

The Legal and Administrative Analysis of Waqf in Bosnia and Herzegovina

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Abstract

This analytical research will analyze the establishment and administration of waqf in Bosnia. The establishment of waqf in Bosnia could be traced back to the days of Ottoman occupation of Bosnia in 1463. Firstly, this paper will explain the establishment and the development of waqf together with its institutions with reference to the 15th and 16th centuries when some of the most famous waqifs emerged in Bosnia and Herzegovina. The great period for waqf in Bosnia and Herzegovina came to an end with the change of regime when Hapsburg Monarchy took over Bosnia and Herzegovina from Ottoman Empire in 1878. From this year onwards the institution of waqf in Bosnia and Herzegovina was subject of enormous injustice, hostility, and devastation from the various regimes that have ruled the country. The deteriorating position of waqf property extended throughout the period of Kingdom of Yugoslavia in 1918. Secondly, the writer will touch on the issues pertaining to unlawful confiscation and nationalization of waqf property in Bosnia and Herzegovina during the communist and socialist regime of Yugoslavia in 1943. In the year 1958 when socialist regime culminated in the Bosnian territory, the institution of waqf was completely shut down. As a result of it, the waqf property was confiscated and nationalized. Subsequently, many cases emerged before the civil court of Yugoslavia for waqf property to be returned back to the waqf trustees and administrators but the pleas were in vain. Legislators at that time worked in favor of government of Yugoslavia under whose supervision Bosnia and Herzegovina was at that time, and the nationalization and confiscation of property were proclaimed lawful for the best interest of the state. This lasted until the breakdown of Yugoslavia and independence of Bosnia and Herzegovina in 1992. Thirdly, when the Muslim community of Bosnia and Herzegovina became stronger and independent after the aggression on Muslims which took place from 1992-1995, the Council of the *Islamic Community* of Bosnia and Herzegovina made the decision to establish the *Waqf Directorate* in Sarajevo with the specifications of its rights and duties, as the legitimate successor of the *Waqf institution* that was closed down in 1958. Lastly, this paper will also evaluate legal applications of the restitution claims made by religious communities for the property which was unlawfully confiscated through various legislative mechanisms during and after the communist regime. The ways to safeguard and protect the waqf properties from the meticulous and unlawful legislative practices which could result into nationalization of waqf property will be examined as well.

The Origin of *Waqf* and its Socioeconomic Importance

The institution of *waqf* is a unique establishment in Islam which promotes social, ethical and moral values of human beings. These values must not be overtaken by greed, selfishness and ignorance. The best reminder of quality of human being is the existence of the *waqfs* in most of the Muslim communities as a seal of understanding, tolerance and willingness to help. The debate in the west is ongoing on the responsibilities of man towards the upcoming generations and that reminder has got to be emphasized all the time. On the other hand the institution of *waqf* in Islam clearly shows the complete concern of *waqif* (the person making the *waqf*) towards upcoming generations by leaving them the property to be used wisely for their benefit. This brings about the social aspect of the *waqf*. When it comes to the economic aspect of *waqf*, the economic system in which the general directions of the Qur'an are incorporated can be considered as a specific system of economics thought in Islam. Islam strongly supports the idea of mutual help, coordinated and collective efforts and efficient management for the same of the common good.

The word *waqf* comes from the Arabic verb “*waqafe*”, what etymologically means to hold, to keep or detain. The legal meaning of *waqf* according to Imam Abu Hanifa, is the detention of specific thing in the ownership of *waqif* or appropriator, and the devoting or appropriating of its profits or usufruct “in charity on the poor or other good objects”. According to the two disciples, Abu Yusuf and Muhammad, *waqf* signifies the extinction of the appropriator's ownership in the thing dedicated and the detention of the thing in the implied ownership of Allah, in such a manner that its profits may revert to or be applied “for the benefit of mankind”.¹ A *waqf* extinguishes the right of the *waqif* or dedicator and transfers ownership to Allah. The *mutawalli* is the manager of the *waqf* but the property does not vest in him. A *waqf* may be made in writing or dedication may be oral. There must, however, be appropriate words to

¹ M Hidayatullah and Arshad Hidayatullah, “Mulla's Principles of Mahomedan Law”, Nineteenth Edition, Bombay N.M. Tripathi Private LTD., 1996. at p. 143.

show an intention to dedicate the property. The usage of word “*waqf*” is neither necessary nor conclusive.²

The difference between the institution of “*waqf*” and the “trust” under English law has got to be admitted. This has been explained in the case of *Vidyavaruthi v. Baluami* by Privy Council whereby they explained that Mahomedan Law relating to trust differs fundamentally from the English law. Furthermore the Lords of the court explained that Mohamedan concept of trust owes its origins to a rule laid down the Prophet of Islam; and means ‘the trying up of property in the ownership of God the Almighty and the devotion of the profits for the benefit of human beings’. When once it is declared that a particular property is *waqf*, or any such expression is used as implies *waqf*, or the tenor of the document shows that a dedication to a pious or charitable purpose is meant, the right of the *waqif* is extinguished and the ownership is transferred to the Almighty. The donor may name any meritorious object as the recipient of the benefit.³

Generally, Islam has permitted the transfer of property under an individual’s possession, to other person through the instrument of sale, gift, or inheritance. At same time, utilization of the property by an individual to his own benefit has also been accepted in principle. However, a person can impose restrictions on the transfer of property both movable and immovable by declaring it as a *waqf*. Therefore, one can transfer the profits accruing from such property from the sphere of limited individual’s benefit of a much larger number of people comprising the weaker sections of not only the Muslim *Ummah* but the entire humanity. The ownership of the property so declared as *waqf* vests in Allah.⁴

Waqf has been established based on *Qur’an* and *Hadith*. Almost all verses of Quran which are prescribing the legal rulings have been revealed in Medina. One of those Qur’anic verses is authority for the establishment of *waqf* and that is verse 92 of *surah Al Imran* where Allah s.w.t. says “You will never attain virtue until you spend something you are fond of; while

² Ibid, at p. 143

³ *Vidyavaruthi v. Balusami* 48 I.A. 302; (‘22) A.P.C. 123

⁴ Dr. Hasanuddin Ahmed and Prof. Ahmedullah Khan, “*Strategies to Develop Waqf Administration in India*”, Islamic Development Bank, Islamic Research and Training Institute, Research Paper No. 50, 1998, at p. 28.

God is Aware of anything you may spend“.⁵ The interpretation of this verse has been done by Prophet s.a.w. according to *Bukhari* and *Muslim* whereby Prophet s.a.w says “ After death of man, his traces in this world will disappear except in three situations: if he leaves perpetual good (*sadaqah*), the knowledge that will benefit others, and well brought up child that will pray for him.” The word “*waqf*” is linked to the name of the Prophet Ibrahim s.a.w. In Palestine even until today there is a town known as *Halilur – Rahman* which was built from the property of Ibrahim s.a.w. as *waqf* and one of Ibrahim’s s.a.w biggest *waqfs* is *Ka’ba* in Mecca which he built on the instruction of Allah s.w.t.

Furthermore, it has been reported that Omar ibn Khattab came to Prophet s.a.w. and said that the property that he owns in *Hayber* is the one that he likes the most, and the one that is the most useful to him and that he wishes to make it as a perpetual good (*sadaqah*). Prophet s.a.w. said to him that the best deed would be if he detains it from his property (*waqf*) with declaration that that property should neither be sold, inherited or gifted in future. When Omar heard the Prophet s.a.w., he made a declaration that the benefits and usufruct from his property should be given for the needs of: poor, his family, freeing the slaves, soldiers, travelers, and there will not be sin if the manager (*mutawalli*) uses the benefits for his food in moderate way and as well as to feed his friend. The example of Omar r.a. has been followed by other companions as well and for that matter there are some historians who claim that every companion of Prophet s.a.w. has left some of their properties as *waqf*. Prophet s.a.w. ha left seven of his gardens as *waqf*.

At that particular time everything that could be useful for the Muslim community for its social and economic development was left over for the community to be used, both, movable and immovable property. Subsequently, the Islamic State was spreading and the Muslims from different social and cultural background became the citizens of the Islamic State. That is the time that new issues appeared before the *Mujtehid*s or Muslim scholars who had to come out with new rulings suitable for the particular time and place. This is the time when differences in the opinion and rulings in relation to *waqf* emerged such as; whether the movable property can constitute *waqf* or whether *waqif* can use the *waqf* property for his benefits until he is alive after he gives property as *waqf* etc. Nevertheless, the *waqf* is still very developed tradition among the Muslims

⁵ Al – Qur’an, verse 92 of *Surah Al Imran* (The House of Imran).

in Bosnia and throughout the world, and its socioeconomic implications and benefits can be seen in the society.⁶

The origin and the importance of *waqf* was discussed by various scholars such as Henry Cattan. He observed that the institutions of *waqf* has developed with Islam and there is no evidence that such a complex system of appropriating usufruct as a life-interest to varying and successive classes of beneficiaries existed prior to Islam. Although, the separation of ownership from the usufruct was not a new legal concept, the settlement of usufruct or property on successive generations in perpetuity for an immediate or ultimate charitable purpose, is an instruction developed by the jurists during the first three centuries of Islam. Furthermore, Henry Cattan states that the similarity and resemblance between Islamic concept of '*waqf*' and English concept of 'trust' poses a question whether English concept of trust was derived from the Islamic concept of *waqf*. When it comes to time, there is no doubt that *waqf* which exists in the present form was developed and established during the eight and ninth centuries while English 'trust' or 'uses' was developed in the thirteenth century. According Henry Cattan, this clearly shows that it would be reasonable to suggest that English concept of 'trust' originates from the Islamic concept of '*waqf*'.⁷

The Establishment of *Waqf* in Bosnia and Herzegovina

Ottoman Empire

The establishment of *waqf* in Bosnia and Herzegovina is closely connected with the occupation of Bosnia and Herzegovina by the Ottoman Empire. Therefore, before embarking on the discussion of the *waqf*, few words about the Ottoman occupation of Bosnia would be useful to mention. Basically, in 1463 General Mahmood Pasha, under the direction of Sultan Mehmed Fatih led the Ottoman armies to the total victory over hostile forces in Bosnia. By 1492, the year when the Muslims lost their control over Spain, the rest of Herzegovina came under Ottoman rule. The Bogomils, sensing the merciful and tolerant nature of these Muslims 'conquerors'

⁶ The website of Department of Waqf in Bosnia and Herzegovina is available at <http://www.rijaset.ba>. For further details about the organizational structure and historical chronology of the development of waqf in Bosnia and Herzegovina see http://www.rijaset.ba/index.php?option=com_content&view=article&id=16&Itemid=201.

⁷ Henry Cattan, "*Law in the Middle East*", Vol. I, 1995, at p. 205

declared to the masse of their allegiance and loyalty to the Ottoman Empire and their acceptance and submission to the Islamic faith. So we could conclude that Islam was brought to this region by the Ottoman, and later on was open-heartedly accepted by the Bogomils.⁸ Safet Abid, an American Muslim of Bosnia and Herzegovina and British Extraction, clearly stipulates in his article entitled “Islam in Bosnia and Herzegovina” that contrary to some “historical writings” the Ottoman did not force the conversion with the sword. Instead, they guaranteed religious freedom and simply undertook the administrative function of the conquered land. The author also adds that such a mass acceptance of Islam by various populations was not unusual in Muslim history.⁹

From the mid-15th century through the late of 17th century, Bosnia and Herzegovina blossomed into the centre of culture, education and commerce in the western part of the Ottoman Empire.¹⁰ In 1537, under the direction of the regional ottoman governor, Gazi Husrev Beg, the first full time *madrasah* was established in Sarajevo. The program was a complete integration of the latest sciences of the time, such as mathematic, literature, science, with religious sciences like *tafsir*, *hadith*, *tawheed* and *usul al fiqh*.¹¹

During the period of Ottoman Empire, most of the administrative, constitutional, and legal matters were done by the administrative branch which was supported by strong army. Other affairs of the state such as cultural, educational, and social were represented and handled by the institution of *waqf*. The importance of *waqf* in an early stage of Ottoman Empire was tremendous. It was unimaginable at that time for any of the towns to be built without the supervision and help of *waqf* institution. Therefore, most of the structural centers of the towns represented by various objects of educational, cultural, or religious aspects of life of Muslims belonged to the *waqf*. This was the early stage of establishment of *waqf* in Bosnia and Herzegovina.¹²

⁸ For the brief information see, www.wikipedia.com

⁹ Safet Abid, “*Europe’s Endangered Species: Yugoslavia’s Forgotten Muslims, A Survey of the Indigenous Muslims of Bosnia and Herzegovina Past History- Current Situation- Future Prospects*”, Al – Islaah Publications, available at www.members.tripod.com/worldupdates/islamintheworld/id23.htm.

¹⁰ Ibid

¹¹ Ibid

¹² See the website of Department of Waqf in Bosnia and Herzegovina which is available at <http://www.rijaset.ba>.

The flourishing time for *waqf* in Bosnia and Herzegovina was during the Ottoman rule, thus, for instance, at the end of Ottoman rule there were more than 5000 *waqs* in Bosnia. These *waqf* were administered by *mutawallis* (managers) appointed according to the will of benefactors as expressed in deeds of the establishment of endowments (*waqfname*). It is interesting to note that Ottoman ministry of *waqf* exercised loose supervision over the administration of Muslim endowments in the province as there was no centralized documentation on the *waqf* properties, their income and expenditure.¹³

Hapsburg Monarchy

When Bosnia under Ottoman rule failed to the Hapsburg Monarchy in 1878, the control over *waqf* was taken by that Provincial government which was non-Muslim government. Subsequently, after ten years of its administration of *waqf* in Bosnia, the Provincial government issued an Ordinance which introduced a uniform and stable administration of *waqf* affairs. Two bodies were established, namely:¹⁴

- Provincial *Waqf* Commission (PWQ)
- Provincial *Waqf* Board (PWB)

The Provincial government appointed a Provincial *Waqf* Commission (PWQ) whose duty was to ascertain details of all *waqfs* in the land, to control their expenditure, and to carry out new regulations regarding the administration of *waqf*. The following year the PWQ were established in all districts. The establishment of those commissions in every district across the country shows the amount of *waqf* land available in Bosnia at that time almost in every district. These commissions were entrusted with the duty to provide detailed surveys of existing Muslim endowments in Bosnia to the Provincial government and to supervise the local *mutawallis*.¹⁵ The

¹³ For the detailed discussion see Nusret Sehic, “*Autonomni Pokret Muslimana za vrijeme austrougarske uprave u Bosni I Hercegovini (Muslim Autonomous Movement During the Austro-Hungarian Rule in Bosnia and Herzegovina)*”, Sarajevo, Svjetlost, 1980.

¹⁴ The original name of these two bodies entrusted with the administration of *waqf* during the Hapsburg Monarchy are stated in Bosnian language. Provincial *Waqf* Commission (PWQ) is the translation of (Zemaljsko Vakufska Komisija) and Provincial *Waqf* Board (PWB) is the translation of (Zemaljsko Vakufsko Ravnateljstvo). The above mentioned abbreviations in English of these bodies are from the author of this paper for the easier reference to them.

¹⁵ Fikret Karcic, “*The Bosniaks and the Challenges of Modernity, Late Ottoman and Hapsburg Times*”, El-Kalem, Sarajevo, 1999, at p. 129

PWQ was composed of the President, Inspector, Secretary, four members of *majlis al-'ulama*, two High *Shari'a* Court judges and two prominent Muslims from each of six districts of Bosnia.

Provincial *Waqf* Board (PWB), on the other hand was an executive body whose main duty was to assist the PWQ with the field work and gathering of any information in relation to *waqf* administration in every particular district. The PWB was composed of the President, Inspector and Secretary of the PWQ, with necessary clerical staff. In the districts these *waqf* boards were headed by *Shari'a* judges. Unfortunate fact is that members of those bodies were appointed by the Hapsburg administration which leaves a lot of space for the misuse of *waqfs* for the purposes other than those which are allowed.

Formation of those bodies governing the *waqf* administration initially looked as it will bring about positive effects on the preservation and righteous use of the *waqf* in Bosnian community. However, the misuse of the *waqf* by the non-Muslim government enabled by their appointed members of those two governing bodies became obvious in many instances. The dominant rule of bureaucrats led toward such an administration, which stressed on the financial aspect of *waqf* over its religious, educational and charitable purposes. Those appointed *waqf* officials drew high salaries at a cost to the ultimate beneficiaries of endowments: schools, *masjids*, poor and the like. The misuse of the *waqf* has led the Bosniaks to believe that the *waqf* funds were used by the non-Muslim government for their administrative purposes.¹⁶

The unsatisfactory state of Muslims in Bosnia was growing from day to day until the incident in Herzegovina which triggered the Bosniaks to take the things in their own hands. Basically, in 1899, an under-aged Muslim girl from the town of Mostar, Fata Omanovic, was taken away by Catholic nuns, converted to Christianity and secretly sent to Austria to marry a Hapsburg officer. This event caused Muslims to demonstrate. These demonstrations were led by Ali Fehmi Dzabic (1853-1918)¹⁷, *mufti* of Mostar, who submitted demands to the Hapsburg administration demanding the reorganization of Muslim religious, *waqf* and educational

¹⁶ Fredo Hauptman, "*Borba Muslimana Bosne I Hercegovine za vjersku I vakufsku autonomiju (The Struggle of the Muslims of Bosnia and Herzegovina for Religious, Waqf and Educational Autonomy)*". These are documents which have been compiled by Fredo Hauptman and they are available in Sarajevo: Arhiv SR BiH, 1967, 26; 49-56; 78-81.

¹⁷ Ali Fehmi Dzabic was the *mufti* of town Mostar. He was known under the name of Ali ibn Shakir Fahmi Djabizade al-Mostari who had the excellent knowledge of Arabic language, literature, and geology. He has written number of works such as; '*Husn al-sihaba fi sharh al-Sahaba*', '*Tilba al-talib fi sharh Lamiyya Abi Talib*' etc.

administrations.¹⁸ A mass movement for religious autonomy was born. The movement demanded reorganization of *waqf* administration in a way that members of *waqf* bodies would be elected by Muslims themselves. Ali Fehmi Dzabic was the leader of this movement until his visit to the Istanbul when the Hapsburg administration prohibited him from returning back to Bosnia and Herzegovina.

After the constant pressure by Bosniaks, the Hapsburg Monarchy accepted most of the movements' demands pertaining to the administration of Islamic affairs. **Statute for Autonomous Administration of Islamic Religious, *Waqf*, and Educational Affairs in Bosnia and Herzegovina** was adopted on 15 April 1909. By the virtue of this statute, the rule granting the autonomy and election of authority administering the *waqf* was founded. Jurisdiction of *Shari'a* Courts was confirmed over litigation cases over *waqf* property where the *waqf* capacity of that property was not disputable.¹⁹

Kingdom of Yugoslavia

Following the defeat of Central Powers in the World War I, 1918 the Kingdom of Serbs, Croats, and Slavens was created. As a result of which, the identity and the freedom of Muslims were weakened. In 1929 the kingdom was renamed as Yugoslavia.²⁰ During Kingdom of Yugoslavia period there was a dispute over authority regarding *waqf* properties between Government and Islamic Community.²¹ The autonomous administration over the *waqf* property

¹⁸ Fikret Karcic, *"The Bosniaks and the Challenges of Modernity, Late Ottoman and Hapsburg Times"*, El-Kalem, Sarajevo, 1999, at p. 131. For the purpose of practicality, see A memorandum submitted to minister Benjamin Kallay on 12 December 1900 which is published as "Spisi Islamskog naroda Bosne i Hercegovine (Documents of Muslim Nation of Bosnia and Herzegovina)", Novi Sad, 1903, 87-138.

¹⁹ Fikret Karcic, *Medunarodnopravno regulisanje vakufskih pitanja u jugoslovenskim zemljama (Solving the Issues of Waqf by International Law in the States of Yugoslavia)*, Andi Gazi Husrev-bay library, book IX-X, Sarajevo, 1983, at p. 148. The English translation of the book mentioned above is written by the author of this paper.

²⁰ Safet Abid, *"Europe's Endangered Species: Yugoslavia's Forgotten Muslims, A Survey of the Indigenous Muslims of Bosnia and Herzegovina Past History- Current Situation- Future Prospects"*, Al – Islaah Publications, available at www.members.tripod.com/worldupdates/islamintheworld/id23.htm

²¹ The Islamic Community of Bosnia and Herzegovina is independent in regulating its activities and managing its assets and bases this autonomy on the legality of religious institutions pertaining to Bosnian Muslims since the period of Ottoman rule in Bosnia. With the foundation of the Austro-Hungarian administration in Bosnia and Herzegovina, official attempts were made to disconnect the Muslims of Bosnia and Herzegovina from Istanbul, their spiritual head-quarter. Initially, the supreme religious authority of the Turkish Empire, the Shaikh-al-Islam in Istanbul refused to give his consent for the establishment of independent Islamic Community in Bosnia and Herzegovina. The Shaikh-al-Islam, however, in 1882 appointed Hilmi ef. Omerović of Sarajevo as the Bosnian mufti and authorized him to appoint junior clerics and judges. As a result, on 17th October, 1882, by the emperor's decree

was claimed strongly by Islamic Community. The statute for Autonomous Administration of Islamic Religious, *Waqf*, and Educational Affairs was abolished in the year 1930 by Yugoslav monarch Aleksandar Karadjordjevic.²² Subsequently, in 1936 the **Law on Islamic Community** was introduced. Compared to the previous statute, this law had offered some more up to date solutions in preserving the *waqf*. However, the political and administrative influence is easily noticeable in the sections of this statute which undermined the quality and the independence of it.²³

Socialist Federal Republic of Yugoslavia (Nationalization of *Waqf* in Bosnia and Herzegovina)

Socialist Federal Republic of Yugoslavia was a state that existed from the second half of World War II (1943) until it was formally dissolved in 1992. It was led by Josip Broz Tito. Bosnia and Herzegovina at that time was proclaimed to be Socialist Republic of Bosnia and Herzegovina which was under the control of Federal Government of Socialist Federal Republic of Yugoslavia. During the Socialist republic of Bosnia and Herzegovina the status of *waqf* was highly unpredictable. In fact, it can be said with confidence that this was one of the most difficult times for the *waqf* in Bosnia and Herzegovina. This was the time of communist regime whereby the postulate that ‘religion and politics’ must be separated was predominant.²⁴

the Austro-Hungarian government appointed Hilmi ef. Omerović as Bosnian mufti and proclaimed him as the first rais-ul-ulama of Bosnia and Herzegovina; this very year is therefore is the year of forming of the independent Islamic Community in Bosnia and Herzegovina. The Islamic Community of Bosnia and Herzegovina is the sole and unique community of Muslims living in Bosnia and Herzegovina, of Bosniaks living outside their homeland and other Muslims who accept this community as their own. The Meshihat of the Islamic Community of Sandžak, the Meshihat of the Islamic Community of Croatia and the Meshihat of the Islamic Community of Slovenia are all constituents of the Islamic Community of Bosnia and Herzegovina. The objective of the Islamic Community presents an endeavour to have all its members living in accordance with Islamic norms. This objective is realized and achieved through the principles of the promotion of good and diverting from evil. See <http://www.rijaset.ba>

²² For further information see Mustafa Imamovic, “*Pregled razvitka Islamske Zajednice u Bosni I Hercegovini*” (*A Survey of the development of the Islamic Community in Bosnia and Herzegovina*), Glasnik Rijaset Islamske zajednice u Republici Bosni I Hercegovini, 61 (1994), at pp. 1-3, 53-63.

²³ Senad Ceman, “*Komparativna Studija o položaju vakufa i fondacija u serijatom pravu I pozitivnim zakonima propisanim u Bosni i Hrcegovini, (Comparative Study of Waqfs and Foundations under Sharia’a Laws and positive Laws Legislated in Bosnia and Herzegovina)*”, Master Theses, Sarajevo, 2007, at p. 104. Hereafter cited as “*Comparative Study of Waqfs and Foundations under Sharia’a Laws and Positive Laws Legislated in Bosnia and Herzegovina*”.

²⁴ There is “*A Memorandum to the Presidency of Bosnia and Herzegovina*” submitted by the Islamic Community of Bosnia and Herzegovina for the compensation and restitution of all the properties of Islamic Community including waqfs that have been devastated and nationalized. Sarajevo, 1997, see p. 94.

The process of nationalization of *waqf* starts with coming into force **Laws on Reform of Agriculture and Colonization of Bosnia and Herzegovina**²⁵ together with other legal laws and regulations whereby the state took by force from *waqf* nearly everything, except mosques and minarets, in accordance with its atheistic point of view leaving Muslims in Bosnia with grave injustice that consequences can be felt even until today. **Section 3(c) of Laws on Reform of Agriculture and Colonialization of Bosnia and Herzegovina** explains that land which was owned and possessed by mosques, churches, religious and educational institutions shall become the ownership and possession of the State. Furthermore, **Section 4** states that the ownership of the state is absolute over confiscated type of land whereby the fixtures and cattle including buildings and agricultural cultivations become the sole ownership of the state without duty to make any sort of compensation. Finally, the amount of land that is allowed to be owned and possessed by the religious institutions is provided in **section 8(1), (2)** whereby it says that amount of ownership of land given to the religious institutions should not exceed 10 hectares while the religious institutions of the greater importance to the society can own up to 30 hectares of land and forest. Two years after the introduction of the agricultural reform laws, precisely on 26. August 1947 the Islamic Community has come out with the Constitution of Islamic Community of Socialist Federal Republic of Yugoslavia which established structural organs of the organization. However, according to Senad Ceman, the new structural organization of the waqf, religious, and educational affairs did not dramatically change from the previous one.²⁶

The extraordinary harsh attitude of communist regime towards the *waqf* at this particular time had culminated in the year **1958** when the **Laws on Nationalization of Leased Buildings and Land** was legislated. The purpose of this piece of legislation was to take the last breath of the Islamic Community. By this legislation the Islamic Community was left, overnight, without any immovable property, except the mosques.²⁷ The *waqf* land, forest, and the buildings which were financial skeleton of the Islamic Community for its maintenance and existence were taken

²⁵ This statute was published in No.2 Official Gazette of Federal Republic of Bosnia and Herzegovina on 9. January 1945.

²⁶ Senad Ceman, “*Comparative Study of Waqfs and Foundations under Sharia’a Laws and Positive Laws Legislated in Bosnia and Herzegovina*”, Sarajevo, 2007, at p. 107.

²⁷ For the particular example of nationalization of the *waqf* of Gazi Husrev-bey see <http://www.vakuf-gazi.ba>

away.²⁸ Subsequently, there was an emergency meeting of Islamic Community whereby new constitution has been adopted on 13. July 1959 which abolished the existence of the organs and administration of *waqf*, since the legislation of laws on nationalization of *waqf*, the *waqf* ceased to remain under control of Islamic Community. The Islamic Community remained as purely religious organization secluded from any active participation in the lives of Muslims in Bosnia and Herzegovina. The mosques were maintained from the alms and financial contributions of Muslim families on the individual basis.²⁹ There are set of statutes and regulations legislated in favor of nationalization of *waqf* throughout the communist period and some of those are:³⁰

- Laws on Confiscation of Property and Methods of Confiscation (Official Gazette of Democratic Federal Yugoslavia) No. 40/45 and 70/45
- Laws on Handling of Confiscated Property which was confiscated from the Owners by Authorities and their Assistants and Property that Owners had Left (Official Gazette of Democratic Federal Yugoslavia) No. 36/45
- Laws on Nationalization of Private Limited Companies (Official Gazette of Democratic Federal Yugoslavia) No. 98/46, 99/46, 35/48, 68/48, and 27/53 etc.

Dissolution of Social Federal Republic of Yugoslavia - Dayton Peace Agreement

This was the period of aggression on Bosnia and Herzegovina by the Serbs of Bosnia and the neighboring country Serbia, and partially Croatia. Ethnic cleansing during the 1992-1995 war caused internal migrations and number of Muslims was terribly affected.³¹ Once again the genocide on Muslims was committed and Muslims were indeed the victims of clearly ideological war while the rest of the Western Powers were silently observing the mass killing of Bosniaks. The war was primarily organized and led by three “cetniks”; Slobodan Milosevic, Radovan Karadzic and Ratko Mladic. According to one Bosnian historian and thinker Mustafa Spahic, the

²⁸ Senad Ceman, “*Comparative Study of Waqfs and Foundations under Sharia’a Laws and Positive Laws Legislated in Bosnia and Herzegovina*”, Sarajevo, 2007, at p. 107.

²⁹ For the detailed discussion see “Islamic Community and its Financing”, which has been taken from Takvim for 1997, Memorandum of Presidency of Bosnia and Herzegovina, at pp. 94-95.

³⁰ Senad Ceman, “*Comparative Study of Waqfs and Foundations under Sharia’a Laws and Positive Laws Legislated in Bosnia and Herzegovina*”, Sarajevo, 2007, at pp. 107 and 108.

³¹ www.wikipedia.com

genocide which was committed by the Serbian aggressors on Muslims of Bosnia is not the first one but it is the 11th genocide. Before that, 10 more genocides have been committed against the Muslims of Bosnia.

During this period of time, the remains of *waqf* which were not devastated and confiscated during the communist regime were almost put to an end by aggression on Bosnia and Herzegovina. In fact, more than 600 mosques were completely destroyed and almost the same number seriously damaged.³² Most of the mosques were completely destroyed using very high concentrated explosive devices so that the traces of the mosques and Islam can be permanently wiped out from the surface of the land. Moreover, at the remains of these places the Serbian-Croatian aggressor had built parking, parks, markets, buildings, and dumping sites for rubbish. Furthermore, out of 8000 Muslim graveyards in Bosnia and Herzegovina at that time, 2000 of them were completely devastated and 1800 were partially damaged.³³

During the period of aggression, the Presidency of Bosnia and Herzegovina, due to an emergency proclaimed in the country, had taken the functions of the parliament in legislating certain important laws since the sessions of parliament were prevented from being held by the aggressors' constant attacks on the capital city. However, it is important to mention here that all the laws and regulations passed by the Presidency at that time were subsequently sent to the parliament for the ratification at the time when the attacks from the aggressors were not as often as before. Thus, as it can be seen, the fundamental principles of democracy were not neglected even though the country was constantly under the attack of aggressors.³⁴ During that time, two very important laws were legislated that were supposed to prevent *waqf* property and the property of other religious institutions that was nationalized, from being soiled or completely alienated. These laws are;

³² Muharem Omerdic, "*Prilozi izucavanja genocida nad Bosnjacima (1992-1995)*" (*The Samples for the Study of Genocide on Bosniaks*), El-Kalem, Sarajevo, 1999, at p. 476, and sample No. 4, at p. 147; Senad Ceman, "*Comparative Study of Waqfs and Foundations under Sharia'a Laws and Positive Laws Legislated in Bosnia and Herzegovina*", Sarajevo, 2007, at p. 112.

³³ Muharem Omerdic, "*Prilozi izucavanja genocida nad Bosnjacima (1992-1995)*" (*The Samples for the Study of Genocide on Bosniaks*), El-Kalem, Sarajevo, 1999, at pp. 24 and 25.

³⁴ See the book edited and prepared by Mustafa Begic, "*Zemljovlasnici Bosne: vlasnicke pravne norme od disolucije (31.12.1991) ex-Jugoslavije do potpisivanja Dejtonskog sporazuma (14.12.1995)*", (Landlords of Bosnia: Legal Norms of Ownership from the dissolution (31.12.1991) of ex-Yugoslavia until Signing of Dayton Peace Agreement (14.12.1995)), Sarajevo, 2000, Vol. 3, at p. 9

- Laws on Prohibition of Sale of Common Property, on which the Right was Established Through Lease³⁵
- Laws on Special Protection of Sacred Objects and Places³⁶

What amounts to sacred objects and places is explained in section 1 of the Laws on Special Protection of Sacred Objects and Places whereby it mentions the following to be in this category: mosques, churches, chapels, *madrasas*, and other theological schools, graveyards, statues, places that are regarded as sacred and other objects that are regarded as sacred. Therefore, the *waqf* property could be included as one of these categories because it is the property of Muslims which has special sacred value. However, the struggle to get back the huge amount of *waqf* property which had been immorally confiscated by the communist regime is still on. These laws practically were weak in their enforcement process and there was lack of political will to return back the *waqf* property to the Islamic Community.

***Waqf* at Present (Post-Dayton Bosnia and Herzegovina)**

First of all, it is important to note that the *waqf* in Muslim and Secular states is not governed and regulated in the same way. In most of the Muslim countries the institution of *waqf* is secured and it is financed from the state budget. In addition, there is special ministry called “Ministry of *Waqf*” entrusted with the duty of maintaining the *waqf*. On the other hand, in most of the purely Secular states or in Muslim states with secular government and political set up, the *waqf* is regulated and taken care of by Ministry of Religious Affairs through which the funding is obtained for its maintenance. Furthermore, in most of the western countries the term ‘*waqf*’ is not mentioned in their legal system, but they use different terminologies in order to indicate and regulate the term ‘*waqf*’.³⁷

³⁵ Official Gazette of Socialist Republic of Bosnia and Herzegovina, No. 4, at p. 100, from 17th February 1992.

³⁶ Official Gazette of Socialist Republic of Bosnia and Herzegovina No. 13, at pp. 324-325, from June 1993.

³⁷ Zarko Paunovic, “*Nevaldine organizacije*”, (Non-governmental Organizations), JP Official Gazette, Beograd, 2006, at p. 26; Senad Ceman, “*Comparative Study of Waqfs and Foundations under Sharia’a Laws and Positive Laws Legislated in Bosnia and Herzegovina*”, Sarajevo, 2007, at p. 14. For the sake of illustration, the term ‘*waqf*’ is indicated by different terminologies in most of the western countries. So, they do not use term ‘*waqf*’ but rather different terminologies are used. For instance; in USA the word ‘non-profit sector’ is used, in England ‘voluntary sector’, in France ‘economic sector’, in Germany ‘*verien*’, in many Developing Countries ‘non-governmental

In Bosnia and Herzegovina there is no Ministry of *Waqf*. In fact, there is no any specific law which mentions the name '*waqf*'. The word which indicates *waqf* is the word 'foundation'. The 'foundation' is English word which can be defined as: "an organization that is established to provide money for a particular purpose, for example for scientific research or charity".³⁸ Therefore, the protection of *waqf* in the legal documentations of Bosnia and Herzegovina is done through the word 'foundation'. The legal status of foundations in Bosnia and Herzegovina should be observed in the light of constitutional provisions of Constitution of Bosnia and Herzegovina, by which the Central Government and both its entities have the constitutional obligation to secure highest level of internationally recognized Human Rights and Fundamental Freedoms.³⁹ Since the foundations have constitutional recognition, Parliament as a legislative body was pressured to pass the laws governing and protecting the foundations. As a result of it, in 2001 The Parliament of Federation of Bosnia and Herzegovina passed a statute called **Law on Association and Foundations**.⁴⁰ This piece of legislation was of the great importance to all non-governmental organizations in Bosnia and Herzegovina including foundations. Thus, this law has legislated indirectly on the protection and legal recognition of *waqf* since *waqf* has been regarded as a foundation.

One of the main benefits of this legislation is that it legally guarantees same level of rights to people in Bosnia and Herzegovina, that under the same conditions they can realize and protect their human and internationally recognized right to associate with others. It is law applicable to all associations and foundations. However, this law does not apply to three distinguished domains, namely: political parties, religious communities, and union organizations. In fact, there are special laws legislated for each of these domains. For instance, religious community is governed by **Law on Freedom of Faith and Legal Status of Churches and Religious Communities in Bosnia and Herzegovina**. When it comes to the *waqf*, as it was earlier mentioned, there is no specific law legislated to govern the *waqf* affairs. The last law

organizations'. Besides, some other countries use the terminologies such as; 'third sector', 'charitable sector', 'civil society organizations', 'independent sector', 'associational sector', and 'tax-exempted sector'.

³⁸ Oxford Advanced Learner's Dictionary, 7th Edition, Oxford University Press, 2005.

³⁹ Senad Ceman, "*Comparative Study of Waqfs and Foundations under Sharia'a Laws and Positive Laws Legislated in Bosnia and Herzegovina*", Sarajevo, 2007, at p. 136.

⁴⁰ Law on Associations and Foundations, was passed by Parliament of Federation of Bosnia and Herzegovina in both Houses in 2002, No. 01-3-02-3-46/02, and this law was also passed by the Parliament of Bosnia and Herzegovina on 5. October 2001.

governing *waqf* in Bosnia and Herzegovina was legislated and ratified in 1909 and it was in force until 1930. Subsequently, the Constitution of Islamic Community of Bosnia and Herzegovina which was adopted on 13th July 1959 stressed by virtue of Article 25 Paragraph 9 that *waqf* (endowment) is under the jurisdiction of Presidency of Islamic Community that is suppose to act on the advice of concerned local community (*jama'at*) in issuing the “*waqfname*” (endowment certificate) which is in Bosnian language.

At present, *waqf* is mentioned and explained in the **Constitution of Islamic Community of 1998**. There are few articles explicitly explaining the matters relating to *waqf*. **Article 28** says that “the property of Islamic Community is comprised of *waqf*, as well as other things like monetary founds”. **Article 31** states that “every person, individual or company (legal personality) can in accordance with *Sharia'a* laws leave his property as *waqf*”. The Presidency of Islamic Community, based on constitutional jurisdiction to deal with the *waqf* affairs, had come out on 22nd May 1999 with the Statute of *Waqf* Directorate which observed that other organs that are entrusted with jurisdictional powers to deal with *waqf* affairs are; Local Islamic Community, Special Judicial *Waqf*, and *Mutawallis*.⁴¹ By virtue of Article 32 of the Constitution of Islamic Community in Bosnia and Herzegovina, the *Waqf* Directorate manages the property of endowment. Therefore, the management of *waqf* in Bosnia and Herzegovina should be entrusted to the *Waqf* Directorate which would be assisted and consulted by three previously mentioned organs.⁴² Furthermore, according to the information given by Director of *Waqf* Directorate of Bosnia and Herzegovina, Nezim Halilovic Muderris, on 24th October 2007 the *waqf* in Bosnia and Herzegovina consisted of: 1144 mosques, 570 *masjids*, 1030 shopping lots, 3027 graveyards, 1570 houses and apartments, 886 buildings, and 4829 parcels of land.⁴³

Restitution of *Waqf* in Bosnia and Herzegovina

⁴¹ Muhamed Salikic, “*Ustavni islamske zajednice*”, (Constitutions of Islamic Community), El-Kalem, Sarajevo, 2001, at p. 352.

⁴² Esad Hrvacic, “*Restitucija I njeno pravno utemeljenje*” (Restitution and its Legal Origins), Hikmet, No. 9-12, Tuzla, December 2000, at p. 265.

⁴³ Senad Ceman, “*Comparative Study of Waqfs and Foundations under Sharia'a Laws and Positive Laws Legislated in Bosnia and Herzegovina*”, Sarajevo, 2007, at p. 159.

The word ‘restitution’ comes from the Latin maxim ‘*restitutio in integrum*’ which means “to restore something to its previous position”.⁴⁴ It is restoration of something to its rightful owner.⁴⁵ Definition of restitution in legal dictionary is as follows: “The restoring of anything unjustly taken from another. It signifies also the putting him in possession of lands or tenements, who had been unlawfully dispossessed of them”.⁴⁶ After the Dayton Peace Agreement⁴⁷, the questions in relation to restitution of *waqf* property had been raised before the legislative organs of Bosnia and Herzegovina for quite many times. Initial step was taken by the team of experts on matters pertaining to privatization in Federation of Bosnia and Herzegovina in December 1996 whereby they drafted the **Bill on Restitution**. The basis of this bill was *restitutio in integrum* of *waqf* property which was in existence at that time. If the return of *waqf* property is not possible then monetary compensation of equal value was needed to be paid.

However, the main issue in bill was in relation to retrospective effect of the bill. In other words, the question posed was whether the bill will be applicable from 1945 or 1918 onwards?⁴⁸ Trying to solve the above issue, the team of experts of the Federation together with the Deputy Prime Minister of federation of Bosnia and Herzegovina, in April and May 1997, suggested the Draft Laws on Restitution according to which the Restitution should take effect from 1919 until 1992.⁴⁹ After 1997, there were a lot of discussions and many different drafts and bills were proposed until the year of 1999. The last **Draft Laws on Restitution** was prepared in December 2006.

Unfortunately, these are only Bills and Drafts which were not passed as law. The main reason for not accepting these Drafts and Bills is the existence of two very controversial sections. First section is known as **Section 18** which is discussing the ‘right of possession’ and the ‘right

⁴⁴ Datinder S. Sodhi and R.S. Vasan, “*Latin Words & Phrases for Lawyers*”, Law and Business Publications (Canada) Inc, 1980, at p. 216.

⁴⁵ See definition in Merriam-Webster Online Dictionary available at <http://www.merriam-webster.com/dictionary/restitution>.

⁴⁶ Sinha & Dheeraj, “*Legal Dictionary*”, International Law Book Services, 1996, at p. 315.

⁴⁷ The Dayton Peace Agreement signed on 14.12.1995, was an agreement that officially ended the aggression on Bosnia and Herzegovina.

⁴⁸ The Islamic Community of Bosnia and Herzegovina did not accept any of the above two dates because the huge amount of *waqf* property had been confiscated since 1886.

⁴⁹ Senad Ceman, “*Comparative Study of Waqfs and Foundations under Sharia’a Laws and Positive Laws Legislated in Bosnia and Herzegovina*”, Sarajevo, 2007, at p. 114.

of ownership' of premises.⁵⁰ The interpretation given by Ministry responsible for the resources was in favor of right of possession. Furthermore, it was explained that those who were living in the premises owned by *waqf* authorities should have right to stay there since they have right of possession and since they have stayed there for long period of time. It has to be explicitly said that this explanation is not proper understanding of law. The ownership over those premises is paramount consideration. It has been explained in many legal systems that adverse possession should not take priority over the legal ownership which belongs to the *waqf*. Another controversial issue is in relation to **Article 24** whereby once again the Resource Ministry was advocating the right of those lessees who had leased the working premises and flats which are owned by *waqf*, to buy them accordingly if they wish to, before being under legal duty to return them back. In other words, the flood gate is open for all lessees to buy the premises for very affordable price. This proposal is against the legal rules and principles of any democratically based country. General rule is clear that the lease is for certain period of time and the owner of the leased property has indispensable title over premises and land.⁵¹

One of the important reasons for the law on restitution not being passed and for the lack of efficiency in the execution of restitution is the existence of two advocating groups of people in the restitution disputes. First group is represented by Coordination Council for the return and compensation of unlawfully confiscated and devastated property of religious communities in Bosnia and Herzegovina.⁵² The legal authority which this group is putting forward is the **Article 17 of Human Rights Declaration 1789** which says "ownership is sacred and absolute right". Thus, this group demands the return of unlawfully confiscated property. Coordination Council has submitted to the Environmental Affairs Ministry the statistics on the premises and the apartments that have been unlawfully taken from the religious communities by way of nationalization. For example, the number of nationalized apartments is as follow: Sarajevo 3299, Federation 3531, Republic of Srpska 445. In total, the number of nationalized apartments in

⁵⁰ See the Speech given before the Parliament of Bosnia and Herzegovina on 11.7.2000. The speech was prepared by advocate and solicitor Hrvacic Esad, available in the Master theses of Senad Ceman, "*Comparative Study of Waqfs and Foundations under Sharia'a Laws and Positive Laws Legislated in Bosnia and Herzegovina*", Sarajevo, 2007, at p. 153.

⁵¹ Ibid

⁵² Senad Ceman, "*Comparative Study of Waqfs and Foundations under Sharia'a Laws and Positive Laws Legislated in Bosnia and Herzegovina*", Sarajevo, 2007, at p. 117.

Bosnia and Herzegovina is 4000 which are supposed to be returned back to the religious institutions.⁵³

On the other hand, there is second group of people that are represented by association of citizens for protection of those who are having the possession of the apartments or premises which were nationalized. The name of this association is “Home”. The main claim put forward by this association is that those who are having the possession of apartments that are legally owned by religious institutions should be given right to buy those apartments from the legal owners.⁵⁴ This association has succeeded to persuade certain political circles to amend the law and to allow them to buy those apartments. Thus, on 21st June 2006, Federal Parliament of Bosnia and Herzegovina passed the amendments to the Law on Sale of Property (apartments) by 28 votes for, 12 against, and 1 neutral.⁵⁵ These amendments give right to those who are having the possession of the confiscated apartments to choose if they wish, to buy those apartments. Few months later, the restitution was tackled by Commission for Restitution appointed by Cabinet of Ministers of Bosnia and Herzegovina which prepared the Draft Law on Denationalization on 27th December 2006. However, even this draft has yet to be passed as a law since some of the provisions are disputed by some members of parliament.

All in all, there is a lot of discussion going on in the political arena, but the laws which are supposed to provide the real restitution of *waqf* property are yet to be passed. It has been submitted that restitution of *waqf* property is the fundamental right guaranteed by many international legal documents such as:⁵⁶

- United Nations Declarations on Human Rights
- European Convention on Protection of Human Rights and Freedom

⁵³ Ibid, at p. 117. It is interesting to note that the highest number of apartments that have been unlawfully confiscated by way of nationalization are the apartments and premises that belonged to the Islamic Community of Bosnia and Herzegovina whereby from 1493 until 1961, 803 objects were nationalized. Orthodox Church had lost in this period 149 objects while Catholic Church had lost 36 objects. There are reports as well that Jewish Community had lost 4 buildings by way of nationalization. This overall statistic can be found in the report prepared by Commission for Nationalization of Social Republic of Bosnia and Herzegovina and also by Commission for Religious Affairs.

⁵⁴ Senad Ceman, “*Comparative Study of Waqfs and Foundations under Sharia’a Laws and Positive Laws Legislated in Bosnia and Herzegovina*”, Sarajevo, 2007, at p. 118.

⁵⁵ See the newspaper cutting entitled “*The Law on Sale of Property (apartments) has been passed*”, Dnevni Avaz, 23rd June 2006.

⁵⁶ This information has been retrieved on 21st August 2009, from <http://www.vakuf-gazi.ba/>

- United Nations Declaration on Basic Principles of Justice for the Victims of War and Misuse of Power (Report A/49/881/ on 29. XI. 1985)
- European Social Declaration
- Documents of OESS-a on Human Dimensions (Copenhagen and Moscow)
- International obligations according to Resolutions 1089 (1996) and 1096 (1996).
- Resolutions of European Union B4-1493/95
- Resolution of USA Congress on 1. 10. 1998, No. 562

The battle to establish proper laws on restitution of *waqf* property is still present and according to *Mutawalli* of one of the significant *waqf* properties in Bosnia and Herzegovina, Mr. Mustafa Vatrenjak, restitution of *waqf* property is basic legal right which should be implemented accordingly.⁵⁷ Moreover, the economic studies indicated that in order for the state to implement full restitution of the property unlawfully confiscated from religious communities it will need 86 billion KM and that process could last for about 30 years.⁵⁸

⁵⁷ Ibid

⁵⁸ Senad Ceman, “*Comparative Study of Waqfs and Foundations under Sharia’a Laws and Positive Laws Legislated in Bosnia and Herzegovina*”, Sarajevo, 2007, at p. 140.

Conclusion

This research addresses the legal and administrative analysis of *waqf* in Bosnia and Herzegovina. It can be concluded that attitude of legislative and political organs of Bosnia and Herzegovina, since the time of Hapsburg Monarchy until today, was irrespective, hostile and destructive towards the institution of *waqf*. This is evident due to huge amounts of *waqf* property that has been unlawfully confiscated, especially by way of nationalization. The proposed draft laws and bills on restitution of unlawfully confiscated property are insufficiently strong to be passed as binding piece of legislation. Unfortunately the attitude of vast number of community in Bosnia and Herzegovina contributes in stopping restitution from being implemented. Moreover, the current laws in Bosnia and Herzegovina are not satisfactorily adequate for proper functioning of *waqf*. There is an urgent need for incorporation of fresh elements in the legal system of Bosnia and Herzegovina that would positively change the attitude of the community towards the welfare of *waqf*. As it has been indicated in the research, the restitution is the natural and legal consequence of the injustice committed towards the perpetual usufruct of the community derived from the welfare of the *waqf* property. The illegality of unlawful confiscation done through the process of nationalization is based on several International legal documents which advocate the protection of basic human rights and freedoms. It is hoped that full ratification of *waqf* property that has been unlawfully taken away through the process of nationalization in Bosnia and Herzegovina will be achieved in the near future.

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