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## The Islamic Family Endowment (Waqf)

David S. Powers

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# The Islamic Family Endowment (*Waqf*)\*

David S. Powers\*\*

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\* The author has provided all translations of Arabic.

\*\* Professor, Near Eastern Studies, Cornell University.

## I. AN INTRODUCTION TO THE ISLAMIC INHERITANCE SYSTEM

A Muslim who wishes to make arrangements for the transmission of his property to the next generation must consider a wide range of variables, including, on the one hand, the nature and extent of his economic assets, and, on the other, the people to whom he wants to transmit these assets. In fourteenth-century Damascus or Fez, the economic assets of an urban Muslim notable typically might have included one or more of the following: a house, compound, workshop, bakery, garden, orchard, or olive grove. The people to whom he might want to transmit these assets would have included his children, spouse, and agnatic relatives. A decision about who would receive what property and in what amounts was likely to be affected, in turn, by demographic considerations and by specific characteristics of the individual members of the family, such as birth order, gender, marital status, residence patterns, age, financial situation, and personality. All of these factors would intersect in a complex but intangible manner, with the nature of the affective relations between and among a proprietor, spouse, children, and other relatives.

### A. *Compulsory Inheritance Rules*

Any decision that a person makes regarding the inheritance of his estate will be the result of a complex calculus that involves the weighing of shifting social, economic, demographic, and personal considerations. In Muslim societies, a person's ability to make such calculations is frustrated, in theory, by the compulsory Islamic inheritance rules that impose substantial constraints upon the freedom of a person contemplating death to determine the devolution of his or her property.<sup>1</sup> Under such rules, bequests may not exceed one-third of an estate, and may not be made in favor of any person who qualifies as a legal heir, unless the other heirs give their consent.<sup>2</sup> Compulsory rules for the division of property have their basis in Qur'anic verses that traditionally have been understood as recognizing two classes of

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1. See N. J. COULSON, *SUCCESSION IN THE MUSLIM FAMILY* 259-79 (1971) (setting forth specific rules that apply to changes in circumstances that occur during "death-sickness").

2. See *id.* at 213-14.

heirs.<sup>3</sup> One group is classified as “sharers,” that is, those persons for whom the Qur’an specifies a fractional share of the estate—daughters (in the absence of sons), a father, mother, or spouse—and, in the absence of children, one or more siblings.<sup>4</sup> The other group comprises agnates, arranged in a series of hierarchical classes.<sup>5</sup> The *raison d’être* of the Islamic inheritance rules is to insure the systematic and consistent application of a formula for the division of property that is regarded as having been divinely revealed, and to prevent the familial strife that may result from mere human calculation.<sup>6</sup> “Your fathers and your sons,” Qur’an 3:14 teaches, “you know not which of them is closer to you in usefulness.”<sup>7</sup>

The division of an estate follows a two-step process in which the qualifying “sharers” take their Qur’anic entitlements, then the closest surviving agnate inherits whatever remains.<sup>8</sup> For example, if a man dies leaving his wife, one son, two daughters, and two brothers, the wife inherits one-eighth of the estate as a “sharer” and the children inherit the remaining seven-eighths of the estate according to the Qur’anic principle, “the share of a male is equal to that of two females.”<sup>9</sup> Thus, the son inherits seven-sixteenths (7/16) of the estate while each daughter inherits seven-thirty-seconds (7/32) of the estate. As the closest surviving agnates, the sons and daughters totally exclude the decedent’s brothers from the inheritance. Theoretically, the person contemplating death is powerless to affect the relative entitlement of his heirs.<sup>10</sup> In the example, if the decedent’s son took care of him in his old age and his daughters were both married to wealthy men, the decedent could not stipulate that the bulk of his estate would pass to his son upon his death. Similarly, he could neither disinherit a child from whom he had become alienated, nor increase the share of a child of whom he was especially fond.

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3. See David S. Powers, *The Art the Legal Opinion: al-Wansharisi on Tawlij*, in ISLAMIC LEGAL INTERPRETATION: MUFTIS AND THEIR FATWAS 98, 99 (Muhammad Khalid Masud, et al. eds, 1996).

4. See *id.*

5. See *id.*

6. See *id.*

7. QUR’AN 4:13. For further details on inheritance law, see generally COULSON, *supra* note 1. For a revisionist approach to the Qur’anic inheritance verses, see generally DAVID S. POWERS, *STUDIES IN QUR’AN AND HADITH: THE FORMATION OF THE ISLAMIC LAW OF INHERITANCE* (1986); see also Richard Kimber, *The Qur’anic Law of Inheritance*, 5 ISLAMIC L. & SOC’Y 291-325 (1998) (discussing how the Sunni law of inheritance relies on interpretations of the Qur’anic inheritance verses).

8. See Powers, *supra* note 3, at 99.

9. QUR’AN 4:12.

10. See Powers, *supra* note 3, at 99.

### B. Circumventing the Rules

During the first two centuries of Islamic history, Muslims throughout the Near East found themselves subject to these compulsory rules of partible inheritance.<sup>11</sup> To the extent that they were applied, these rules frustrated the desires of proprietors to make the kind of calculations referred to above and resulted in the progressive fragmentation of wealth and capital.<sup>12</sup> It is perhaps not surprising that Muslims found numerous ways to circumvent the compulsory inheritance rules and that they received important assistance in this regard from jurists.<sup>13</sup> By distinguishing between *post mortem* and *inter vivos* transactions, jurists taught Muslims that the inheritance rules apply only to property owned by the decedent at the moment he enters his deathbed illness and that a proprietor is free to dispose of his property in any way he wishes prior to that moment.<sup>14</sup> There were no restrictions on the amount of property that a person might alienate during his lifetime, whether in favor of his eventual heirs or a "stranger."<sup>15</sup> Therefore, a proprietor might shift assets to his desired heir or heirs by means of an *inter vivos* transaction, such as a gift, charitable donation, sale, or acknowledgment of a debt, provided that these transactions conformed to the requisite legal formalities.<sup>16</sup>

In other words, a Muslim proprietor who wanted to avoid the application of the compulsory Islamic inheritance rules had to engage in some form of pre-mortem "estate planning" by making real or nominal transfers of property to his desired heirs. Such practices were common already in eighth-century Medina, in twelfth-century al-Andalus, and in fourteenth- and fifteenth-century Maghrib. Indeed, they are likely to have been common in Muslim societies at most times and places.<sup>17</sup>

The most important variation of a gift *inter vivos* was the family endowment (*waqf ahli*). Like a simple gift, a family

11. See *id.*

12. See *id.*

13. See *id.*

14. See *id.* On the doctrine of deathbed illness and its historical development, see generally Hiroyuki Yanagihashi, *The Doctrinal Development of "marad al-mawt" in the Formative Period of Islamic Law*, 5 ISLAMIC L. & SOC'Y 326 (1998).

15. See Powers, *supra* note 3, at 99.

16. See *id.* On such transactions, see generally David S. Powers, *The Islamic Inheritance System: A Socio-Historical Approach*, in ISLAMIC FAMILY LAW, 11-29 (Chibli Mallat & Jane Connors eds., 1990) [hereinafter Powers, *The Islamic Inheritance System*].

17. See generally, e.g., Powers, *The Islamic Inheritance System*, *supra* note 16; Powers, *supra* note 3; David S. Powers, *The Art of the Judicial Opinion: On Tawlij in Fifteenth-Century Tunis*, 5 ISLAMIC L. & SOC'Y 359 (1998).

endowment made it possible for a proprietor legally to remove part or all of his estate from the effects of the Islamic inheritance laws and to reduce the quantum of property available as an inheritance for ascendants, collaterals, and spouses. Further, the creation of a family endowment enabled the proprietor to establish a lineal descent group with exclusive usufructory rights to the endowment revenues and to define the descent strategy according to which these rights pass from one generation to the next, theoretically, in perpetuity.<sup>18</sup> Thus, a family endowment provided a means of ensuring that property would remain intact throughout the generations.

The Qur'an contains no reference to the institution of *waqf*, which, most historians agree, emerged during the first and second Islamic centuries (the seventh- and eighth-centuries C.E.).<sup>19</sup> During this period, Muslim jurists identified two key legal principles: (1) the distinction between real property (*asl*) and the revenue or usufruct (*manfa'a*) generated by that property; and (2) the notion that real property could be sequestered in perpetuity.<sup>20</sup> These two ideas are clearly reflected in an anecdote attributed to the Prophet Muhammad:

Verily, 'Umar b. al-Khattab owned some land called Thamgh, which was a valuable date grove. Umar said [to the Prophet], "O Messenger of God, I have acquired property that is dear to me. May I give it away as alms?" The Messenger of God replied, "Dedicate its principal as alms, but it may not be sold, nor given away as a gift, nor inherited."<sup>21</sup>

In another version, the Prophet recommends to Umar that he "sequester its principal and dedicate its fruits to charitable purposes."<sup>22</sup>

It is not certain that Muhammad in fact uttered these words to 'Umar. Indeed, pious, well-meaning Muslims may have attributed them to the Prophet during the century following his death in 632 C.E.<sup>23</sup> Nevertheless, by the end of the first Islamic century and beginning of the second, incontrovertible evidence exists of a sophisticated pious endowment.<sup>24</sup> For instance, a

18. See SHORTER ENCYCLOPAEDIA OF ISLAM 626 (H.A.R. Gibb & J.H. Kramers eds., 1965).

19. See *id.* at 626.

20. See *id.* at 624.

21. 4 AHMAD B. MUHAMMAD AL-TAHAWI, SHAR MA'ANI AL-ATHAR, LI-ABI JA'FAR AHMAD IBN MUHAMMAD IBN SALAMAH IBN 'ABD AL-MALIK IBN SALAMAH AL-AZD: AL-HAJAR: AL-MISRI AL-TAHAWI AL-HANAFI. HAQQAQA-HU WA QADDAMA LAHU WA 'ALLAQA ALAYH MUHAMMAD SAYYID JAD AL-HAQQ 95 (al-Qahirah, Matba'at al-Anwar al-Muhammadiyah 1968).

22. 4 MUHAMMAD B. IDRIS AL-SHAFI, KITAB AL-UMM 52-53, 58, (Muhammad Zuhri al-Najjar ed. Maktabat al-Kulliyat al-Azhariyya, 1961) (1903).

23. See SHORTER ENCYCLOPAEDIA OF ISLAM, *supra* note 18, at 626.

24. See *id.* at 627.

deed in which a well-known jurist designated his house in Fustat as a familial endowment is attested for the end of the eighth century C.E. Other examples follow in profusion. During the first half of the ninth-century C.E., two treatises devoted to the institution of *waqf* were written by Hilal al-Ra'y and al-Khassaf, respectively.<sup>25</sup> Clearly, the emergence of the Islamic pious endowment pre-dates the emergence of the trust in Western Europe by several hundred years.<sup>26</sup>

### C. Sources of Evidence

The Islamic endowment can be studied from a wide range of documentary and literary sources. The primary documentary source is the endowment deed (among the Malikis, *rasm al tahbis*; elsewhere, *waqfiyya*). The literary sources include the standard collections of prophetic hadith, early juridical treatises, doctrinal lawbooks, and collections of judicial opinions (*fatawa*, plural of *fatwa*). This article focuses exclusively on the Maliki school of law, which was prevalent in the Islamic West. The conclusions presented here are based upon an analysis of 101 judicial opinions, or *fatwas*, contained in volume seven of the *Kitab al Mi'yar* of Ahmad al-Wansharisi (d. 1508).<sup>27</sup> These opinions were issued by prominent Maliki muftis living in the major towns of Muslim Spain (Cordoba and Granada), the Maghrib (Fez and Tlemcen), and Ifriqiya (Qayrawan and Tunis) between the tenth and sixteenth centuries C.E. Taken individually, these *fatwas* provide only a truncated and fragmentary picture of the Maliki family endowment. Most *fatwas* are less than a page long and focus on one or more technical aspects of the institution. A smaller number contain supplementary documentation that makes it possible to trace the history of an endowment from the year of its creation until the year in which the *fatwa* was

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25. On the formation of the Islamic law of *Waqf*, see generally Peter Charles Hennigan, *The Birth of a Legal Institution: The Formation of the Waqf in Third Century A.H. Hanafi Legal Discourse* (1999) (unpublished Ph.D. dissertation, Cornell University) (on file with author).

26. See Henry Cattán, *The Law of Waqf*, in 1 *LAW IN THE MIDDLE EAST: ORIGIN AND DEVELOPMENT OF ISLAMIC LAW* 203, 213 (photo. reprint 1970) (Majid Khadduri & Herbert J. Liebesny eds. 1955).

27. 7 ABU AL-'ABBAS AHMAD B. YAHYA AL-WANSHARISI, AL-MI'YAR AL-MUGHHRIB WA'L-JAMI AL-MU'RIB 'AN FATAWI AHL IFRIQIYA WA'L-ANDALUS WA AL-MAGHRIB (Rabat: Ministry of Culture and Religious Affairs 1981-83) [hereinafter 7 AL-WANSHARISI]. For a French translation of selected *fatwas* based upon the earlier lithograph edition published in Fez in 1896-97, see 12, 13 E. AMAR, *La Pierre de touche des fetwas, de Ahmad al-Wanscharisi*, in *ARCHIVES MAROCAINES* (1907-08). For a convenient summary of the contents of the *Mi'yar*, see VINCENT LAGARDÈRE, *HISTOIRE ET SOCIÉTÉ EN OCCIDENT MUSULMAN AU MOYEN AGE: ANALYSE DU MI'YAR D'AL-WANŞARIŞI* (1995).

issued).<sup>28</sup> For historical investigation, the *fatwas* are best utilized when treated as a single corpus exhibiting the characteristic features of the pre-modern Maliki family endowment. The geographical and chronological distribution of these *fatwas* is sufficiently narrow to allow for such treatment.

## II. AN ANALYSIS OF ENDOWMENT DEEDS

### A. Legal Doctrine

The Maliki jurist Ibn 'Arafa (d. 1400) defined a *waqf* as the grant of the usufruct of a thing that is binding on the donor for the duration of the thing's existence. The ownership of the thing remains—hypothetically—with the donor, though he is no longer entitled to use the substance of the property.<sup>29</sup> If the usufruct can no longer be applied to the purpose for which the endowment was created, the property reverts to the ultimate beneficiary, usually a religious institution.<sup>30</sup> To be valid, a family endowment must satisfy certain general requirements. First, the founder must be an adult Muslim in good health and acting of his own free will. Second, the founder must use certain prescribed words and verb forms conventionally understood as signifying the notion of perpetuity, such as *waqf*, *hubs*, *sadaqa muharrama*, or *la yuhab wa la yuba'*. Third, the object of the endowment must be property whose utilization will not result in its dissipation or consumption.<sup>31</sup> Most endowments were created from immovable revenue-producing property, such as land or shops.<sup>32</sup> Fourth, a founder was enjoined from excluding one or more children as

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28. See David S. Powers, *A Court Case from Fourteenth-Century North Africa*, 110 J. AM. ORIENTAL SOC'Y 229-254 (1990) [hereinafter Powers, *A Court Case*] (translating and analyzing a significant number of documents dealing with a lengthy, inter-family conflict over control of a family endowment); David S. Powers, *Fatwas as Sources for Legal and Social History: A Dispute over Endowment Revenues from Fourteenth-Century Fez*, 11 AL-QANTARA 295-341 (1990) [hereinafter Powers, *Fatwas*].

29. See SHORTER ENCYCLOPAEDIA OF ISLAM, *supra* note 18, at 625 (noting that the Malikis are the main subscribers to this view of ownership in *waqf* property).

30. See 7 AL-WANSHARISI, *supra* note 27, at 12-14. Ownership is a point that sharply distinguishes the *waqf* from the English trust. Neither the founder of the *waqf* nor its supervisor may subsequently alienate the property that has been endowed. According to some observers, this makes the *waqf* a less flexible instrument than the trust.

31. See *id.* at 88-90.

32. See *id.* (explaining that shares of jointly held property could be designated as an endowment, although the procedure varied depending on whether or not the property in question was divisible).



beneficiaries of the endowment.<sup>33</sup> Family endowments created in favor of males to the exclusion of females were declared null and void by Malik b. Anas, the founder of the Maliki school of law. It was permitted, however, to stipulate that the share of a male was to be equal to that of two females, in accordance with a well-known Qur'anic inheritance verse.<sup>34</sup> Fifth, the creation of the endowment had to be declared formally in a legal ceremony in which two notary-witnesses attest to their presence at, and their witnessing of, the actual physical transfer of the property from the founder to the beneficiary. This ceremony, known among the Malikis as *hiyaza* (conveyance or taking possession), could be waived in certain circumstances, including when a founder created an endowment on behalf of his minor children.<sup>35</sup> The ceremony served to publicize the establishment of the endowment and to inform potential creditors or purchasers of the property's new status.<sup>36</sup>

A family endowment may be created between two living beings (*inter vivos*) or by means of a last will and testament. An *inter vivos* endowment takes effect immediately, cannot be revoked by the founder, and is not subject to any restriction with regard to its size. A testamentary endowment takes effect only upon the founder's death, may be revoked by the founder at any time prior to that occurrence, and is subject to the normal constraints on Muslim wills, which may not exceed one-third of a person's net assets and may not be made in favor of a legal heir.<sup>37</sup> In the *Mi'yar*, endowments created *inter vivos* are mentioned more frequently than testamentary endowments.

The specific terms of a family endowment are set out in an endowment deed, a legal instrument drafted with great care in an effort to eliminate any possible ambiguity. In the words of the fifteenth-century Fasi jurist, al-Mawasi, "Legal documents are predicated upon the removal of all ambiguities and summary statements . . . even if this causes them to run on at great length."<sup>38</sup> The founder customarily begins by designating the first generation of beneficiaries, usually one or more children, and by indicating whether or not males and females are to be treated

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33. See *id.* (referring to an injunction that derives from a *hadith* in which the Prophet reportedly rebuked a man who had made a charitable gift to one of his sons, saying, "Fear God and treat your children equally.").

34. See QUR'AN, 4:12.

35. See 7 AL-WANSHARISI, *supra* note 27, at 321-29 (explaining that the waiver was not allowed in the case of a house in which the founder continued to reside).

36. See *id.* at 48, 81, 88-90, 226-27, 321-29, 444.

37. See *id.* at 21-29, 75-76, 311-21, 463-64, 477-78.

38. See *id.* at 346.

equally.<sup>39</sup> Next, the founder indicates what happens to the revenues belonging to a beneficiary of the first generation upon his death. If that beneficiary leaves a child, his share reverts to that child; if the beneficiary dies without a child, his share reverts to the surviving beneficiaries of the first generation or their descendants. In this manner, the entitlement of extinct branches reverts to the surviving branches (per stirpes) of the lineal descent group.<sup>40</sup>

This pattern for the transmission of entitlement from the first generation of beneficiaries to the second may apply to the transmission of entitlement from the second generation to the third, although this is not necessarily the case. Referring to the second generation of beneficiaries, the founder generally indicates that the revenues are "for their descendants *and* their descendants' descendants, etc." Such phrasing generally was understood by the jurists as signifying that the entitlement now applies to anyone who qualifies as either a descendant (*'aqib*) of the founder or a descendant of a descendant. In other words, two or more generations of lineal descendants may qualify as beneficiaries simultaneously. At this stage, such an endowment is characterized as being *mu'aqqab* (for a descent group). If a member of the second generation of beneficiaries dies, his share reverts to the surviving beneficiaries of the second generation and to beneficiaries of all subsequent generations. In such cases, the revenues are divided among the qualifying beneficiaries, either per capita or according to need.<sup>41</sup>

A founder who does not want an endowment to become *mu'aqqab* must use some particle, word, or phrase conventionally understood as signifying that the entitlement does not pass from the first to the second generation of beneficiaries—or from the second to the third, and so on—until all members of a given generation have died out. For example, the founder may use the particle *thumma* (then), as in the phrase, "then for their descendants," or the phrase "one [generation] after the other" (*awwalan fa awwalan*). The revenues in an endowment of this type are distributed exclusively among the members of a single generation. If a qualified beneficiary dies, his entitlement passes to the surviving beneficiaries of the same generation, whether or not the decedent had a child. Thus, as the members of a single generation of beneficiaries die, the revenues accumulate in the

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39. The Malikis, unlike the Hanafis, do not allow a founder to designate himself or herself as the initial beneficiary. See Aharon Layish, *The Maliki Family Waqf According to Wills and Waqfiyyat*, BULLETIN OF THE SCHOOL OF ORIENTAL AND AFRICAN STUDIES, § 46:1, at 5-6 (1983).

40. See, e.g., *id.* at 29-30, 67, 267, 269, 279, 343, 355, 360, 396, 442.

41. See *id.* at 141, 280, 357, 398.

hands of the surviving members of that generation until the longest living member eventually controls the entire endowment. Upon that individual's death, the revenues are divided per capita among the next generation of beneficiaries, whereupon the process begins again.

Whether or not the endowment is *mu'agqab*, when a line of beneficiaries dies out completely, the revenues revert to the charitable purpose specified by the founder, usually a mosque or some other religious institution.

## B. Social Practice

### 1. Motives and Function

In Islam, charity begins at home. A man's first obligation, before other charitable purposes, is his family. According to a report attributed to the Prophet, "It is better to leave your heirs rich than to leave them destitute, begging from others."<sup>42</sup> A family endowment is thus regarded as an expression of the founder's desire to perform an act of charity, for which he or she will be rewarded in the hereafter. The charitable motive may be indicated explicitly, as in an endowment created "for the poor among my children and my children's children," or "for the needy of so-and-so's family,"<sup>43</sup> or for the founder's "needy relatives on both his father's and mother's sides."<sup>44</sup>

The pietistic urge is manifested in the testamentary endowments preserved in our source. Drafted toward the end of a person's life, these documents reflect the founder's anticipation of final judgment in the hereafter. By creating an endowment for some pious purpose, the founder hoped to earn divine reward in the next life, a hope that was expressed in formulaic phrases that appear repeatedly in the deeds. Most commonly, the founder indicated that he was seeking "the face of God the Almighty and the abundance of His momentous reward."<sup>45</sup> This formula invariably was followed by the citation of Qur'an 18:30, "surely we leave not to waste the wage of him who does good works."<sup>46</sup>

The pietistic motive of a family endowment must be distinguished from its many practical functions. A family endowment might be created for a wide variety of reasons, such

42. 11 MUSLIM IBN AL-HAJJAJ AL-QUSHAYRI, SAHIH MUSLIM BI SHARH AL-NAWAWI 76 (1930).

43. 7 AL-WANSHARISI, *supra* note 27, at 484.

44. *Id.* at 478.

45. *Id.* at 80.

46. QUR'AN, 18:30.

as a legal fiction to prevent revocation of a sale or secure property whose ownership was contested, to avoid confiscation of property, or as an act of loving kindness toward a dying husband. The primary function of the endowment, in this author's view, was to keep property intact, to assure the entitlement of beneficiaries for the duration of the object, and to regulate the transmission of usufructory rights from one generation to the next. Not only did the institution accord a founder the freedom to make decisions that Islamic inheritance law denied him, but the creation of a family endowment also gave a proprietor a legal means to remove all or part of a patrimony from the effects of that law. The creation of an endowment for the benefit of one's children and descendants—regarded as a pious act—reduced the quantum of property available as an inheritance for the founder's ascendants, collaterals, and spouse or spouses, thereby limiting its fragmentation through inheritance.

Some Western observers have asserted that family endowments commonly were used to frustrate the inheritance rights of females.<sup>47</sup> The *Mi'yar* does contain examples of this phenomenon—albeit fewer than the secondary literature suggests—but children of both genders were vulnerable to a founder's preferences.<sup>48</sup>

Founders who created an endowment for sons and their lineal descendants to the exclusion of daughters and their descendants frequently stipulated that if the line of males came to an end, the endowment was to revert to a daughter or her female descendants.<sup>49</sup> The specification of females as secondary beneficiaries of familial endowments suggests that Muslim society in the Maghrib during the Marinid period (1258-1465) was not as rigidly patriarchal as is often asserted. Indeed, the *Mi'yar* indicates that the Maliki family endowment frequently was used to supplement the rights of females.

Family endowments customarily were created for the benefit of the founder's male and female children alike.<sup>50</sup> Certainly, founders frequently invoked the Qur'anic principle that a son was to receive twice the share of a daughter.<sup>51</sup> The founder's ability to define a descent strategy, however, made it possible to

47. See OCTAVE PESLE, *LA THÉORIE ET LA PRATIQUE DES HABOUS DANS LE RITE MALÉKITE* 75 (1930); ERNEST MERCIER, *LE CODE DU HABOUS, OU OUAQF, SELON LA LÉGISLATION MUSULMANE: SUIVI DE TEXTES DES BONS AUTEURS ET DE PIÈCES ORIGINALES* 131 (1899).

48. See, e.g., 7 AL-WANSHARISI, *supra* note 27, at 62, 80-82, 270-72, 278-79, 281, 441.

49. See *id.* at 80, 223.

50. See *id.* at 9.

51. QUR'AN 4:12.

circumvent this provision, if desired.<sup>52</sup> The stipulation of equality between males and females could be applied to the founder's grandchildren and subsequent descendants. For example, a founder could specify in a deed that the revenues of the endowment were to be divided "equally among [the founder's] male and female children and grandchildren."<sup>53</sup> Such a provision is significant because it points to the willingness of men to use the endowment system to treat their daughters and female grandchildren on an equal basis with their sons and male grandchildren.

## 2. Founders and Beneficiaries

Legal texts, by their very nature, conceal important aspects of the social reality that gave rise to them. The scribes and jurists who produced *fatwas* had as their primary objective the reduction of social and economic conflicts into the objective and specialized vocabulary of the law. As a result, many of the *realia* that would be of interest to social historians are not articulated in the *fatwas*. The *Mi'yar* preserves the names of only ten founders of family endowments, eight males and two females.<sup>54</sup>

In most instances, the *fatwa* merely indicated in summary fashion that, for example, "a man created an endowment for his three sons" or "a woman created an endowment for her minor daughters." Although one would prefer a full transcription of the endowment deed, summary statements of this nature, used with care, can provide data sufficient to generate a profile of the typical family endowment in the period under consideration. Of the seventy-five cases in which both a founder and a beneficiary are mentioned, seventy-five percent (or, fifty-seven) were created by fathers and mothers on behalf of their children and, less frequently, grandchildren. Fathers outnumbered mothers as founders by a ratio of six to one (forty-eight as opposed to eight). The remaining twenty-five percent of the endowments were created for someone other than the founder's children and lineal descendants.<sup>55</sup> These figures suggest that the endowment system reinforced the boundaries of the Muslim nuclear family and contributed to its social reproduction.

In regard to the gender distribution of founders vis-à-vis beneficiaries, the record demonstrates that males commonly used the endowment to support the interests of other males. Of forty-

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52. See 7 AL-WANSHARISI, *supra* note 27, at 281.

53. See, e.g., *id.* at 141, 269, 343.

54. See *id.* at 25, 186, 248, 278, 281, 311, 343, 486 (males); *id.* at 188, 311 (females).

55. See *id.* at 248-57, 343-47, 463-64.

three endowments created by a father for his children, sons were specified as the exclusive beneficiaries in sixty percent of the cases, whereas daughters were specified as exclusive beneficiaries in only nineteen percent. Sons and daughters were named as co-beneficiaries in the remaining twenty-one percent of the cases. Thus, fathers were three times as likely to create an endowment for sons as for daughters. By contrast, mothers appeared to have been more even-handed. Of eight endowments created by mothers for the benefit of their children, three were created for a son, three were created for one or more daughters, and the remainder were created for sons and daughters jointly.

Twelve percent of the endowments created by parents for the benefit of their children specified that the children were minors at the time the endowment was created. This statistic suggests that it was common for a parent to establish a family endowment soon after he or she married and produced offspring. This practice points to a desire on the part of proprietors to make de facto arrangements for the ultimate devolution of their property while they were in the prime of life. This phenomenon required founders to make special provision for the inclusion of unborn children in the endowment.<sup>56</sup>

If a man had two or more wives, his calculations were more complex. Some husbands may have wished to favor the offspring of one wife over those of another. For example, a man created an endowment for his three minor children, Muhammad, Ahmad, and 'A'isha, by his wife, Maryam bint Yahya b. al-Ustadh, and for all subsequent male and female children by that same wife.<sup>57</sup> Presumably, the man had other children from a second wife. By contrast, another founder treated his sons by his two wives equally, creating an endowment for his three minor sons "and for all male children born in the future to his two wives, 'A'isha and Ghaniyya."<sup>58</sup>

A founder could also choose to create an endowment for his unborn grandchildren and great-grandchildren, a practice that is documented most frequently in testamentary instruments. Because a testamentary endowment takes effect only upon the founder's death, the founder retains control of his property throughout his lifetime. This advantage is offset by two distinct disadvantages. First, the endowment is limited to one-third of the estate. Second, the endowment may not be made in favor of

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56. See *id.* at 223, 229, 269, 442.

57. See *id.* at 281.

58. *Id.* at 278. The tendency of male founders to express a preference for male beneficiaries is even more pronounced in the case of endowments created for unborn children than in the case of endowments created for currently living children.

an heir.<sup>59</sup> The latter restriction entails that a testamentary endowment may not be created for the benefit of a son or daughter, thereby posing a dilemma for the founder who wants to maintain control of his property until he dies but also wishes to designate one or more children as beneficiary. Because the prohibition on bequests to heirs does not apply to a grandchild whose father is alive, a solution to the dilemma was to designate a currently living or unborn grandchild as the initial beneficiary. Since a minor grandchild would be subject to the authority of its father—who was the desired heir—the latter would in effect control the endowment revenues. Naming an unborn grandchild or great-grandchild as an endowment beneficiary also gave the founder an opportunity to favor the offspring of one branch of the family over another.<sup>60</sup>

When a designated family line became extinct, the endowment revenues reverted to a public institution. Some founders sought to circumvent this outcome by specifying that the revenues were to revert to his or her closest relative.<sup>61</sup> More commonly, a founder would specify that the revenues were to revert to “the Muslim poor”<sup>62</sup> or to “the poor and indigent.”<sup>63</sup> Some founders made very particular designations, such as, for example, “the poor and the indigent in Granada and al-Bira,”<sup>64</sup> or “the poor and indigent who reside in the mausoleum of Shaykh Abu al-‘Abbas al-Sibtī.”<sup>65</sup> One founder stipulated that upon the extinction of the designated line, the revenues were to be used to support students, ransom captives, and manumit slaves.<sup>66</sup> Another founder assigned the revenues for the use of lepers.<sup>67</sup>

The most common way to insure the perpetuity of an endowment was to designate as the ultimate beneficiary a religious institution, such as a mosque, school, Sufi convent, or the personnel associated with such an institution.<sup>68</sup> In a testamentary endowment created on June 30, 1389, the founder stipulated that if the first and second branches of lineal descendants died out, the revenues were to revert to the Jami' al-Sabirin inside the Victory Gate of Fez for the purchase of olive oil

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59. See *supra* note 2 and accompanying text.

60. See 7 AL-WANSHARISI, *supra* note 27, at 311.

61. See, e.g., *id.* at 50, 80, 189, 360. The deeds do not specify to whom the revenues were to revert after the death of the closest relative.

62. *Id.* at 49.

63. *Id.* at 60.

64. *Id.* at 463.

65. *Id.* at 343.

66. See *id.* at 438.

67. See *id.* at 186.

68. See, e.g., *id.* at 46, 281, 452, 459.

and carpets and for the repair of the mosque itself.<sup>69</sup> Any surplus revenues were to be used to feed the poor Sufis and Murabits associated with the mosque. Other founders designated as the ultimate beneficiary "the muezzin in a Friday mosque,"<sup>70</sup> or "whoever recites [the Qur'an] over the graves of the founder and his relatives."<sup>71</sup>

### 3. Endowment Property: Size and Type

Almost without exception, the size of the testamentary endowments preserved in our source was equal to one-third of the deceased founder's net assets, which was the maximum allowed by law. There were no constraints on the size of endowments created *inter vivos*, and as a result, many individuals designated part or all of their property as a familial endowment.<sup>72</sup> In the middle of the fifteenth century, the Zayyanid Sultan, Abu 'Abdallah Muhammad, designated as an endowment for the benefit of an unnamed religious scholar immovable property that included lands prepared for sowing, gardens, and a bath.<sup>73</sup> More commonly, however, a founder designated a discrete piece of property or a fraction of a property as a familial endowment. More than half of the endowed properties were urban in character; forty-five percent included residential property such as a room (*bayt*), house (*dar*), or compound (*rab'*). Non-residential property such as a shop, bakery, or mill accounted for another eleven percent. Slightly less than half of the endowed properties were agricultural in nature. These endowments included gardens, orchards, and olive groves, which constituted sixteen percent of the endowed properties, while unspecified agricultural property, including village properties and entire villages, accounted for another twenty-four percent. It was not uncommon for a founder to designate a share of a piece of property as a familial endowment, such as one-fourth of a jointly held compound, half of an unspecified share in several shops, two-thirds of a well-known strip of land, half of a house, or one feddan of land.<sup>74</sup> Although the rate at which property in a given area at a given time was being transformed into family endowments is unknown, it is reasonable to assume that over time considerable segments of the urban and rural landscape were being converted from

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69. See *id.* at 312.

70. *Id.* at 202.

71. *Id.* at 141.

72. See, e.g., *id.* at 80, 432.

73. See *id.* at 248-49.

74. See *id.* at 45, 49, 75, 202, 206, 423, 446.



private property into endowment property, and that efforts to check or even reverse that process were undertaken as well.

### III. AN ANALYSIS OF ENDOWMENT DISPUTES

Unaware of the gender and number of his lineal descendants, the founder of an endowment would formulate a descent strategy designed to regulate its smooth functioning for every possible combination of male and female children and descendants. In an effort to avoid any ambiguity that might upset the subsequent functioning of the endowment, the notary who drafted the deed acted with great care. However, even the most carefully drafted deed could not anticipate every potential dispute over control of the endowment. Such disputes typically were of two types: an external challenge to the endowment by persons who did not qualify as beneficiaries; or an internal struggle for control of the revenues among the beneficiaries themselves. The frequency with which such disputes occurred was partially a function of the economic importance of the endowment property.

A dispute over control of an endowment might arise during the lifetime of the founder, or, more commonly, one or more generations after his death.<sup>75</sup> Such disputes might last for several generations.<sup>76</sup>

#### A. *The Function of Documents*

In an era in which no institutional records were kept of either births, deaths, or property transactions, private family archives were of great importance. Written records played a critical role in the resolution of disputes over family endowments because, as noted, such disputes might arise one or more generations after the death of both the endowment's founder and the witnesses to the deed.<sup>77</sup> For this reason, an endowment deed was deposited customarily in a family archive for safekeeping, along with other important records, and would pass from one generation of beneficiaries to the next. In the event of a dispute, the deed would be presented to the judicial authorities.<sup>78</sup> The importance of written documents is dramatically demonstrated in the case of an endowment created by a certain Abu al-Qasim b. Bashir.

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75. See, e.g., *id.* at 261-62, 311-21, 435, 452-53.

76. See *id.* at 486-514; Powers, *A Court Case*, *supra* note 28, at 231.

77. See, e.g., Powers, *A Court Case*, *supra* note 28, at 233, 237 (documenting a dispute that arose in 1376 over an endowment that was founded before 1328).

78. See 7 AL-WANSHARISI, *supra* note 27, at 80-82.

Each of the parties to this litigation possessed a collection of legal documents relating to the disputed property, so that during the course of the dispute, twenty-eight different documents were entered into the records of various judicial proceedings.<sup>79</sup>

Muslim jurists traditionally have viewed written documents with a generous measure of suspicion, in part because the written word can be manipulated in a manner that the oral testimony of trustworthy persons cannot.<sup>80</sup> For example, in one case a woman produced an endowment deed in an effort to secure her status as a member of the first set of beneficiaries. The deed, however, was torn. Although the mufti to whom the case was referred suspected that someone had tampered with the document, he accepted it as legitimate in its current state. However, he also warned that whoever had torn the document would suffer disgrace in both this world and the next.<sup>81</sup>

Another strategy of a person who exercised physical possession over an endowment deed was to frustrate the claims of potential beneficiaries by refusing to make the document available to others. Such unscrupulous behavior typically manifested itself in connection with the transfer of entitlement from one generation of beneficiaries to the next. In one instance, a man who was the sole surviving member of the second generation of endowment beneficiaries withheld the endowment deed from his patrilineal nephews in an effort to keep them ignorant of its terms.<sup>82</sup> Presumably unwilling to challenge the authority of their uncle, the nephews remained silent for several years before taking their case to the judicial authorities.<sup>83</sup>

### B. *Interpretive Strategies Employed by the Jurists*

Many muftis refrained from issuing judicial opinions until they had seen a certified transcription of the original endowment deed.<sup>84</sup> On occasion, the muftis complained about the summary nature of the transcription.<sup>85</sup> Only when a mufti was presented with an accurate transcription of the endowment deed could the

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79. See Powers, *A Court Case*, *supra* note 28, at 231 (reconstructing, on the basis of the twenty-eight written documents, a prolonged legal dispute over a family endowment involving six generations of a family).

80. See, e.g., EMILE TYAN, *LE NOTARIAT ET LE RÉGIME DE LA PREUVE PAR ÉCRIT DANS LA PRATIQUE DU DROIT MUSULMAN* (2d. ed. 1959); Jeanette A. Wakin, *Introduction to THE FUNCTION OF DOCUMENTS IN ISLAMIC LAW: THE CHAPTERS ON SALES FROM TAHAWI'S KITAB AL-SHURUT AL-KABIR* 4-16 (Jeanette A. Wakin ed., 1972).

81. See 7 AL-WANSHARISI, *supra* note 27, at 455.

82. See *id.* at 278-81.

83. See *id.*

84. See *id.* at 228-30.

85. See *id.* at 81.

interpretive task begin in earnest. Regardless of the notary's care in formulating the deed, the detail of the descent strategy specified therein, and the length of the resulting document, the subsequent demographic history of a family<sup>86</sup> frequently resulted in situations for which the founder had not left clear instructions, and therefore required the intervention of either a judge, or if the case was difficult, a mufti. The jurists were asked to determine exactly what the founder had intended at the time of the endowment's creation. They generally assumed that the founder's intention could be ascertained from the words preserved in the endowment deed, irrespective of the passage of time or the changed circumstances of the endowment beneficiaries.<sup>87</sup> The jurists treated the founder's words as being sacred and immutable, comparing them to God's words as preserved in the Qur'an.<sup>88</sup>

Both the *mustafti* (the person who formulates the question) and the mufti repeatedly refer to the founder's intention using the Arabic terms *irada* and *qasd*.<sup>89</sup> In response to the contention that the revenues of a testamentary endowment created for both living and unborn persons should be frozen until all of the potential beneficiaries had come into existence, the mufti al-Mazjaldi said, "This [conclusion] is not required by either the founder's words or his intention."<sup>90</sup> Toward the end of the fifteenth century, Ahmad al-Wansharisi was asked to consider the meaning of a clause in an endowment deed that read, "If one of them dies without any descendants, his share reverts to his aforementioned two brothers (*akhawayhi*)."<sup>91</sup> Al-Wansharisi declared that the founder's use of the dual form of the noun "brother" indicated that he did not intend for this stipulation to apply generally to any generation of beneficiaries, but rather specifically and exclusively to the first generation. Had the founder intended otherwise, the mufti added, he would have used another formulation.

### C. Analysis of Case Studies

The 101 *fatwas* upon which the present study is based deal with a range of issues that defies any singular, comprehensive

86. That is, its pattern of births, deaths, and marriages.

87. See 7 AL-WANSHARISI, *supra* note 27, at 285.

88. See *id.* at 285; *cf. id.* at 280. One Andalusian jurist wrote: "The words of the founder are like the words of the Divine Lawgiver. Their sense must be followed with respect to both formulation (*nusus*) and external meaning (*zawahir*)." *Id.* at 280.

89. See, e.g., *id.* at 26, 229, 316.

90. *Id.* at 23; *cf. id.* at 196.

91. *Id.* at 356.

treatment. For the purpose of analysis, the cases are classified here according to the nature of the relationship between litigants. Thus, each dispute has been assigned to one of three distinct sets: disputes between endowment beneficiaries and other relatives of the founder who do not qualify as beneficiaries; disputes between the founder and his children; and disputes over transmission of entitlement from the first to the second, or the second to the third and subsequent generations of beneficiaries.

### 1. Beneficiaries Versus the Founder's Heirs and Agnates

As noted, the Islamic inheritance system contains rules for the regulation of both inheritance and family endowments.<sup>92</sup> Inheritance law imposes compulsory rules for the division of property among a wide group of male and female heirs, each of whom receives a fractional share of the estate as private property that subsequently may be bought, sold, or recycled as an inheritance. Left unchecked, inheritance law would result in the inevitable fragmentation of property. Endowment law, however, enables a proprietor to remove all or part of a patrimony from the effects of the inheritance rules by reducing the amount of property available as an inheritance to those of the founder's potential heirs who do not qualify as beneficiaries of a familial endowment. Unlike the compulsory inheritance rules, endowment law allows a proprietor to allocate usufructory entitlements to specified people in specified amounts, regulate the transmission of those entitlements from one generation of beneficiaries to the next, and insure the physical and economic integrity of an estate or a piece of property.<sup>93</sup> The wide gap separating these two sets of legal norms may be illustrated by comparing the group composed of the beneficiaries of a familial endowment with the group composed of the founder's heirs. While most beneficiaries are also heirs, the great majority of heirs do not qualify as beneficiaries. Thus, a man who establishes an endowment for his children and lineal descendants effectively disinherits his spouse, siblings, cousins, uncles, nephews, and others.<sup>94</sup> Because they have been disinherited, these "outsiders" have an obvious material interest in challenging the validity of the endowment. A successful challenge will result in the property's redesignation as inheritable property. The heirs, spouse, siblings, and other relatives stand to inherit a fractional share of the estate.<sup>95</sup> In many of the cases preserved in the source, the plaintiffs are

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92. See discussion *supra* Part I.A-B.

93. See *supra* note 18 and accompanying text.

94. See *supra* notes 17-18 and accompanying text.

95. See *supra* notes 8-9 and accompanying text.

collectively referred to as either the founder's heirs (*waratha*) or agnatic relatives (*asaba*).<sup>96</sup>

Endowments created from jointly-held property frequently resulted in disputes between the endowment beneficiaries and the founder's other heirs. In several instances, the dispute was resolved by the physical division of the property.<sup>97</sup> The relationship between endowment beneficiaries and others could be complicated if the relative amount of endowed and unendowed portions of jointly held property was unknown.<sup>98</sup> In a fifteenth-century case, ignorance of the respective proportions of endowed and unendowed property resulted from carelessness on the part of the notary who had formulated the endowment deed.<sup>99</sup>

The complex interplay between inheritance law and endowment law, on the one hand, and between these two sets of conflicting norms and social realities, on the other, created an incentive for those persons who qualified as heirs and endowment beneficiaries to manipulate the legal system so that the judicial authorities would redefine private property as endowment property or vice-versa.

## 2. Founders and Their Children: The Problem of *Hiyaza*

Unlike their Hanafi counterparts, Maliki jurists did not permit the founder of an *inter vivos* family endowment to serve as the initial beneficiary.<sup>100</sup> This meant that the numerous advantages of the endowment system vis-à-vis the inheritance laws were offset by the requirement that the founder immediately relinquish physical control of the property. This requirement ran counter to the natural human desire to retain effective control of one's property until one dies. Many proprietors circumvented this obstacle by creating an endowment while their children were either unborn or minors. The law allows a founder who creates an endowment for a minor child to exercise control of the property on behalf of the child.<sup>101</sup> However, the law requires the founder to spend the endowment revenues on the needs of the child. When the child reaches the age of legal majority, the founder is obligated to convey the property to the young adult by means of the legal ceremony known as *hiyaza*.<sup>102</sup>

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96. For examples of inheritance of fractional shares, see 7 AL-WANSHARISI, *supra* note 27, at 104-05, 228-29.

97. See, e.g., *id.* at 49, 432.

98. See *id.* at 72.

99. See *id.* at 45-46.

100. See Cattan, *supra* note 26, at 203-04.

101. Except when the property designated as an endowment is a house in which the founder resides.

102. See *supra* note 35 and accompanying text.

In practice, many founders ignored these regulations, spending the endowment revenues on their own interests and continuing to exercise de facto control of the endowment even after a child had reached the age of legal majority. This irregularity exposed the endowment to subsequent challenge and possible nullification.<sup>103</sup>

When the object of an endowment was a house in which the founder resided, the founder was obligated to vacate the premises for one year. Although failure to observe this rule could result in nullification of the endowment, in practice many founders ignored the rule.<sup>104</sup> A founder's failure to observe the one-year rule could result in litigation setting parent against child.<sup>105</sup> What appears to have been at stake in these disputes between parents and children was the exact timing of the transfer of resources—and, hence, of power and authority—from one generation to the next.

### 3. Disputes over Transmission of Entitlement from the Beneficiaries of the First Generation to Those of the Second and Subsequent Generations

Questions relating to the timing of economic transfers surface again in the third category of dispute, namely, the transmission of entitlement to the endowment revenues from the first generation of beneficiaries to the second and subsequent generations. At this stage, three issues appear repeatedly in the source. First, the determination of whether or not an endowment became *mu'aqqab*. Second, in the event that it did, the criterion according to which the revenues were to be divided among the qualifying beneficiaries. Third, the definition of the lineal descent group for which the endowment had been created.

The first issue had important consequences for the division of revenues among the founder's lineal descendants. If an endowment does become *mu'aqqab*, the revenues in theory were to be divided among all of the founder's living lineal descendants irrespective of their generation. If the endowment does not become *mu'aqqab*, the revenues were controlled by the members of the oldest generation. In practice, a younger generation of descendants often contended that the endowment had become *mu'aqqab*, while the surviving members of an older generation insisted that it had not. In disputes of this nature, one or more paternal uncles might try to prevent the inclusion of their nephews in the division of the endowment revenues. Typically,

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103. See 7 AL-WANSHARISI, *supra* note 27, at 202-03.

104. See *id.* at 218, 426.

105. See *id.* at 202, 260-62.

the *mufta* asked the mufti to determine whether or not the nephews were entitled to participate in the endowment together with their uncles.

If it was determined that an endowment had in fact become *mu'agqab*, there remained the determination of the criterion according to which the revenues were to be divided among the qualifying beneficiaries. Some authorities maintained that they should be divided on a per capita basis, while others held that the judge should allocate the revenues according to need, as determined by his independent reasoning.<sup>106</sup> Need was defined by a number of variables, including family size, financial resources, and degree of the beneficiary's relationship to the founder.<sup>107</sup> In their discussions of this issue, the jurists manifested an explicit concern for the notion of equity.<sup>108</sup>

The third recurring issue in struggles between adjacent generations of lineal descendants related to the principle of agnation, a principle that is reflected in the definition of terms such as *walad* and *'aqib*. The term *walad* was defined by the founder of the Maliki law school, Malik b. Anas, as "a man's sons and daughters and his son's children, males to the exclusion of females." An uninterrupted line of jurists from Malik to al-Wansharisi defined the word *'aqib* as "the descendants of a person who are not separated from him by a female link."<sup>109</sup> Thus, a female may qualify as a member of an agnatic lineal descent group, but she does not transmit this status to either her sons or daughters. Presumably, this restriction results from the legal notion of agnation, which is related to the socio-cultural assumption that a woman's children become members of her husband's agnatic group, not her father's. If a man creates a family endowment for his son and the latter's lineal descendants, the principle of agnation therefore will exclude progressively from the resulting lineal descent group both female *and* male cognatic descendants of the founder. These cognates are referred to as "the children of daughters" (*awlād al-banāt*).

Once again, theoretical considerations often were ignored in practice since "the children of daughters" frequently sought inclusion in a lineal descent group established by a founder. Even more striking is that a series of muftis interpreted the terms of a particular endowment in such a manner as to validate their claims. Paradoxically, this approach to the issue of gender—liberal in the eyes of a modern observer—was made possible by the muftis' adoption of a literalist approach to statutory

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106. See *id.* at 358.

107. See *id.* at 88, 358, 396, 462, 478, 484.

108. See *id.* at 359.

109. *Id.* at 281-85.

interpretation, as illustrated by a case referred to the Cordovan jurist, Ibn Rushd (d. 1126). A man created an endowment for his two concubines, stipulating that when both had died, the endowment was to revert to his two paternal cousins, Ahmad and al-Hasan, and to "their descendants and their descendants' descendants." The two concubines died, while Ahmad died leaving no descendants. Al-Hasan, however, produced at least three generations of lineal descendants, including a grandson whose mother was al-Hasan's daughter, and a great-grandson whose mother was al-Hasan's agnatic granddaughter (his son's son's daughter). Although neither of these two persons was agnatically related to al-Hasan because of the intervening female link, both sought inclusion as beneficiaries of the endowment. Ibn Rushd ruled that the grandson qualified but that the great-grandson did not. Applying what may be called the transitive principle of interpretation, Ibn Rushd reasoned that al-Hasan's daughter was his agnatic descendant and that her son qualified as the "descendants' descendant" mentioned in the deed. The great-grandson, on the other hand, did not qualify as a beneficiary because the founder had not specified "the descendant of a descendant's descendant." Presumably, had the founder included this phrase, the great-grandson would have qualified as a beneficiary.<sup>110</sup> Maliki jurists subsequently treated the reasoning behind Ibn Rushd's ruling as legal precedent.<sup>111</sup>

#### IV. CONCLUSION

As part of the larger Islamic inheritance system, endowment law accorded Muslim proprietors a legal means to circumvent the effects of the Islamic inheritance rules by allocating usufruct rights to specified people in specified amounts and to regulate the transmission of those rights from one generation of beneficiaries to the next. Over time, the institution appears to have contributed to the physical integrity of both urban and rural property. Whether or not it also contributed to the economic viability of the local economy is a subject that deserves further investigation.<sup>112</sup> At the same time, the transformation of significant segments of the rural and urban landscape into

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110. See *id.* at 463-64; see also Powers, *Fatwas*, *supra* note 28, at 313; *cf.* 7 AL-WANSHARISI, *supra* note 27, at 462-63.

111. See, *e.g.*, 7 AL-WANSHARISI, *supra* note 27, at 51, 186-87, 191-92, 343-47, 354-58.

112. See, *e.g.*, MIRIAM HOEXTER, ENDOWMENTS, RULERS AND COMMUNITY: WAQF AL-HARAMAYN IN OTTOMAN ALGIERS 141-43 (Studies in Islamic Law and Soc'y, Rudolf Peters & Bernard Weiss eds., vol. 6, 1998).



familial endowments frequently resulted in discord, conflict, and litigation.<sup>113</sup> The members of a lineal descent group acted as a kind of "corporation" bound by ties of blood and by economic interests in the endowment property. Those interests had to be defended against the attempted incursions of "outsiders," usually relatives of the founder who did not qualify as endowment beneficiaries. The latter had a powerful incentive to challenge the validity of a particular endowment, because a successful challenge might result in their inheriting the property in full ownership. In this context, the interface between endowment law and inheritance rules created a calculus of material interest that encouraged individuals to manipulate the rules in order to advance their own interests.

Discord also surfaced among members of a lineal descent group. Like any corporate enterprise, descent groups functioned smoothly at times, less smoothly at others. The transfer of usufruct rights from one generation to the next often engendered conflict and competition among members of the group, as, for example, between fathers and sons, brothers and sisters, and uncles and nephews. Some individuals were ruthless in their efforts to seize or maintain control of usufruct rights, as disputes over the control of these rights sometimes extended over decades.<sup>114</sup>

The disputes analyzed here point to an ongoing debate in Muslim society about the meaning of family, kinship, and descent. Some cases support the notion that pre-modern Muslim society was rigidly patriarchal. Males often created familial endowments to support the interests of other males, while the entitlement of a female beneficiary was especially vulnerable to challenge. Furthermore, some jurists defined membership within a particular lineal descent group exclusively in terms of agnation. Other cases, however, indicate that pre-modern Muslim society was not as rigidly patriarchal as is commonly assumed. Endowments typically were created for males and females; indeed, some founders treated males and females on a basis of equality. Meanwhile, some jurists upheld the entitlement of cognatic descendants of the founder, invoking the transitive principle of interpretation for the sake of a broader, more inclusive definition of kinship.

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113. See generally, e.g., 7 AL-WANSHARISI, *supra* note 27.

114. Whether the competitive behavior associated with endowment disputes was in fact characteristic of the Maliki West in the period under question deserves further consideration. One should bear in mind, however, that the cases under review here are not necessarily representative of Muslim society in general.