regulations, that it is managed by bodies elected by local Muslims, and that it serves exclusively for religious and educational purposes of local Muslims.<sup>52</sup> That Statute brought positive changes and solutions regarding the management of waqf and was positively received by the local population. However, historical changes very quickly led to the collapse of the Austro-Hungarian Empire in 1918 and the establishment of the State of Serbs, Croats and Slovenes (SHS State) a precursor to the first Kingdom of Yugoslavia. In the initial period, the Statute remained valid under the new political system, however, with the introduction of the January 6 dictatorship in 1929, the Law on the Islamic Religious Community of 1930 was adopted, which repealed the Statute of 1909. The Islamic Community formally remained the holder of the waqf property, however, with the adoption of the Decree on the Provisional Authority and Organization of the Affairs of the

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<sup>48</sup> Ibid, 248

<sup>49</sup> Ibidem

<sup>50</sup> Imamović, *Historija Bošnjaka*, 392

<sup>51</sup> Čajlaković, „Nastanak i razvoj vakufa sa posebnim osvrtom na vakuf u BiH“, 248

<sup>52</sup> Ibidem

Islamic Community, the management of the waqf property was very quickly placed under the direct authority of the Ministry of Justice of the newly proclaimed Kingdom of Yugoslavia.<sup>53</sup>

A very negative mark was left by the interference of the state in the management of the waqf, but more significant interference happened during the agrarian reforms, which did not spare the waqf property even though it could not be regarded as private feudal or landlord property. It is estimated that the agrarian reform took away about 4 million dunums<sup>54</sup> of the waqf land alone,<sup>55</sup> which all contributed to the sudden decline of the waqf property. This continued during the period of socialist Yugoslavia. Within the Federative Peoples Republic of Yugoslavia (FNRJ), later renamed as the Socialist federative republic of Yugoslavia (SFRY), the abolition of Sharia courts started and with the adoption of the *Law on the Legal Status of Religious Communities* in 1953, the issue of waqf management was formally returned to the jurisdiction of the Islamic Community. However, the process of expropriation, nationalization and confiscation of waqf property, as well as other private property started at an increasing pace.<sup>56</sup> These expropriations reduced the substance of the waqf property to the point that it called into question the very existence of the waqf, which resulted in the shutdown of the waqf directorate itself in 1959, due to the fact that almost the entire waqf property was confiscated and reduced to a minimum and there was no point for the directorates existence since it had no property to manage.<sup>57</sup>

After the independence of Bosnia and Herzegovina and the destruction brought by the war which further destroyed the substance of the waqf property, the Constitution of the Islamic Community in Bosnia and Herzegovina (ICBIH) from 1997 placed the management of waqfs under the authority of the Riyaset of ICBIH and the Directorate of Vakufs, which was re-established by the decision of the of ICBIH in 1996.<sup>58</sup> However, although there is now the possibility of autonomous management of waqf property, there are still no legal solutions for the return of confiscated and nationalized waqf property.

## 7. Management of waqfs

Throughout history, the management of waqfs has been a very important issue, which has also been the subject of disputes and interferences by various political systems, as well as misuse by those entrusted to take care of them. The adoption of the Statute by the Austro-Hungarian Monarchy in 1909, which gave autonomy over the management of waqf property,<sup>59</sup> turned out to be the last legislative act adopted by the state that dealt with the issue of waqfs in the territory of Bosnia and Herzegovina in an acceptable manner. The management of waqfs has mostly been the subject of unfavourable legal solutions imposed by different political systems. In the post-war period of legal and political life in Bosnia and Herzegovina, the management of waqf is once

<sup>53</sup> Durmišević, Enes „Vakufi u različitim političkim sistemima“. Vakufi u BiH - Zbornik radova, Sarajevo, (2011): 111-130, 122

<sup>54</sup> Dunum (Donum) – an area of land in Balkans usually counted as 1000 m2, not a SI system measurement, but an historical measurement unit, originating from the Ottoman era

<sup>55</sup> Durmišević, „Vakufi u različitim političkim sistemima“, 124

<sup>56</sup> Čajlaković, „Nastanak i razvoj vakufa sa posebnim osvrtom na vakuf u BiH“, 249

<sup>57</sup> Ibid, 125

<sup>58</sup> Zajimović, Senaid. „Petnaest godina rada vakufske direkcije“. Vakufi u BiH - Zbornik radova, Sarajevo, (2011): 137 – 160, 138

<sup>59</sup> Salkić, Muhamed, “Islamska zajednica i vakufi”, 29

again under the jurisdiction of the Riyaset of the Islamic Community in BiH and the Waqf Directorate.

Currently, waqf is regulated solely by internal acts of the Islamic Community of Bosnia and Herzegovina (ICBIH) and the Directorate, such as the Statute of the Waqf Directorate from 1999, which gives the Waqf Directorate status of a legal entity, under positive norms of the Bosnian legal system. Further important internal acts are Rules on Waqf from 2000 and 2011; Rules on giving real estate property belonging to waqfs for lease, from 1998 and 2003, as well as other internal regulations.<sup>60</sup> According to the provisions of the Statute of the Waqf Directorate, independent waqfs (srf) and family waqfs (evladijet waqfs) are recognised. As a specific type of independent waqfs, "special waqfs" is defined, with a goal to represent waqfs with a significant economic utility and which could finance certain institutions of the Islamic community, in accordance with the waqfnama. Bodies participating in the management of waqf assets, according to the Statute of the Waqf Directorate, can be the Majlis of the Islamic Community (regional body), a representative of special waqf that has equal rights and obligations with the Majlis, and a mutaveli, which can be a mutaveli of an independent waqf or a mutaveli of a special waqf. Accordingly, the Majlis takes care, among other duties, of property records, concludes lease contracts and other contracts related to waqf property within their territory, based on the consent of the Waqf Directorate. Further, it supervises the work of the mutevelis, approves the waqf budget if it does not exceed the amount of 10,000 KM, undertakes protection and improvement activities and submits reports on the state of waqfs in their area to the waqfs directorate. Muteveli can be both a natural person and a majlis as a legal entity.<sup>61</sup> Muteveli deals with the management of waqf property and with fulfilling of the provisions of the waqfnama, supervises the use of waqf property, submits the final account of approved spending and proposes the waqf budget if it does not exceed 10,000 BAM, represents the waqf and performs other tasks.<sup>62</sup> Muteveli of a special waqf has similar powers, modified to take into account the importance of a special waqf and is appointed for a term of 4 years.<sup>63</sup>

When it comes to current experience and practice of establishing waqfs in Bosnia and Herzegovina, the bearer of these activities is the Islamic Community in Bosnia and Herzegovina (ICBiH) and the Waqf Directorate. According to the internal regulations of the ICBIH, when a request for the endowment of the property appears, the Waqf Directorate in cooperation with the Mejlis of the ICBIH, carries out the endowment procedure. The first step is to check whether the property fulfils the conditions needed for the purpose of the waqf and if it is suitable to be the subject of the endowment (e.g. in the case of immovable property, whether it is encumbered or otherwise restricted). After that, a written statement is taken from the wakif and mutaveli, if the same is appointed by the wakif. Such a statement is submitted to Rijaset ICBIH, which makes the final decision. In the case of a positive decision, it is issued to the endowments in the Bosnian language, one copy of which is submitted to the wakif, and the other to the Waqf Directorate.<sup>64</sup>

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<sup>60</sup> Zajimović, "Petnaest godina rada vakufske direkcije", 141

<sup>61</sup> Buljina, Halid. „Osnovni uzroci osiromašenja i propadanja vakufa u BiH“. Anali GHB biblioteke, knjiga IX-X, 1983, 155

<sup>62</sup> Hrvačić, Vakuf, 43

<sup>63</sup> Ibid, 44

<sup>64</sup> Ibid, 26

## 8. Issues facing waqf

The reasons leading to the decline of waqf and waqf property in the past have been correctly identified in the literature<sup>65</sup>, and they can be grouped into:

- 1) Destructive activity during the war and intentional destruction;
- 2) Fires, floods and other natural disasters;
- 3) Repressive legal solutions;
- 4) Abuse of waqf property.

Throughout history, the ravages of war have led to the destruction of waqf property. In fact, waqf has regularly been one of the specifically intended targets of attack. Historically, one of the biggest single acts of destruction that hit the territory of Bosnia and Herzegovina, especially the waqf property, was the invasion of Eugene of Savoy,<sup>66</sup> which left a particularly destructive mark in the area of Sarajevo. According to some reports, all the mosques in Sarajevo were burned on that occasion and almost all the waqfs were destroyed and burned down.<sup>67</sup> In the last war and aggression against Bosnia and Herzegovina in the period 1992-1995 the waqf property, especially sacral property, was the target of a systematic and widespread attack with the aim of complete destruction and eradication of every trace of its existence. The destruction of waqf property was a part of systemic attacks, crimes against humanity and war crimes, amounting to what can be identified as cultural genocide.<sup>68</sup> Thus, it is estimated that 1185 mosques and 335 other religious buildings of the Islamic community in BiH were destroyed.<sup>69</sup>

In addition to the destruction suffered during the war, great damage was also caused by fires, which were particularly frequent in the 17th and 18th centuries. Due to the closeness of buildings in urban areas and the use of wood as a building material, fires were frequent and very destructive. For example, the great fire in Sarajevo in 1879 was particularly destructive, when, among other objects, Đulaga Khan, Tašlihan and Gazi Husrev-beg's bezistan were destroyed.<sup>70</sup>

A particularly negative impact was left by repressive measures in the form of legal solutions adopted by various political systems, which primarily resulted in the confiscation of property belonging to waqf. For example, the “agrarian reform” carried out by the SHS State, starting in 1919, took away 4 million dunums of waqf land, and about 17 million dunums of private land held by Muslims in Bosnia and Herzegovina.<sup>71</sup> The regulations guaranteed payment

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<sup>65</sup> Ibid, 58

<sup>66</sup> Eugen Savoy, an aristocrat and military leader that lead the incursion in Bosnia, on which occasion, on 23rd of October, 1697, Sarajevo, then an undefended city was completely destroyed and burned down. According to his own memoir notes, the city was burned and his forces plundered great material gains and taken „many women and children“ as slaves. (see further: Imamović, Mustafa. *Historija Bošnjaka*. 1997, Sarajevo, Preporod, 288)

<sup>67</sup> Hrvačić, Vakuf, 61

<sup>68</sup> Novic, Elisa. *The concept of cultural genocide: an international law perspective*. Oxford: Oxford University Press, 2016, 46

<sup>69</sup> Hrvačić, Vakuf, 62

<sup>70</sup> Ibid, 78

<sup>71</sup> Vakufska direkcija IZ BiH. *Vakufi u Bosni i Hercegovini, Historijat, trenutno stanje i perspektive*. Sarajevo: Islamic community of Bosnia and Herzegovina, 2018, 30

for confiscated land and property, however, when it comes to property in the territory of Bosnia and Herzegovina, the planned compensation payment was much lower than the one paid in other parts of the SHS State, and in many cases, it was never paid at all,<sup>72</sup> resulting in rapid decline in personal wealth and rise in poverty. As a particularly striking individual example, the act of confiscation by the decision of the Vrhbosna Banovina of the land belonging to the Gazi Husrevbeg waqf and which was located in the area of Dobož, Tešanj and Teslić can be cited. From the total area of 136,925 dunums that belonged to Gazi Husrev-bey's waqf, 107,676 dunums were taken away, which reduced the property of waqf to only 11,955 dunums.<sup>73</sup>

Most of the damage in terms of confiscation of waqf property was suffered during socialist Yugoslavia as the result of the application of legal solutions, such as the Law on Agrarian Reform and Colonization from 1946, the Law on Nationalization of Rental Buildings and Construction Land from 1958, the Basic Law on Expropriation from 1949, the Basic Law on Agricultural Land Utilization from 1959, the Decree on arrondissement from 1946, the Law on Property Rights in Business Buildings and Business Premises from 1979 and many other laws and regulations. In that period, particularly vulnerable was the valuable property located in urban areas. For example, it is estimated that 377 apartments were confiscated in the Sarajevo area and 524 real estate properties used for business purposes, i.e. 408,011 m<sup>2</sup> of real estate, all belonging to waqf property.<sup>74</sup> Thus, the waqf property practically disappeared, and the property of the Islamic community was reduced to a minimum, which led to the closure of the Waqf directorate in 1959.<sup>75</sup>

It should also be noted that beginning with the rule of the Austro-Hungarian Monarchy and continuing through the two Yugoslavia's, waqf property was often the object of destruction in the processes of urbanization, urban development and reconstruction. Many mosques, mektebs, tekkes and especially, Muslim cemeteries (mezaristans) were destroyed and demolished, and buildings or parks were built in their place, which was the cause of great dissatisfaction of the Muslim population and expressed in many petitions submitted to the authorities.<sup>76</sup>

A very important factor that contributed to the decline of waqf and waqf property is also the unscrupulous management by those entrusted with it. During the inventory of waqf property, it often happened that the mutavelis or beneficiaries illegally registered the waqf property as their own personal property. A special problem was the appropriation of the income that was produced by waqf. This became particularly pervasive when the control over the waqfs was more decentralized. For example, according to the decision of the Waqf Assembly in 1923, the decentralization of the waqf took place and surplus income from waqfs was assigned to the regional waqf commissions. With the re-introduction of centralized management, it was apparent that the previous situation of decentralised management was abused by many mutavelis and county commissioners, leading to many negative consequences and a decrease in property and income.<sup>77</sup>

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<sup>72</sup> Hrvačić, Vakuf, 81

<sup>73</sup> Hrvačić, Vakuf, 31

<sup>74</sup> Ibid, 84

<sup>75</sup> Ibid, 84

<sup>76</sup> Vakufska direkcija, Vakufi u Bosni i Hercegovini, Historijat, trenutno stanje i perspektive, 28

<sup>77</sup> Čajlaković, „Nastanak i razvoj vakufa sa posebnim osvrtom na vakuf u BiH“, 251



Among the main open issues currently facing waqf property, as well as the Wakf Directorate, which is primarily responsible for taking care of the waqfs, is certainly the ongoing failure to adopt the legislation on restitution/denationalization and return of property confiscated by previous political systems. Some legal solutions in post-war BiH, which enabled the purchase of nationalized apartments, may have had an irreversible impact on waqf property. Certainly, in that situation, there was a conflict between two rights, i.e. the rights of the waqf and the rights of the users of apartments, both of which are legitimate. Therefore the titleholders of waqf property (ICBiH) should have been entitled to fair compensation.<sup>78</sup> Attempts to enact entity laws on restitution were stopped by the High Representative and it is unlikely that the issue will return to the spotlight, especially considering the projections of extremely high compensations that would follow in the events of the impossibility of natural restitution and the return of the confiscated property. The argument that a large amount of valuable property, especially the one located in the central urban areas would be “frozen” under the waqf can be described as unsubstantiated since such property is in most cases put to an economic use by the way of leasing unless it is obviously unsuitable for economic use and serves primarily for religious functions. On the other hand, unresolved legal issues and litigations can be identified as a large factor contributing to the exclusion of property from the market and useful economic employment.

Further problems are the disorderly conditions in land registers and cadastral registries and the way waqf property and the property of the Islamic community in general have been registered over the years. A problem also is a large number of lost waqfnamas, which makes it impossible to consistently implement the wishes of the waqif.<sup>79</sup>

## 9. Future possibilities

Certainly, one interesting question is the question of the possible codification of the institute of waqf in Bosnia and Herzegovina. Such an activity would have both its advantages and possible disadvantages. The waqf is practically inseparable from the Islamic Community of Bosnia and Herzegovina because within the ICBIH it can, through internal regulations and procedures, and the discretionary evaluation of the Riyaset of the ICBIH, be carried out in accordance to the rules prescribed by the Sharia, which defined and shaped the legal concept of the waqf itself and are inseparable from it. The introduction of positive law in form of state codification could be faced with the impossibility of the full application of Sharia requirements.

On the other hand, codification would provide greater legal certainty and the waqf would once again become a part of state legislation and not just exist within the internal rules of the ICBIH. The last state-made legislation concerning waqf applicable in the territory of Bosnia and Herzegovina was adopted during Austro-Hungarian Monarchy. This codification could be achieved by the adoption of separate legislation which would, of course, include the similar religious charitable endowments found in other traditions in Bosnia and Herzegovina. Less ambitious, but not less effective, would be a limited legislative change recognizing waqf as a special type of foundation in laws related to the establishment of foundations (entity legislation, e.g. Law on foundations of the Federation of Bosnia and Herzegovina). That would be effective because essentially, there are no contradictions between the basic Sharia principles related to the

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<sup>78</sup> Ćeman, *Vakufi i fondacije, komparativna studija*, 180

<sup>79</sup> Zajimović, “Petnaest godina rada vakufske direkcije”, 156

waqf and the principles applicable to the foundations. This is also confirmed by the fact that separate foundations operate under the auspices of the Waqf Directorate as well.<sup>80</sup> Foundations are particularly suitable legal vehicles for the establishment and management of waqfs in the countries of the European Union.<sup>81</sup> Such a proactive legislative approach would enable waqf property, if established as a foundation, to enjoy certain tax privileges granted by certain jurisdictions, especially in dealings abroad, given its charitable nature.

On the other hand, the possibility of Bosnia and Herzegovina progressing on the path of European integration, and potentially becoming a member of the European Union (EU) in future, would bring new and interesting possibilities for making waqf a part of the legal space of the EU. Namely, for some legislation to be considered as part of the community law of the EU (*acquis communautaire*), it has to be adopted at the level of the European Union in form of the legislative acts of the Union (such as regulations, directives and decisions).<sup>82</sup> However, one of the fundamental principles of EU law is the principle of mutual recognition. The principle serves as a tool for the harmonisation of legislation between the member states, without the need for the imposition of new legislation on the community level.<sup>83</sup> Through that principle, member states must recognize and give the same treatment to the legal entities recognized under the laws of another member state's jurisdiction. The rationale of that principle is to avoid disruption within the single market and attempts of member states to adopt subsequent legislation and introduce discrimination between the legal entities (or discrimination in other areas such as products, services etc. which all fall under the principle of mutual recognition). Parallel to the EU Law as a positive normative legislation of the European Union, stands legal culture, as a societal phenomenon. Legal culture, as a phenomenon that is in close connection with other aspects of society like economic and political influences, is a fluid concept open to the influence of various actors. Therefore, the legal culture within European Union is shaped and defined by various contributing actors.<sup>84</sup> With the proactive approach to the regulation of waqf through legislation, Bosnia and Herzegovina, as a potential future member state of the EU would ensure the recognition of its waqfs as legal entities throughout the union, which would also be an excellent contribution made by Bosnia and Herzegovina to the legal culture of European Union.

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<sup>80</sup> Mehmedović, Ahmed. Upravljanje vakufima u BiH 1847-2017. Sarajevo: El-Kalem, 2017, 151

<sup>81</sup> Karčić, Fikret „Mogućnost uspostavljanja vakufa u EU“. Vakufi u BiH - Zbornik radova, Sarajevo, (2011): 131 - 137, 135

<sup>82</sup> Craig, Paul and De Búrca, Graine. Eu Law : Text Cases and Materials, fifth edition. New York: Oxford University Press, 2011, 104

<sup>83</sup> Rainer, Arnold. "Aspekti ujednačavanja prava unutar EU, državama-kandidatkinjama i trećim državama." *Zbornik radova Pravnog fakulteta u Splitu*, 44, br. 3-4 (2007): 393-401, 396

<sup>84</sup> Visegrady, Antal. "Legal Cultures in the European Union," *Acta Juridica Hungarica* , 42, no. 3-4 (2001): 203-218, 204

## 10. Conclusion

The long-term experience Bosnia and Herzegovina had with waqf, as well as the current situation, all provide a special insight and lessons which waqfs in other parts of the world probably have not encountered. The same can be said for future possibilities.

Waqf as a legal concept that originated in the Sharia Law certainly is not an invention of the people of Bosnia and Herzegovina but represents a cultural good, which is shared with other societies, primarily those with large Muslim populations and traditions. The waqfs can be seen as a motor of urbanisation and development in certain periods of the past of Bosnia and Herzegovina. On the other hand, the issues waqfs in Bosnia and Herzegovina have encountered in the past include intentional destruction and targeting as well as legislative interventions from different political systems which included the acts of large-scale confiscation and nationalisation of waqf property. Remediating such a situation still represents an open issue.

From a legal and historical point of view, the concept of waqf, shaped and codified by the state, or at least, by the entity, would be an excellent contribution that Bosnia and Herzegovina could bring to the legal cultural heritage of the European Union. Creating a legal culture and heritage is a two-way process. Bosnia and Herzegovina would certainly be under the obligation, and already partially is, to adopt the *acquis* of the EU and harmonize its regulations with those of the EU. However, with the possible accession of Bosnia and Herzegovina to the EU, Bosnia and Herzegovina would become an active participant and would be in a position to contribute. In such a case, specific legal concepts become part of the legal heritage of the European Union. If not through legislation at the community level, then through the application of the principle of mutual recognition, as applied and understood in EU law. Thus, it would be ensured that the accepted legal entities recognised under the laws of Bosnia and Herzegovina are also recognized throughout other member states.

However, as a precondition for such a possibility, there is a need for an open debate, understanding and proactive legislative action. Such a legislative activity could be done by the adoption of a separate law which would deal with waqf as well as other similar endowments that could be identified in other religious traditions in Bosnia and Herzegovina. Another option would be a limited amendment in the legislation related to Foundations (like the Law on foundations of Federation of Bosnia and Herzegovina), which would recognise waqf as a separate form of a foundation. That would be an opportune solution, since sharia rules applicable to waqf essentially do not oppose the general rules applicable to foundations, and such a legislative intervention would enable waqf to enjoy legal protection and benefits (such as tax benefits granted by some jurisdictions). Moreover, that would represent the return of waqf into positive legislation of the state, which was not seen in Bosnia and Herzegovina for a long time.

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