

# ‘GOD IS AN ABSENTEE, TOO’: THE TREATMENT OF *WAQF* (ISLAMIC TRUST) LAND IN ISRAEL/PALESTINE

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## Introduction: Legal Pluralism in Israel/Palestine

Greater recognition of *shari'a* law is being called for among jurisdictions with significant Muslim minorities and conditions of legal pluralism. In Europe this may be limited to areas such as family and inheritance law, while in sub-Saharan Africa a wider application is campaigned for. Recent academic work in postcolonial legal geography has also been re-appraising how differentiated territorial jurisdictions marginalize unwanted social groups (Blomley & others 2001). Indigenous groups dispossessed from their communal and ancestral lands are increasingly re-asserting their claims through legal and human rights challenges. This article explores the treatment of Islamic *waqf* property (held for religious charitable purposes) in the Arab/Israeli conflict over land in Israel/Palestine, setting it within a context of postcolonial legal pluralism.

Within the territories that comprise Israel/Palestine<sup>1</sup>, land is the central contested issue. The Zionists in the early 20<sup>th</sup> century regarded Palestine as ‘a land without people for a people without land’, and claimed for themselves a historic and God-

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<sup>1</sup> This article refers to Israel/Palestine as the pre-1948 territory of Palestine, which now comprises: the state of Israel; the occupied territories (post-1967) of the West bank, formerly under Jordanian jurisdiction, and the Gaza Strip, formerly under Egyptian jurisdiction; and Jerusalem, with a special and complex legal status.

given mission to ‘redeem the land from desolation’. Recent revisionist academic lawyers and historians have relocated the Israeli national story within a colonial and postcolonial narrative (eg Morris 2000, Benvenisti 2002). Israel/Palestine inherits several legal traditions, offering often conflicting sources of legitimacy: Islamic, as applied by the Ottoman empire until 1918, and more recently by Jordan in the West Bank and Egypt in Gaza; British colonial, under the League of Nations Mandate (1923-48); and post-1948 Israeli, with borrowings from United States and European jurisdictions. As stated by Shamir:

‘Too little attention has also been given to the basic fact that the British, aided by all their colonial experience elsewhere, created and installed a functioning state in Palestine: a rather advanced web of administrative apparatuses and governmental departments, a sound infrastructure and, of course, a fully-developed, ready-to-use legal system’ (Shamir 2000: 11).

Israel/Palestine’s sacred status to three major religions (Islam, Judaeism and Christianity) also makes the territory uniquely saturated with religious and symbolic significance. The stewardship of land by the different faiths has been a contested area. This article examines the large-scale transfer of *waqf* land, supposedly held in perpetuity, to Jewish control through various legal mechanisms since the creation of the state of Israel in 1948, and recent legal disputes over the status of certain mosques and cemeteries.

The English-language literature on *waqf* in Israel/Palestine is limited, while relevant legislation and court rulings are often unpublished, or unavailable in English. This article is the outcome of field research undertaken by a Palestinian Arab living in Israel (Haitam Suleiman). He had the advantage of full Hebrew, Arabic and English language competence, and familiarity with the local cultural background, all important where questions dealt with controversial and sensitive issues, and when the field-work was sometimes disrupted by the current instabilities.

### The *Waqf*: A Stagnant or Reviving Institution?

The Islamic legal system presents an eternally valid ideal towards which society aspires, and thus differs from the Western legal tradition, which separates or

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reduces the role of religion. *Waqf* [pl. *awqaf*] in Arabic means confinement or prohibition, and in Islamic *shari'a* law is a juridical institution facilitating the reservation of property for religious purposes. A *waqf* is established by a living man or woman (the *waqif* = founder) who holds a certain revenue-producing property, and makes the property inalienable in perpetuity, prohibited from sale, gift and inheritance. The property is placed under the stewardship of a fiduciary (*wali* or *mutawalli*) who assures that the revenues pass to the intended beneficiaries (*mustahiqeen*) (Zarqa 1994; Sait & Lim 2006). Under *shari'a* law, while *sadaqa* (charity) should reach only the poor and needy, *waqf* can be directed to both poor and rich; *Sadaqa* may be owned, sold, or granted, but the *waqf* is perpetual, with no intervention in ownership, and is confined to fixed property, or things that have sustainable reserved revenues.

There are three basic kinds of *waqf*. The first, the *khairiy* or charitable *waqf*, directs property revenues towards philanthropic goals. The second, the *ahli* or family *waqf*, benefits family members, with the endower choosing what individuals and what lines of descent benefit; administrators are family members, and the revenue-bearing assets circulate indefinitely. Finally, the *mushtarak* or joint *waqf*, divide the revenues between philanthropy and family.

Ironically, given the contested state of *waqf* in Israel, the very first *waqf* was created by a Jewish convert to Islam who bequeathed his wealth to the Prophet for the benefit of the poor and needy (Akgundfiz 1996: 59). The juridical form of the *waqf* took shape in succeeding centuries, and the jurist Abu Yusuf (d. 798) asserted that a *waqf* was valid only if irrevocable and made in perpetuity (Hennigan 1999). Its perpetuity element distinguishes the *waqf* from the trusts and foundations found in Western legal systems, but it apparently influenced the early English trusts during the time of the crusades, when there was much population movement between Europe and the Holy Lands, including the Franciscan Friars. The University of Oxford in its early years may have been influenced by the *waqf*, with the 1264 Statutes of Merton College (significant in the founding of the college system) showing Islamic influences (Gaudiosi 1988).

*Awqaf* proliferated with the establishment of Muslim-ruled states, offering a means of diverting resources from consumption, and investing them in productive assets to provide either usufruct or revenues for future consumption by individuals or groups of individuals (Yediyildiz 1990: 35-39; Kahf 1998). *Awqaf* served many functions. They provided educational institutions with buildings, teaching materials, staff salaries, and scholarships for poor students, derived from the

revenues of orchards and rental buildings, and independent of the state (Sayed 1989: 249-258). They provided health services, public kitchens, orphanages, environmental protection and animal care (Al Qaradawi 1976). *Awqaf* stimulated economic activity, providing shops at low rent, public water fountains, and accommodation for commercial caravans (Kuran 2004). A range of public goods now provided by government agencies in the past came through private *waqf*, which have been called ‘the single most important and pervasive economic institution of Islamic society with profound effects on the tax structure of the state, the redistribution of wealth in society and the urban fabric of Islamic cities’ (Peters 1986: 173). The *waqf* was an urban institution that shaped the civic space of Ottoman cities (Van Leeuwen 1999: 203), while *waqf* property was estimated at over a third of the agricultural land in Turkey, Morocco, Egypt and Syria (Kahf 1998).

By the second half of the 19th century the *waqf*’s rigidities made it increasingly inadequate for the provision of public goods, and modernizing states in the Middle East nationalized vast *waqf* properties, while new municipal government services increasingly supplanted the *waqf* (Kahf 1998). Legislation brought *waqf* under greater regulation or absolute prohibition, and contributed to the prevalence of secular law over *shari’a* principles, resulting in the stagnation of *waqf*. The family *waqf* was restricted, and some states forbade new creations, with the stipulations of *waqf* founders no longer treated as ‘sacred and inviolable’. The state claimed that the *waqf* was no longer serving its original purposes, and it could administer them better (Sait & Lim 2006: 76). The eclipse of *waqf* has left a vacuum in the arena of public services: students, the sick, homeless, travellers, the poor and prisoners are only some of the vulnerable who have lost the protection of the *waqf*.

The *waqf* is, however, showing signs of reinvigoration, with *awqaf* properties occupying a growing share of the societal wealth of Muslim countries and those with significant Muslim minorities. Since the oil crisis of the 1970s Islamic banking has developed new tools of finance, and *waqf* has emerged as a non-profit ‘third’ sector, distinct from the profit-based private sector and the official public sector. Its institutional protection is making it again a main actor in the social and economic life of Muslims (Kahf 1998).

### ‘God is an absentee too’: The Loss of *Waqf* Land to the State of Israel

Most *waqf* property in Israel has been expropriated by the Israeli state under

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Absentee Property Laws, and it is one of the most sensitive and complicated issues in the Palestinian-Israeli conflict. As the Palestinian refugees put it, 'God is an absentee too'. Israel claims 93 per cent of its territory as public domain for the Jewish faith, and the process of confiscation has isolated and contained the surviving Arab communities within Israel, while the rest of the Palestinian people have been displaced to peripheral locations (Gaza, the West Bank), under Israeli military occupation since 1967 (Home 2003).

During the period 1918-48 land dominated the efforts of the British Mandate, whose land law was claimed to 'embrace the system of tenures inherited from the Ottoman regime *enriched by amendments* [our italics], mostly of a declaratory character, enacted since the British occupation, on the authority of the Palestine Order-in-Council 1922-40' (Survey 1946-7: 225). Among the first actions of the occupying British were to close the Ottoman land registers, prohibit all land transactions until a new registry was installed, and transfer much jurisdiction in land matters from Islamic *shari'a* courts to new secular land courts. Two Mandate lawyers prepared 'as comprehensive a treatise on the Land Law of Palestine as is possible in the present circumstances' (Goadby and Doukhan 1935), and the resulting book has been called 'a master-piece of how colonial regimes occupy legal systems' (Strawson 2002: 370).

The Mandate recognised the five land tenure types in Ottoman law (Goadby & Doukhan 1935), which were as follows:

*Mulk land* (fully-owned urban freehold property). The 7 per cent of the land of Israel still in private ownership is mostly former *mulk* land, mostly located within Arab villages.

*Miri* land. This had heritable use rights, but could revert to the state if not cultivated after three years (*mahlul*), and then be auctioned to anyone prepared to cultivate it. *Miri* land represented the largest proportion of land in Palestine, and after 1948 was mostly acquired by the Israeli state, particularly through strict application of the three-year rule.

State land required for public purposes (*matruka*, meaning withdrawn) and registered with the state or local authority. This included military bases, roads, forest land. and public open spaces within villages.

Dead land (*mawat*), ie uncultivated, un-irrigated and vacant land, needing government consent to bring it into cultivation. Islamic law defined ‘dead land’ as sufficiently far from an inhabited place (a distance regarded as in practice a mile and a half) that a human voice could not be heard. *Mawat* in Palestine included the Negev desert and the 3000 sq.km. of mountain and desert east of Hebron, Jerusalem & Nablus. Article 6 of the League of Nations Mandate made it and *matruka* land available for Jewish settlement.

*Waqf* land, held in trust for Muslim religious and charitable purposes. In 1948 *waqf* land was estimated to comprise a sixth of the country (Dumper 1994), and the Palestinians’ culture of the sacred *waqf* is reflected in their treatment of *waqf* plots, often olive groves, which were cultivated by community volunteers, who would afterwards meticulously clean from their clothes traces of the sacred *waqf* soil.

During the Mandate period the British established a Supreme Muslim Council in 1921, which managed *shari’a* affairs in Palestine. Its *waqf* activities from 1921 to 1936 were impressive:

Twenty-one new mosques and three minarets built, and 313 mosques repaired (notably the *Al Aqsa* mosque in Jerusalem).

224 new properties built, and 300 repaired, including shops, houses, and the *waqf* building (originally the Palace Hotel in Jerusalem, after 1948 used as Government offices).

Draining of swamps, Planting of trees on *waqf* lands, and enlargement of *waqf* lands by the purchase of about 25,000 dunums.

Maintenance of schools and award of scholarships for Muslim students to universities in Egypt, Syria, and Europe.

Establishment of a Moslem orphanage, training of midwives. (Survey 1946-47)

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After 1948 the new Israeli state reformulated regulations which had been devised in 1939 by the British for wartime conditions, as the 1949 Emergency Regulations on Property of Absentees, subsequently the Absentees Property Law 1950. A Custodian of Absentee Property was instituted, similar to the preceding Mandate Custodian of Enemy Property. Property abandoned by Arab refugees passed into the control of the new Israeli administration, with the confiscation of two million *dunams* to the Custodian, who later transferred the land to the development authority. Land in *waqf* ownership also passed from Muslim hands to the Custodian, since Israel did not distinguish between *waqf* property and other land, and the Custodian of Absentee Property claimed *waqf* property on the ground that the Supreme Muslim Council had become an 'absentee' (most of its members becoming refugees in 1948). Thus the Custodian was a conduit through which land passed to the Israeli Development Authority, and later the Israel Land Authority, in effect as a means of 'laundering' confiscated Palestinian land. The Absentee Law 1950 prohibited the *shari'a* court from supervising *waqf* property, while the Israeli high court held, in *Habab v the Custodian over Absentee Property (58/54)* that the custodian was neither a trustee of the properties, nor responsible for their management; also the absentee was not entitled to take legal action against the custodian (Jiryis 1981: 84)

Another modification of Mandate emergency regulations was the Emergency Regulations (Cultivation of Waste Lands) Law, 5709-1949. This law derived legitimacy not only from Mandate law but also the Ottoman Land Code, which had provided for special commissions to record abandoned villages and reclassify vacant land lying idle and 'exposed to the sun' (*shamsieh*) as state domain. It empowered the Ministry of Agriculture to declare lands as 'waste' lands (Article 2), and to take control of 'uncultivated' lands (Article 4), which could be confiscated without having to confirm the absentee status of owners. Much of the land abandoned by the Palestinians in 1948 was not recorded in the Ottoman or Mandate land registers, as many did not register their land for fear of tax collectors and military conscription. While much urban property was held freehold (*mulk*), agricultural land was classed as *miri*, in which formal and ultimate ownership was held by the State, and which if uncultivated for three years could be reclaimed by the state (COHRE & Badil 2005).

A further important law for land confiscation was the so-called 1965 amendment, described by Israeli scholars as a 'reform' of the *waqf* in Israel: the Absentees' Property (Amendment No. 3) (Release and Use of Endowment Property) Law

1965. The Board of Trustees of the Muslim *awqaf* was made up of government appointees, who would sell or exchange land with the ILA unaccountable to the Muslim community, and this sometimes caused violence within the Palestinian community, including assassinations. The 1965 amendment represented a further stage in the confiscation by authorising the transfer of *waqf* property to the Custodian, denying the conditions that were attached when the property was endowed, and ensuring that property confiscated from the *waqf* would not be returned, regardless of whether the *mutawalli* or the beneficiary is classed as an 'absentee'. The law empowered the Custodian to pass the property to the Development Authority or to a board of trustees, ostensibly to prevent its neglect, but in practice to sell it for development, contradicting the fundamental perpetual characteristic of *waqf* land. It freed the remaining *waqf* from restrictions under *shari'a* law, and also restricted the political use of funds generated from those *awqaf*. The state thus acquired a further tool to transfer remaining *waqf* properties from Muslim hands to the Jewish community through the use of Muslim 'state appointees' to a board of trustees (Dumper 1994).

### *Waqf* Land in Jerusalem: Special Status

The situation with *waqf* property is particularly complicated in Jerusalem, because of that city's special status under international law, and it comprises some 90 percent of property within the Old City (both Islamic and Christian). Jordan continues to exercise its sovereignty and law over *waqf* institutions in Jerusalem through the Ministry of Waqf in Amman, and, while Jordanian law became obsolete with the establishment of the Palestinian Authority (PA) in the West Bank and Gaza, it still forms the legal basis for some institutions in Jerusalem where the PA is not allowed to function. During the Mandate the Palestinians used *waqf* properties as a buffer against the sale of land to the Jews. Jordanian control during the 19 years of its rule (1948-67) allowed the decline of *waqf*, with only 16 new *awqaf* being founded in Jerusalem, compared with 90 under the first 23 years of Israeli occupation (1967-1990) (Reiter 1996). Israel maintained the sovereignty of Muslim institutions and the *waqf* in East Jerusalem (including the Old City). Individual *waqf* property is recorded in the *Shari'a* Court in Jerusalem and in the Department of Islamic *Awaqaf*, but the extent of *waqf* property in the Old City is not publicly available.

Many Jerusalem residents rent from *waqf* institutions. Since 1967 rents agreed under Jordanian rule are not recognised by Israeli law, and have not increased in



line with inflation, resulting in dilapidation of much *waqf* property in the Old City (Lapidoth 1995). Cases decided by the *Shari'a* Court in East Jerusalem on rent or tenancy issues could only be enforced by the civil courts, which are Israeli and so not recognised by the *Shari'a* Court. The *mutawalli* of family *waqf* cannot resolve *waqf* property disputes, because a Palestinian court decision cannot be enforced, and will not take action in the Israeli *shari'a* court because this would be recognizing its jurisdiction over Jerusalem. As a result of this 'void in legal authority', the family *waqf* managers and the Administration have had to rely on moral and community pressure to enforce decisions. Investment in property and establishing new *awqaf* were neglected as a result of the uncertainty and the ambiguity. leading to property blight in Jerusalem particularly in the Old City (Dumper 1994: 111).

The Tenancy Protection Act of 1954 provides that a tenant cannot be evicted either for non-payment of rent, alterations, or sub-letting if resident for more than fifteen years. Additionally most leases allow a tenant to sub-let with *mutawalli* having no control over the sub-letting but still responsible for upkeep. Rent increases were linked to the cost of living index, but only for rents charged in Israeli shekels, while most properties in the Old City are charged in Jordanian dinars, and tenants can avoid rent increases with support from Israeli courts. Some landlords changed rents to Israeli shekels, seen as more stable than Jordanian, but deflation of the Israeli currency devalued these rents, while Israeli law prohibits lease revisions or eviction of tenants (Qupity 1998: 15–16). Commercial and cultural activities could flourish with Palestinians avoiding full landlord or Israeli control, but investment and development were neglected because of legal uncertainties and ambiguities, as the field-work revealed. In a study of the *awqaf* of six families in Jerusalem and reading 100 *waqf* deeds, Al-Alami (2006: 147-153) found that the long-term control of these *awqaf* by families gave them special benefits such as long-term leases of valuable *waqf* assets. The Israeli district court issued an initial decision allowing itself the right to review cases related to Islamic *Waqf* property in Jerusalem, but with the potential to be applied all over Palestine.

### Mosques and Graveyards as Sites of Resistance

The Absentee Property Laws precluded Muslims from protecting and maintaining their sacred places, and many were subsequently transferred by the custodian to the development authority, which sold on to Jewish investment companies, so that eventually many mosques and cemeteries became museums, cafes, restaurants or

even synagogues. The remaining unsold mosques are deserted, and cannot be maintained and used by Muslims who are denied access to them.

In 1951 the Ministry of Religious Affairs and the Custodian agreed that the ministry would be directly responsible for the management of sacred places, and this was confirmed by the government in 1952. The *Protection of Holy Places Law* 1967 (Article 1) states that:

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

This guarantee was inserted to neutralize international public opinion, but there was no clear definition of “sacred place” in the Israeli legal system (Berkovits 2006). Adjudication is still governed by a 1924 Mandate law, upheld by the Israel Supreme Court, with matters relating to religious rights in the Holy Places (including disputes between denominations of the same religion, and between religions) decided by the government, not adjudicated in the courts.

About a third of Muslim *waqf* property, principally mosques and graveyards still in use, was not expropriated after 1948, and in the early 1990s, following the Oslo accords, the Islamic Movement in Israel started to survey the *waqf* properties, intending to protect and develop them, and to prevent attempts by Israeli authorities to change their status and sell them off through the state-appointed trustees. Various cases illustrate the progress (or lack of it) of that contestation, as investigated in the field research for this article.

Among the disputes over *waqf* properties was that involving the Muslim cemetery of Haifa, *Jamia' al-estiqlal*, used since the Mandate. In 1993 the *shari'a* court in Haifa confirmed an agreement between two *mutawallis* and an Israeli company regarding a deal to develop the site, but some months later one of the signatory *mutawallis* applied to the *shari'a* court to cancel the agreement, since the same *qadi* Zaki Midlij who permitted the agreement disowned it. The *mutawalli* then applied to the High Court, relying on an additional statement of *qadi* Midlij, in which he claimed he had been coerced under armed threat from the company's lawyer. The police questioned the *qadi*, who resigned over the matter as a *qadi* of the *shari'a* court of appeal. The two parties agreed to transfer the case to the civil court in Haifa, where it is still pending.

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The Adalah organisation (the Legal Centre for Arab Minority Rights in Israel) petitioned the Supreme Court in the name of Muslim religious leaders to demand legal recognition for the Muslim Holy Places in Israel. A special committee was formed in 2000, to investigate the situation of Arab holy sites, with representation from the Ministry of Religious Affairs, the Ministry of National Infrastructures, the Israel Lands Administration, and the Regional Committee for Arab Local Councils. The committee prepared a plan for abandoned non-Jewish holy sites, compiling a list of 53 Muslim holy sites and 58 abandoned Muslim cemeteries, but the Ministry of Religious Affairs did not implement the committee's recommendations. In *Bhmr 1931/97* the Israeli civil court held that a mosque should be considered as a sacred place only if the property itself is sacred (the use in itself being insufficient). In Islamic law, however, a *shari'a* court *qadi* can confirm the sacred element: mosques and graveyards remained sacred, even without a roof.

The *qadi* of the *shari'a* Court of Appeal Ahmed *Natur* issued a *marsoom qadai* (legal decree), legally binding on all *shari'a qadis*, which attempted a tougher line. With the Muslim *waqf* places, and the sacred places specifically, gradually losing their status, abuse of *waqf* properties had become a routine practice, with manipulation of the *shari'a* courts to secure their release to Israeli control. The *qadi's marsoom*, for the 'public benefit' of Muslims in accordance with Islamic law, criticised the Israeli state for confiscating *awqaf* properties, and proposed procedural steps to protect the remaining *awqaf* from extinction. The *shari'a qadis* were not allowed to deliver any *fatwa* which might permit the use of sacred *waqf* properties or any other *awqaf*, for other purposes than those declared in the *waqfiya*. Even if the *qadi* tried to rely upon *shari'a* judgments, they might violate basic principles. Mosques were declared sacred even when closed or deserted, 'as long as one prayer was performed there'. The *qadi* could not issue or confirm agreements on *waqf* property when these effected sale, rent, or substitution. *Shari'a* courts appointing *mutawallis* should call them to account every six months, with reports kept in an official register available to the public (an important procedure as previously many *fatwas* and approvals were inadequately documented). The *shari'a* courts should dismiss *mutawalli* who abused their positions and took no action to protect the *waqf*. The *shari'a* courts were not allowed to appoint *mutawallis* without permission of the *shari'a* court of appeal, choosing only those who had good character, history and no criminal record. The Israeli Minister of Religious Affairs, however, by letter of 3 June 1996 rejected the *marsoom*, claiming that *qadi Natur* was not authorised to issue it. *Qadi*

*Natour* challenged the minister as improperly intervening in the judicial system, arguing that the *shari'a* Court of Appeal had jurisdiction.

The case of the Beer el-Sabe (Beersheva) ‘big mosque’ further illustrates the conflict over *waqf*. The first mosque in the Naqab (Negev), it was founded in 1906, with Arab Bedouin sheikhs contributing half of the funding. After 1948 the mosque was confiscated, and was used as a court and prison until 1953, then as a museum until 1991, but has since been neglected and unprotected, surrounded by restaurants and bars, a municipal building and a public garden. In 2005, the Supreme Court of Israel sat to adjudicate on a petition submitted by *Adalah*, the Legal Centre for Arab Minority Rights in Israel. In 2002, a request was made for the re-opening of the Big Mosque for Muslim prayer. At the time Beer el-Sabe had some 259 synagogues for 180,000 Jewish residents (one for every 700), while the 5,000 Muslim residents had no mosque, not to mention the 150,000 Muslims in the surrounding Naqab. The petition was submitted by *Adalah* on behalf of the Association for Support and Defence of Bedouin Rights in Israel, the Islamic Committee in the Naqab, and 23 Palestinian citizens of Israel, against the Municipality of Beer el-Sabe, the Development Authority, the Ministry of Religious Affairs, and the Minister of Science. *Adalah* argued that free access to the mosque was protected by the right to freedom of religion. The Israeli police force claimed that reinstating the mosque would create inter-community conflict, and the municipality argued that it would bring the ownership of all Muslim religious sites into dispute, even the Temple Mount and Jerusalem. *Adalah* argued that maintaining the *status quo* would continue discrimination against Muslims, violating the right of freedom of worship. *Adalah* added that “there was no presence or representation of any Muslims from Beer el-Sabe or elsewhere on the Committee, and that, as it was formed by and constituted of members of various governmental offices, who are essentially a party to the dispute with an interest in maintaining the *status quo*, the Committee’s recommendations were neither just nor objective” (Adallah 2005: 4). Justices Procaccia, Hayut and Jubran ordered that the parties review their positions and within sixty days reach an agreement to convert the mosque to a cultural and social centre for use by the Muslim community of Beer el-Sabe, *except for the purpose of praying*. In 2009 the Supreme Court upheld the previous decisions, still denying Muslims use of the building for prayer.

In the case 2289/81, involving the *waqf Alestiqlal* cemetery in Haifa, the Muslim community in Haifa petitioned in the district court to prevent the *mutawallis* transferring the bones of the Muslim dead elsewhere, and to develop the site. The

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court claimed that it had no jurisdiction, but referred the case to the *shari'a* court, which allowed the transfer, asserting that the sacredness of a cemetery lapses after 36 years of abandonment. Similar approaches have been adopted in other cases. In 232/76 (*Shukri v Sharia Court-Bagats*), the court upheld and reiterated the *Alestiqal* judgment. The *qadi* Tawfiq Asaliya in 1969 had stated that after 36 years the status of the *Salma* cemetery in Jaffa changed to 'outworn', but he reversed that decision in 1991, then claiming that 'the sacredness of graveyards is eternal and this entitlement cannot be nullified as it belongs to Allah', so no-one should destroy graves there.

The *Ijzim* cemetery raised similar issues recently, resulting in Palestinian demonstrations on site. In 1949, a Jewish settlement was built on the lands of the Palestinian village *Ijzim*, whose inhabitants fled after the 1948 war. In 2002 Jewish developers bought land which included a graveyard of Muslim and Christian Palestinians. In 2004 the '*Al-Aqsa* institution for the development of *waqf* properties applied to the Israeli Supreme Court to stop construction work, because of the destruction of Muslim graves. The appeal relied upon the 2004 fatwa of *qadi* Ahmed Natour, stating that:

the sacredness of graveyards is eternal and no one is permitted to remove it... insulting graves and the cemetery for the purpose of building a residential area as in this case is forbidden.... the landscape of the graveyard (even though it was not used for long time) is still considered as *waqf* and it cannot be confiscated, nor it can be used for other purposes [translated from Arabic].

The developers disputed that the land was a cemetery, arguing that the graveyard recognised by the authorities was at some distance, and that local Muslims did not regard it as such, but admitted that graves had been discovered on the site, and the Ministry of Religious Affairs barred them from removal. In 2009, however, the Supreme Court rejected the petition and allowed construction to continue.

The *Maamano-Allah* Graveyard in West Jerusalem has been another recent case. Dating from at least the 13th century (Muslim tradition claims that companions of the Prophet Muhammad are buried there), the cemetery was declared absentee property in 1955 (although there was no publicity in Arabic as required under Israeli law), and during the next 30 years the municipality of Jerusalem gradually acquired ownership, with objections being filed but over-ruled. In 2004 the Simon Wiesenthal Centre began constructing a Museum of Tolerance on part of the

cemetery, with a much-publicized ground-breaking ceremony attended by California Governor Arnold Schwarzenegger, the Israeli President and Vice Prime Minister, the Mayor of Jerusalem, and dignitaries and guests from around the world. The centre aims to 'fortify the value of tolerance between peoples and between man to man'. When work uncovered human graves, the *Al-Aqsa* institution petitioned the Supreme Court for a provisional injunction preventing construction, and the dispute was brought to the *shari'a* and civil courts, who issued conflicting judgments. In 2009 the Israeli Supreme Court confirmed that three Muslim cemeteries (*Maamano-Allah*, *Ijzim* and *Alberwa*) could be confiscated to Jewish developers, against Palestinian objections which included demonstrations on site.

### Conclusions: 'into a dark tunnel'

The British Mandate over Palestine legislated for an array of modern land management tools, and allowed the mutation of the despised but useful Ottoman/Islamic land law for Israeli purposes, retaining a religious communal basis which could be pre-empted. The state of Israel came into existence in 1948 as the inheritor of a body of non-Jewish law derived from Ottoman law, following a positivist ideology of law and the state. Having driven out most of the Palestinians, it then modified the Mandate institution of the Custodian of Enemy Property, designed to hold such property in trust pending the end of hostilities, into the Custodian of Absentee Property, drawing upon the legal concept of 'absentee' in the Ottoman Land Code. The new state already had control of state and waste land, transferred to it by the outgoing Mandate administration, and used its powers against absentee property to confiscate large tracts of land. It treated *waqf* land as little different from other absentee property, disregarding the perpetuity element conferred under *shari'a* law, although 'holy' and 'sacred' places were placed under special protection, and there were particular arrangements for the Old City of Jerusalem. Palestinian attempts since the 1990s to revive *waqf* status and protect mosques and cemeteries from confiscation and change of use have generally been denied in Israeli courts, with *shari'a* court judgments over-ruled. As expressed by the director of *Awqaf* in Jerusalem, petitioning the Israeli court is 'like walking into a dark tunnel. Nobody can tell what is waiting for him at the other end'.

With the culture of endowing new *awqaf* disappearing under Israeli disapproval (except in Jerusalem), the role of *waqf* property in social and economic development has not been realised for Palestinian society, although it is being re-

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discovered in many Muslim countries after a century of stagnation. The Israeli state did not incorporate *waqf-khayri* into the state structure as other Arab countries have done, but confiscated *awqaf*, denied Muslim jurisdiction over them and deprived the Muslim community from benefiting from them.

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