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ENGAGEMENTS AND ENTANGLEMENTS: THE CONTEMPORARY *WAQF* AND THE FRAGILITY OF SHI'I QUIETISM

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ABSTRACT

Two primary impulses have historically motivated the Iraqi Shi'i juristic establishment in its relations with the Iraqi state. The first, deeply embedded in centuries of Islamic jurisprudence, is to achieve maximum autonomy for the Shi'i community from the state. The second has developed more recently in response to the modern state's efforts to extend its hegemonic control over areas that premodern empires were content either to leave to the jurists to administer or at least to share the administration of with jurists. This is to have the state recognize and implement Shi'i rules within parts of the state infrastructure that are of core interest to the juristic establishment. There is an obvious tension between these two desires, nowhere more evident than in the subject of this article—namely, the law pertaining to the creation, management, and liquidation of the Islamic charitable land trust known as the waqf. On the one hand, Article 43 of Iraq's constitution declares the followers of religions and sects to be "free" in administering the waqfs and their affairs, suggesting a strong desire for autonomy and separation from state control. Yet the implementing legislation for this provision extends the existence of a thick state bureaucracy and hands its administration over to juristic authorities. The ultimate irony of this arrangement is that it subjects juristic forces to far more potential interference as a legal matter than they have ever been subjected to, even during the totalitarian rule of the Ba'ath. In the end, a religious establishment historically deeply suspicious of political rulers and political engagement—indeed, one that defines itself by virtue of its separation from the state—now finds itself deeply and dangerously entangled in state political and administrative affairs. This article explores how this came to be and some of the significant consequences that arise from it.

INTRODUCTION: THEORIES OF JURISTIC ENGAGEMENT

A brief review of Shi'ism's core tenets as they have evolved and crystallized over time reveal its traditional, so-called Quietist[1] attitude toward secular authority. Primary among these is the conviction that God has blessed humanity with divinely inspired figures who are able to lead human beings to know God's will, both to achieve the good life in this world and to attain felicity in the hereafter.[2] The obvious exemplar par excellence of such a person is the Prophet

1 For a fuller exposition on Quietism in Najaf throughout Iraq's early history, see Haider Ala Hamoudi, *Transparency and the Shi'i Clerical Elite, in* Research Handbook on Transparency 142–45 (Ala'i and Vaughn, eds. 2014).

2 Vali Nasr, The Shia Revival: How Conflicts within Islam Will Shape the Future 38–39 (2007).

Muhammad, described in the Qur'an itself in such terms.[3] With the passing of Muhammad, the authority figures were the Imams, male lineal descendants of the Prophet Muhammad, divinely inspired and sinless, but not in some sort of direct, verbal communication with God.[4] The Twelfth Imam, known as the Mahdi, disappeared into hiding over a millennium ago, initiating what is known as the *ghayba*, or the occultation.[5] He will return from hiding at an unknown time in the future to institute a form of utopian political rule on earth.[6]

It is the latter set of beliefs, respecting the Imamate, that most distinguishes Sunnism from Shi'ism as a theological matter. Where Sunnism regards Islam as a belief system conceptually complete at the death of the Prophet Muhammad, thereby leaving secular authority in the hands of the community to determine, Shi'ism regards authority as having been transferred to the first Imam, the Prophet's son-in-law Ali.[7] Where Sunnism therefore regards proper (if imperfect) Islamic rule to be achievable on earth by that same community, Shi'ism traditionally regards the state—any state—not led by the Imam of the time to be a form of usurpation of the Imam's prerogative and, for that reason alone, illegitimate.[8]

The result is an implacable disdain on the part of Shi'i jurists toward political authority and a vesting of whatever temporal authority exists with the learned jurists, who serve as the deputies of the Mahdi pending his return.[9] The Shi'i juristic authorities, and the seminaries of Islamic law that they lead and within which they are trained, historically sought maximum autonomy from the state and its rules with the hope and the expectation that the Shi'a would then be able to live by the law enunciated by the jurists to the fullest extent practicable.[10] Their focus thus remained very much on private law, and they saw no need to develop any theory at all on the relationship of the juristic authorities to a state that was by definition tyrannical and usurping.[11]

Highly regarded scholarship has revealed that over the course of history, Shi'i jurists were not quite as contemptuous of political authority in fact as they claimed to be in theory.[12] There are practical difficulties, after all, in maintaining a social structure where the premier religious authorities within the polity—the figures who enjoy the deepest legitimacy among the laity—do not recognize at all the legitimacy of the political forces that rule the state, and vice versa. In modernity, these difficulties have compounded significantly as the state's reach has extended deeper into the

3 *See* Qur'an 33:21 ("Certainly you have in the Messenger of God an excellent exemplar for he who hopes in God and the latter day and remembers God much."). Unless otherwise noted, all translations from the Arabic are mine.

4 Hamid Mavani, Religious Authority and Political Thought in Twelver Shi'ism 4 (2013).

5 Abbas Amanat, *From* ijtihad *to* wilyat al-faqih: *The Evolving of the Shi'ite Legal Authority to Political Power*, in Shari'a: Islamic Law in the Contemporary Context 120, 122 (Abbas Amanat and Frank Griffel eds., 2007).

6 *Id.*

7 Mavani, *supra* note 4, at 1.

8 Amanat, *supra* note 5 at 123 ("Every government was in theory seen as inherently oppressive."); *see also* Reidar Visser, *Sistani, the United States, and Politics in Iraq: From Quietism to Machiavellianism*, 700 Norwegian Institute of International Affairs 6 (2006), *available at* http://www.historiae.org/documents/Sistani.pdf ("According to Shiite doctrine, supreme political authority on Earth rests with [the] Hidden Imam, meaning that any Shiite ventures into politics carry the potential of usurpation."); Hamid Algar, The Roots of the Islamic Revolution 25 (1983) (noting, with respect to Iranian clerics at the start of the twentieth century that "[i]t was held . . . that a totally legitimate authority was, in the nature of things, impossible, given the continuing occultation, or absence, of the Imam from the world. It was held that all that could be done in his absence was to limit the inevitable illegitimacy to existing rule.").

9 Linda S. Walbridge, The Most Learned of the Shi'a: The Institution of the Marja' Taqlid 3–4 (2001).

10 Amanat, *supra* note 5, at 121.

11 *Id.*

12 *Id.* at 123.

lives of the citizenry. If the jurists truly ignored the state and its rulemaking powers, then outside of the very limited area of religious ritual, their rules, and hence their authority, run the risk of near total obsolescence.

Shi'i political theory has ruptured as a result. Within Iran, Ayatollah Khumayni introduced the comparatively radical notion that the deputyship enjoyed by the jurists in the Mahdi's absence was not only one that permitted them to pronounce and preserve Islamic law, but also one that entitled them to assert political rule.[13] This conception, crystallized in Khumayni's phrase "Guardianship of the Jurist," was ultimately brought into being through the 1979 Revolution in Iran.[14] Following the Revolution and Khumayni's assumption of power, the juristic academies and institutions in one of Shi'i Islam's major centers of learning were thoroughly transformed and bureaucratized into a modern state framework that was comparatively radical relative to Shi'ism's deep Quietist tradition.[15]

This article concerns what has transpired in the other major Shi'i center of learning, which is located in Najaf, Iraq. In that seminary city, there has been a modest, but important, reformation of the idea of Quietism. In the early years of the state, these interventions were highly sporadic, largely in response to the state's creeping control over areas of traditionally religious remit, and made without any sort of theoretical justification.[16] Since the end of Ba'ath rule in 2003, juristic interventions are more frequent and more sustained.[17] Even more importantly, the contemporary jurists quite directly justify these interventions as being not only a right, but also a religious duty—a function, in other words, of the exercise of their juristic authority. In the words of Grand Ayatollah al-Fayyadh:

> The role of the *marjàiyya*[18] [i.e., the jurists] is offering guidance for citizens and the state. The role of the *marjàiyya* is observation of responsible officials, to ensure they act in accordance with their duties to the

13 Ruhollah Khomeini, Islam and Revolution: Writings and Declarations of Imam Khomeini 27 (Algar trans., 2002) ("The governance of the [jurist] is a subject that in itself elicits immediate assent and has little need of demonstration, for anyone who has some general awareness of the beliefs and ordinances of Islam will unhesitatingly give his assent to the principle of the governance of the [jurist] as soon as he encounters it; he will recognize it as necessary and self-evident.").

14 Amanat, *supra* note 5, at 132.

15 *Id.*

16 Examples of such interventions abound. Iraq's juristic forces participated in the famed 1920 uprising against the British. Iraq's leading jurist in the early part of the twentieth century, Grand Ayatollah Kashif al-Ghita', published a manifesto against the promulgation of Iraq's first civil code, the Ottoman *Majella*, because it did not take sufficient account of Shi'i rules. A later jurist of somewhat lower rank, Muhammad Bahr al-`Ulum, decades later adopted the format of that manifesto to publish his own work decrying the enactment of Iraq's 1959 Personal Status Code. Iraq's leading jurist from the middle part of the twentieth century until his death in 1970, Muhsin al-Hakim, issued a fatwa describing the joining of the Communist Party as an act of apostasy. Abbas Kadhim, *Forging a Third Way: Sistani's Marja'iyya between Quietism and Wilayat al-Faqih*, *in* Iraq, Democracy and the Future of the Muslim World 69–73 (Ali Paya and John Esposito eds., 2011). *See also* Rula Jurdi Abisaab & Malek Abisaab, The Shi'ites of Lebanon: Modernism, Communism, and Hizbullah's Islamists 90–91 (2014) (respecting Hakim's fatwa). None of these actions was Quietist—to the contrary, each of them was a response to political and social changes taking place that the jurists found threatening and dangerous.

17 Kadhim, *supra* note 16, at 76–78 (describing various Sistani-led interventions into political and social affairs, which include objecting to the formation of an unelected constitution drafting commission, opposing the 2004 interim constitution known as the Transitional Administrative Law, and managing a truce of sorts that spared the city of Najaf from destruction during a military confrontation between U.S. forces and Muqtada al-Sadr's militia, known as the Mahdi army).

18 A Shi'i jurist who has attained the rank of *mujtahid* is frequently referred to as a *marja' al-taqlid*, or a "source of emulation." *Marja'iyya* refers to the broader, informal hierarchical institution of juristic training. Walbridge, *supra* note 9, at 4.

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people. The role of the *marjàiyya* is unification of all of Iraq's population, Sunnis and Shiites and religious minorities. The role of the *marjàiyya* is not to play any direct role in the government.[19]

The importance of public and political engagement ("guidance for *citizens and the state*") is unmistakable. Also unmistakable, however, are Quietist-inspired limitations on that engagement. The jurists eschew the profane matters of state rulemaking and state administration. They instead limit themselves to outside advocacy, encouraging and advising the state and its officers toward proper conduct.

There are some conceptual tensions in Najaf's current approach, as I have suggested elsewhere, in that it seems both to legitimize the state, and yet retains the core of a theory whose entire justification is that any state led by any figure other than the Mahdi is an illegitimate usurpation.[20] Nevertheless, the method works for the most part, for both Iraq and the jurists. The jurists are able to provide public input on matters from time to time.[21] Moreover, there is a legal constraint inserted into Iraq's constitution that prohibits the promulgation of law that lies in violation of Iraq's "settled rulings," thereby giving Najaf's "guidance" to the state on Islamicity at least some theoretical legal power.[22] At the same time, Najaf largely keeps to itself, and, for the most part, the state's legislative and administrative machinery remains undisturbed by the jurists or their rules. Hence, for example, the Federal Supreme Court, which determines whether or not law conflicts with Islam's "settled rulings," is composed entirely of state judges with legal, not juristic, training.[23] The result is that the Court without exception has either upheld state law in the face of Islamic challenges, or used a device such as standing or ripeness to avoid deciding a matter altogether.[24] At the same time, when Najaf does engage, on matters ranging from school curricula[25] to transparency and political accountability[26] to the dress of female violin players at stadiums in the Holy City of Kerbala,[27] the state tends to take notice. Many commentators are content to leave the matter there, and suggest that there is stability and perhaps even cause for optimism in this embrace of quasi-Quietism on the part of the jurists and the state alike.[28]

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19 Haider Ala Hamoudi, *Navigating the Najaf Mantra with the Four Grand Ayatollahs*, Daily Star (Lebanon), November 5, 2009 (quoting al-Fayyadh).

20 Haider Ala Hamoudi, *Beyond the State and the Hawza: Legal Pluralism and the Ironies of Shi'i Law*, *in* Regulating Religion in Asia: Norms, Modes, and Challenges 298, 304 (Jaclyn L. Neo, Arif A. Jamal & Daniel P.S. Goh eds., 2019).

21 *See supra* note 16 for specific examples.

22 Article 2, Section 1, Dustūr Jumhurīyat al-'Irāq [The Constitution of the Republic of Iraq] of 2005 [hereinafter Iraq Constitution].

23 Haider Ala Hamoudi, Negotiating in Civil Conflict: Constitutional Construction and Imperfect Bargaining in Iraq 189 (2014).

24 *Id*. at 189–96 (describing some of the more significant cases that have arisen).

25 *Id*. at 198.

26 Hamiudi, *supra* note 1, at 147–51.

27 John Davison, *In Iraqi Holy City, Row over Female Violinist at Soccer Match Shows Social Rift*, Reuters (August 7, 2019).

28 *See, e.g.*, Kadhim, *supra* note 16; Babak Rahimi, *Democratic Authority, Public Islam, and Shi'i Jurisprudence in Iraq and Iran: Hussain Ali Montazeri and Ali Sistani*, 33 International Political Science Review 193, 194 (2012); Yizhak Nakash, Reaching for Power: The Shi'a in the Modern Arab World 17–18 (2007). Perhaps the most sanguine contemporary commentator is Juan Cole, who has described Najaf's efforts as an Islamic Reformation of sorts, fusing the ideas of the Enlightenment with those of traditional Islamic jurisprudence, in a fashion that is among the "more thorough-going and institutionally promising in modern history." Juan Cole, Ayatollahs and Democracy in Contemporary Iraq 5, 24–25 (2006).

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In fact, as this article shows, quasi-Quietism is quite fragile. The approach does not work in those areas of vital importance to the juristic forces, where the jurists have traditionally expected to exercise actual control of affairs. These include family law and inheritance law (categorized together in most Middle Eastern legal systems as part of "personal status law"), and the law pertaining to the *waqfs*—endowments of real property for religious or charitable purposes. As discussed in detail below, in centuries past, jurists were able to apply their own rules in these areas and indeed in most areas of private law, within the context of a premodern empire largely indifferent to such matters. As the state has expanded in modernity, jurists have ceded control of nearly all private law to the state, but they have held tenaciously, through the cataclysm of colonialism and its aftermath, to personal status and, where possible, control of the waqf.[29] In the twenty first century, the desire to maintain juristic autonomy in even these limited fields collides headlong into the reality of state expansion into all legal realms. Either the jurist controls the state machinery, or the jurist cedes all authority over all that is left of law to the state to administer, offering nothing but vague "guidance" to the state as it asserts that control. Neither is particularly appealing to the quasi-Quietist.

Accordingly, the Iraqi Constitution reflects a certain ambivalence on the part of how to relate these areas of traditionally religious concern to the state. On its surface, the text favors a traditional approach that emphasizes juristic and religious autonomy vis-à-vis the state. Article 41 of the constitution, pertaining to personal status law, declares Iraqis to be "free in their commitments to personal status, according to their religions, sects, beliefs, or choices."[30] Similarly, Article 43 indicates that "followers of all religions and sects are free in the practice of religious rites . . . and the management of the religious endowments (waqf), their affairs, and their religious institutions."[31] The reference to the waqf alongside religious rituals is quite telling. In the same manner that any Iraqi is free to attend a mosque of a particular sect and pray in that mosque in accordance with the rules of their sect, so a landowner is free to dedicate land to some specified religious or charitable purpose. That landowner is then entitled to expect that the land will then be forever administered according to some preexisting set of juristic rules, without any more state interference than one would expect in the context of private rites of worship.

This is hardly realistic. From the vantage point of the modern Westphalian nation-state, there is a world of difference between, on the one hand, committing not to interfere in the performance of religious rituals, and, on the other, leaving the administration of significant amounts of real property to nonstate authorities. Indeed, the constitution's drafters were at least partially aware of this, as becomes clear in a closer reading of Article 43(1), which reads in full as follows:

> The followers of all religions and sects are free in the: A. Practice of religious rites, including the Husseini rituals. B. Management of religious endowments (waqf), their affairs, and their religious institutions, *and this shall be regulated by law.* (emphasis added)[32]

The reference to waqf management being "regulated by law" also appears in the context of personal status in Article 41. This is quite telling, in particular when read alongside Article 43(1)(a), concerning the carrying out of religious rituals. As concerns religious rituals, as one might expect, there is no reference to state law organizing the matter at all. The state, in other words, does *not* go

29 Haider Ala Hamoudi & Mark Cammack, Islamic Law in Modern Courts 475–77 (2018).

30 Article 41, Iraq Constitution of 2005. The English translation of the Iraqi Constitution is taken from the Constitute Project, https://www.constituteproject.org/constitution/Iraq_2005.pdf?lang=en.

31 *Id.* at art. 43(1)(b).

32 *Id.* at art. 43(1).

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about passing laws organizing religious rituals, but rather refrains from interfering with them on a near absolute basis. By contrast, the state certainly does pass laws organizing personal status and waqf. This reflects the growing realization of the Najaf juristic forces that as to core areas of concern, they could not simply demand autonomy from the state, as they had traditionally done. Rather, they had to demand some state recognition of juristic rules and, where appropriate or necessary, exercise control over state machinery to ensure that the juristic rules were being properly administered.

In personal status law, this could potentially be achieved merely through a repeal of existing legislation and a directive to the courts to apply juristic rules. Some Muslim states do this, as do some non-Muslim states applying law to a Muslim minority.[33] Indeed, early efforts in Iraq to render Shi'i juristic rules more relevant adopted a similar approach.[34] It is quite hard to see how waqf law, intimately connected to the management of real property, could be handled in the same manner, given the bureaucratic apparatus necessary to exercise supervision and oversight of land use.

Accordingly, the approach that was taken following 2003 was one that effectively continued the broad state apparatus that was already firmly in place respecting the management of the waqfs but transferred its administration to Najaf. Specifically, the relevant state institutions were given new names and reincarnated as sect-based *diwans* (or administrative bodies) rather than a single uniform ministry.[35] The jurists were then given near total control of the Shi'i waqf *diwan*, which made rules for and exercised supervision over all Shi'i waqfs.[36] The result is that Iraqi waqf law currently renders Najaf's highest jurist the substantive rulemaker for Shi'i waqfs, and his rules displace all earlier ones created by the state.[37] A deputy authorized by Najaf's highest jurist serves as the head of the *diwan*.[38] This means the *diwan*, a state institution equivalent to a ministry, in effect administers the rules of Najaf's highest jurist. What was once a desire to be left alone by the state was thus transformed, in this vital field, into the juristic projection of power within the state and the consequent assumption of a state role that Najaf's jurists traditionally eschew.

The irony, of course, is that this assertion of state control, exercised for the primary reason that it is the only way for Najaf to remain relevant in the area of waqf, results in a formal entanglement between state and jurist that is far more pervasive than anything that existed previously, even during the brutal reign of Saddam Husayn. In other words, the assumption of power works to destroy the very autonomy that Najaf seems otherwise so intent on extending. For if the state, for the first time, is to confer such vast power upon Najaf's highest jurist, then it must determine—as a legal matter—who Najaf's highest jurist is. Obviously, that state determination will have a profound effect on who Najaf itself regards as its highest jurist. Indeed, the delegation to the state of a role in succession in Najaf is not merely implicit. As detailed below in the discussion of juristic assumption of state control over the waqf since 2003, the state also has newfound legislative power to intervene in the affairs of Najaf to advance the interests of Najaf's highest jurist, or, more aptly, the figure it deems to occupy that role.[39] That the determination of who Najaf's highest

33 Haider Ala Hamoudi, Islamic Law in a Nutshell vi, ix (2019).

34 *See* Hamoudi, *supra* note 23, at 99.

35 Stefan Talmon, The Occupation of Iraq: Volume 2: The Official Documents of the Provisional Authority and the Iraqi Governing Council (Documents in International Law) 292 (2012) (reproducing Governing Council Resolutions 29 of August 30, 2003, and 68 of October 22, 2003).

36 The Law of the Shi'i Waqf Bureau Law No. 57 of 2012, art. 14. *See also infra* the discussion of the Waqf Bureau laws of 2012 (discussing the law in greater detail).

37 *Id.*

38 *Id.* art. 4(2); *see also infra* the discussion of the Waqf Bureau laws of 2012.

39 *Id.* at art. 15.

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jurist is has been the subject of contestation in the past, and that there is no reliable and objective way to determine this, only renders the matter more dangerous. In the end, in order to preserve its influence, Najaf may very well have paved the road to the eventual end of its autonomy from the state.

In the next section, I lay out the key features of the historical waqf doctrine, and then proceed to show the ultimate decline of the waqf in much of the Sunni world, with particular reference to the Arab states whose legal systems most closely resemble Iraq's. In the section following, I describe how the waqf has been administered throughout Iraqi history. In particular, I show how, in many ways, as a historically Sunni dominated country, Iraq seemed throughout much of its early history to be embarking on the same path as Sunni Arab states. I also describe in that section how the efforts to bring waqfs under greater state control in Iraq were on balance timid, and less successful than elsewhere, and I offer potential reasons for this. I then discuss legal developments after 2003 and show how Najaf has managed to effect a series of changes in law that leaves them in primary control of the Shi'i waqfs, both administratively and in terms of rulemaking. I conclude by laying out the manner in which Najaf's assertions of control over the state's waqf administrative process leave it exposed to state interference. Specifically, waqf law now provides the state a legal avenue through which to directly intercede into internal Najaf politics that would have been unthinkable in earlier eras, when Najaf's role in state affairs was perforce more circumscribed.

THE WAQF EXPLAINED

Nature and Purposes

It is difficult to gainsay the importance of the waqf over the course of Islamic history. As one scholarly account of the early emergence of the waqf has indicated, "[i]t is not an exaggeration to claim that the *waqf* . . . has provided the foundation for much of what is considered 'Islamic civilization.'"[40] Sait and Lim offer an even more robust exposition on the historic importance of the waqf institution, as follows:

> The investment of the Muslim community over time into the *waqf* institution is enormous, including hundreds of sultans and rulers, thousands of affluent families and millions of anonymous ordinary citizens . . . . [Waqfs] grew to a staggering size, amounting to about one third of the Islamic Ottoman Empire and a substantial part of Muslim lands elsewhere. Wherever there was an established Muslim community, one was likely to find a *waqf*.[41]

The general structure of the waqf is simple enough, and not particularly different across the principal schools of Islamic thought, Sunni and Shi'i. Essentially, an individual grantor, or *waqif*, dedicates his or her property in waqf to serve a pious purpose in perpetuity.[42] Importantly, the grantor must own the property outright, in what is known as *mulk* in Islamic parlance.[43] Much agrarian property within the Islamic world, and Iraq in particular, has been classified since Ottoman

40 Peter C. Hennigan, The Birth of a Legal Institution: The Formation of the Waqf in Third-Century A.H. Hanafi Legal Discourse xiii (2003).

41 Siraj Sait & Hilary Lim, Land, Law and Islam: Property and Human Rights in the Muslim World 147 (2006).

42 Farhat Ziadeh, *Land Law and Economic Development in Arab Countries*, 33 American Journal of Comparative Law 93 (1985); *see also* Sait & Lim, *supra* note 41, at 150.

43 Sait & Lim, *supra* note 41, at 150.

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times as '*amiri* land.[44] This land is technically owned by the sovereign, though a private person can have a right to transact with respect to it, known as the right of *tasarruf*. This right runs with the land to such an extent that over time it has become largely indistinguishable from *mulk*.[45] One important remaining difference, however, is that the waqf cannot be created on '*amiri* land. This is a distinction that proved important as modern states sought to assert greater control over the waqf.[46]

In creating a waqf, the grantor may specify beneficiaries, though the importance of specification depends on the nature of the waqf itself.[47] For example, if the grantor were to make the very common endowment of real property for a mosque or other Islamic center of worship, such as a Shi'i Husayniya, then the beneficiaries would be, implicitly, anyone seeking to worship there. A waqf intended to feed the poor would more likely specify what class of individuals qualified for receipt of the funds. Similarly, if a grantor sought to create a waqf for the benefit of his family, which was long deemed a perfectly legitimate pious purpose, then the specific description of which family members benefit and in what shares becomes more important. There are default rules respecting the matter if the grantor makes no such specification.[48]

Thus, the waqf often generated income from lease payments, sales of agricultural products grown on it, or otherwise, which is dedicated to a pious purpose. Other waqfs, such as mosques or other religious centers, did not generate income and instead consumed resources. Commonly, income generating and resource consuming waqfs were combined, such that the grantor might create a waqf of a date farm and a mosque, with the revenues generated from the date farm used to fund the expenses of maintaining the mosque.[49]

The legal effect of the waqf, at least in theory, was to render the property inalienable and the grant of the waqf irrevocable, with the property conceptually belonging to God.[50] Hence, a

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44 *Id*. *See also* Hanna Batatu, The Old Social Classes and the Revolutionary Movements of Iraq: A Study of Iraq's Old Landed and Commercial Classes and of its Communists, Ba'thists and Free Officers 53 (1978) (noting that only 1.4 percent of Iraq's land in 1958 was privately owned through *mulk*, with 14.6 percent being '*amiri* land).

45 Farhat Ziadeh, Property Law in the Arab World 60–61 (1979).

46 Richard van Leeuwen, Waqfs and Urban Structures: The Case of Ottoman Damascus 108–09 (1999).

47 Sait & Lim, *supra* note 41, at 150–51.

48 For example, Shi'i jurists indicate that as a default, males and females share equally in a waqf designated for a grantor's children, unless custom dictates that females would be excluded by such a formulation, in which case they would be so excluded. *See, e.g.*, 2 Ali Al-Sistani, Minhaj Al-Saliheen ¶ 1536 (2008) [hereinafter Sistani]. By contrast, a designation of "sons" ('*ibna*) as beneficiaries would necessarily exclude females, while a designation of "descendants" (*dhurriya*) would necessarily include them. Sistani, *supra*, at ¶ 1538. The interesting paradox this creates, much discussed by jurists and commentators alike, is that the waqf rules can be used to circumvent the mandatory inheritance rules, which require that particular relatives receive specified amounts on the death of their relative. Hamoudi & Cammack, *supra* note 29, at 541. Hence, for example, a father seeking to exclude his daughters from inheriting any of his estate might create a waqf from his landholdings and exclude his daughters as beneficiaries, even though his daughters would ordinarily be entitled to a share of their father's estate upon death under Islamic inheritance law. This artifice to avoid inheritance rules was largely deemed permissible, though there are some limitations among some jurists, from the Sunni Maliki school, on the extent to which daughters in particular can be excluded. 7 Encyclopedia of Islamic Law 240 (Arif Ali Khan et al. eds., 2006) (quoting Khalil ibn Ishaq). The broader constraint on the practice was that any waqf created on a deathbed was invalid beyond the one-third of the estate that a decedent can always bequeath. Hamoudi & Cammack, *supra* note 29, at 541. What this means is that a grantor who created a waqf that excluded his female kin would have to do it while alive and well, and thus endow his property to God (and constrain its use accordingly) at that time. Hamoudi & Cammack, *supra* note 29, at 541; *see also* Wahba al-Zuhaili, al-Wasaya wa al-Waqf fi al-Fiqh al-Islami [Wills, Guardianship Appointments, and Waqfs in Islamic Jurisprudence] 199 (2d ed. 1998).

49 Van Leeuwen, *supra* note 46, at 11–12.

50 Sait & Lim, *supra* note 41, at 152–53.

waqf of land in favor of relatives is not the devising of the land to the relatives, but rather giving the beneficiaries the proceeds arising therefrom, subject to whatever limitations the grantor establishes for the use of the land.[51]

In light of the trust-like structure of the waqf, the property endowed requires a trustee to administer it. The grantor is permitted to select a trustee and set forth a means by which future trustees are to be selected.[52] A particularly popular method in modern Iraq, despite its indeterminacy, is for a grantor to appoint as trustee the most pious male member of his family of the nearest generation to him of which there are surviving members. In other words, the most pious of the grantor's sons, followed upon the death of the last son by the most pious grandson, followed by the most pious great grandson, and so forth. If the grantor does not select a trustee, then in theory a judge would do so.[53]

Because waqfs are supposed to be perpetual, questions arise as to what happens if a grantor's direct line of descendants were to be extinguished in a family waqf. Shi'i jurists generally declared the waqf terminated in this exceptional circumstance.[54] The Malikis take the same position. Hanafi jurists, by contrast, required that the property be dedicated to some other pious purpose, such as the establishment of a mosque or religious school, because waqfs can never terminate. The property having been dedicated to God, it cannot be returned to the ownership of people.[55]

An even greater concern surrounded the circumstances under which endowed property could be leased or sold and exchanged for different property. Short-term leases were universally accepted.[56] After all, the most common way that commercial property could generate income would be through the leasing of shops and other commercial facilities. Shi'i jurists express little to no reservations about longer-term leases as well, given that their compendia make no reference to time limits on leases of waqf property. Sunni jurists, however, generally limited longer-term leases.[57] There were a number of reasons they took this position, including that waqfs would no longer seem perpetual and dedicated to God if long-term leases were common; that a longer-term lease could harm the waqf; and that witnesses, who were the primary means of proving the existence of transactions (including waqf dedications) in classical Islam, would die or forget that a particular piece of land had been placed into waqf if it had been leased long before.[58]

Even greater concern surrounded the sale and subsequent exchange of waqf property for other property of equal value. For Hanafi jurists, unless the grantor had given the trustee the power to make the exchange, such as transaction should only be undertaken if the property had become incapable of generating income entirely, or at least generating sufficient income to satisfy whatever expenses it was expected to cover.[59] (For example, if a date farm was supposed to generate revenues to support a particular seminary, and the income it generated was no longer sufficient for this purpose). At that point, a judge could authorize the trustee to make the exchange, so that a different property would then be under endowment.[60]

51 *Id.*
52 Van Leeuwen, *supra* note 46, at 43.
53 Hamoudi & Cammack, *supra* note 29, at 532–33.
54 Sistani, *supra* note 48, at ¶ 1484.
55 *See* Mahkamat al-Tamyīz [Court of Cassation], Personal Status Panel, decision No. 3657 of October 20, 2010 (Iraq), *in* Hamoudi & Cammack, *supra* note 29, at 539.
56 Van Leeuwen, *supra* note 46, at 63.
57 Miriam Hoexter, *Adaptation to Changing Circumstances: Perpetual Leases and Exchange Transactions in Waqf Property in Ottoman Algiers* 4 Islamic Law & Society 319 (1997).
58 *Id. See also* Van Leeuwen, *supra* note 46, at 63.
59 Hoexster, *supra* note 57, at 320.
60 Van Leeuwen, *supra* note 46, at 61.

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Shi'i jurists proved even more exacting on exchanges not authorized by the grantor, requiring that the property provide no income at all before the sale and exchange becomes permissible.[61] Sistani provides the example of a rotting tree trunk.[62] Even then, Shi'i jurists require an exchange for something as similar to the original property as possible.[63] For example, if a date farm under waqf had suffered a drought and the trees died, then the trustee would presumably sell the land to someone, perhaps for its wood, and use that money to purchase a working farm capable of generating revenue.[64]

There are a number of other features of waqf that are emphasized among scholars and commentators over the course of Islamic legal history, from whether a grantor can be both a trustee and a beneficiary[65] to whether property other than land can be endowed.[66] These debates need not detain us, rich and interesting as they may be, as they are of limited concern to the subject of this article. Rather, I focus below on two relevant aspects of the waqf that are of central importance. These are, first, the relationship of the waqf to the state, and second, the deep social and economic interests that jurists historically had vested in waqfs.

Waqfs and the State

Perhaps the most remarkable feature of the waqf is the extent to which it purports to operate independently of the state to a large extent. That is, the grantor is generally a private individual with no necessary connection to the state.[67] Moreover, the grantor's dedication lasts forever, without state interference.[68] The grantor determines the property appropriated, the designation of the beneficiaries, and even the identity of the trustee.[69]

This separation of the waqf from the state proved to have some benefit historically. As Kuran has noted, the waqf permitted individuals in the premodern world to decide where best to focus resources to provide public goods, rather than bureaucratize them in the state.[70] Moreover, waqfs commanded vast public resources that could then be used to challenge the political authority of the state. In the words of another scholar, "the *waqf* . . . combined the features of a philanthropy, a social service agency, and, albeit indirectly, a political voice competing with that of the ruler."[71]

61 Sistani, *supra* note 48, at ¶ 100.

62 *Id.*

63 *Id.* at ¶ 103.

64 Hamoudi & Cammack, *supra* note 29, at 549–50. It might be noted that none of these rules apply to mosques, as jurists across the schools and sects almost always took the position that once endowed, a mosque would remain one forever.

65 *See id.* at 540–41 (describing debates respecting grantors being beneficiaries of waqfs).

66 *See, e.g.*, Jon E. Mandaville, *Usurious Piety: The Cash Waqf Controversy in the Ottoman Empire*, 19 International Journal of Middle East Studies 289, 293 (1979).

67 *Cf.* Van Leeuwen, *supra* note 46, at 87 (noting that the long-standing practice of state-owned land never being dedicated as waqfs began to change for the first time in the twelfth century CE).

68 Sait & Lim, *supra* note 41, at 150.

69 *See supra* the discussion of the nature and purposes of the waqf.

70 Timur Kuran, *The Provision of Public Goods under Islamic Law: Origins, Impact, and Limitations of the Waqf System*, 35 Law and Society Review 841, 843. Kuran makes the point that these benefits did not extend into modernity because of the lack of flexibility inherent in the waqf structure. This is a point I engage below, in the discussion of the mechanisms of state control of the waqfs. *See also* Batatu, *supra* note 44, at 8 (pointing out the manner in which lands not protected by waqf in Ottoman era Iraq were subject to frequent confiscation).

71 Sait & Lim, *supra* note 41, at 156 (quoting J. Bremer); *contra* Timur Kuran, *Legal Roots of Authoritarian Rule in the Middle East: Civic Legacies of the Islamic Waqf*, 64 American Journal of Comparative Law 419, 421 (2016)

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That said, it is a mistake to suggest that somehow before modernity, Islamic states were hostile to, or even unconcerned with, the administration of waqfs. In fact, as Richard van Leeuwen has shown, from early in Islamic history, the establishment of waqfs was firmly embedded as part of state policy.[72] Even if a state did not create a waqf, a caliph or a sultan certainly could, as could governors and other high state officials.[73] The waqfs created by these individuals could provide public goods and public services, such as pilgrimages to Mecca, food for the needy, and revenues for mosques and seminaries in a manner that directly fostered state ends.[74] The Ottomans, for their part, used the waqf as a means to connect the outer provinces to the center through the distribution of largesse and the provision of public services.[75]

Moreover, the power of judges to supervise waqfs was always important. Thus, at various points throughout Islamic history, waqf properties were exchanged with far more frequency than juristic rules would seem to have permitted. State judges simply authorized the exchanges by reading the juristic rules quite broadly.[76] Finally, of course, it was always possible for states to at least try to reassess whether or not waqfs had been validly created in the first place, and, in so doing, reassert control over vast portions of land.[77]

The point, therefore, is not that premodern Islamic states were completely disassociated from the process of dedicating and administering waqfs. This was never true. The point, rather, is that despite their material power and their obvious interests in determining how such vast wealth producing property was being used, premodern states could only play a limited role in managing waqfs.

Waqfs and the Jurists

The interests of the jurists in waqfs are even more direct and obvious than those of the state. First of all, jurists created the rules under which the waqfs were supposed to operate.[78] In addition, and quite importantly, they were also quite often beneficiaries of waqfs. This is because one of the most common forms of waqf over time was either a seminary, or a piece of wealth-producing land whose revenue would be dedicated to the support of a seminary and the students studying in it.[79] Jurists therefore created, and were supported by, the waqf system.

This juristic interest, coupled with the state interests described above, led to a rather complex interplay as between jurist and state over the waqf. On the one hand, jurists relied on the waqf to finance their institutions, and thus they jealously guarded the waqf from state intrusion to the fullest extent possible. On the other hand, when the state rendered waqf creation a central part of state policy, as the Ottomans did,[80] and when state officials created, and facilitated the creation

(claiming that while the waqf had the potential to serve as a vehicle for political accountability, in fact it "impoverished civil society and made democratization more difficult").

72 Van Leeuwen, *supra* note 46, at 87 (describing the Ayyubid use of the waqf to support policies of the ruling elite).

73 *Id.*

74 *Id.* at 79–82, 97.

75 *Id.* at 97.

76 Hoexter, *supra* note 57, at 322.

77 Van Leeuwen, *supra* note 46, at 111.

78 *See id.* at 68.

79 *Id.* at 75–84. In addition, as a historical matter, jurists supplied the cadres of the judiciary, which would supervise waqfs. *Id.* at 68. This latter factor is less relevant today, given highly professionalized judiciaries in most Muslim majority states whose training is in modern, largely transplanted, law rather than the methods and modalities of juristic shari'a training.

80 Sait & Lim, *supra* note 41, at 149–50; Kuran, *supra* note 70, at 854.

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of, waqfs whose beneficiaries include jurists and seminaries, the involvement of the state is inevitable.[81]

In other words, across the span of Islamic history, there was a rather elaborate relationship, at once competitive and symbiotic, between the politically powerful state and the legally authoritative jurists over waqf law, policy, and administration. The next section shows how this system ultimately came to an end in modernity.

The Death of the Sunni Waqf

Causes

With the onset of modernity, the Sunni juristic institutions began to lose their power and influence.[82] The complex interplay between the jurists and the state thus gave way to an overweening state with broad powers of rulemaking that it had never before exercised.[83] The law was no longer what the jurists said it was, but rather what the state declared it to be as a positive matter. This rendered the jurists redundant at best, and irrelevant at worst.[84] With the jurists gone, the state could assert its control over the waqfs within its territory. This had the effect of not only increasing the state's revenue base, but actually weakening the jurists further by taking away control and use of one of their important sources of revenue.[85] Thus, creeping state control over the waqf served as both cause and effect of the loss of juristic influence. That is, the state not only assumed control over waqfs because the jurists were weak, but it also did so in order to weaken them further, and render them entirely dependent on the state for support.[86]

Factors beyond the mere weakening of the jurists played an important role in the advancement of state control. The waqf over history laudably kept the state from being able to bureaucratize the delivery of public goods in some sort of centralized, inefficient fashion. However, over time, the collective weight of the dead hands of waqf grantors proved to offer inefficiencies of its own.[87] The idea that property, and in particular real property, needed to be administered according to the wishes of a grantor who might have lived centuries before, and that the property could not even be exchanged for another except in the most limiting of circumstances, rendered the institution vulnerable to attack as outdated and retrograde.[88]

Family waqfs were even more controversial as the colonial era began. The association of piety with taking care of one's family is not a phenomenon limited to Islam. However, it is vulnerable to attack when it is extended so far as to result in the creation of a system that enables wealthy, landed families to tie up vast amounts of a nation's land in waqf, living off of its revenue and resisting any attempt at reform on the grounds that the land itself had been piously dedicated to God. Hence, as early as the late nineteenth century, British courts in India began to challenge the

81 *See, e.g.*, Van Leeuwen, *supra* note 46, at 76–77 (describing long-standing Ottoman policy of offering juristic appointments with plush salaries funded by waqf).

82 *See, e.g.*, Clark Benner Lombardi, State Law as Islamic Law in Modern Egypt: The Incorporation of the Shari'a into Egyptian Constitutional Law 67–68 (2006) (describing decline of law guilds in Egypt); Hamoudi & Cammack, *supra* note 29, at 27–28; Bernard G. Weiss, Spirit of Islamic Law 188–89 (1998).

83 Weiss, *supra* note 82, at 189.

84 *See* Wael B. Hallaq, The Impossible State: Islam, Politics, and Modernity's Moral Predicament 29–30 (2013) ("[T]he modern state is constituted by sovereign will, and . . . sovereign will manifests itself through law.").

85 Kuran, *supra* note 70, at 887–89.

86 *Id.*

87 *Id.* at 871–72.

88 *See generally* Hoexter, *supra* note 57.

Islamicity of the family waqf.[89] Other objections to the family waqf were raised in other states, including that as the number of beneficiaries increased, their interest in developing the property productively dwindled, such that most waqf properties were in a state of disrepair and neglect.[90]

Mechanisms of State Control

This subsection lays out the means adopted by modern states to assume control of the waqfs within their territory. The primary focus is Egypt, though reference is made throughout to other states. Egypt is particularly relevant because it is the state on which the most scholarship and literature exists as concerns modern Arab law, for good reason. Its legal system has long been the influential across significant parts of the entire Arab world.[91] Specifically, Egypt's private law rules resemble very closely those of Iraq, which is the primary subject of this article. The same individual, the renowned Abdul Razzaq al-Sanhuri, drafted the civil codes that serve as the bedrock of private law in both states.[92] The resulting codes are close analogues of each other, and indeed Sanhuri's commentaries on the Egyptian Civil Code continue to be an authoritative interpretive source of the Iraqi Civil Code.[93]

For these reasons, developments in Egyptian law ordinarily reflect themselves in Iraqi law over time. That Iraq has not followed the Egyptian trend as concerns the waqf, and in fact has gone in precisely the opposite direction, demands explanation.

To be clear, the fact that states such as Egypt were successful in bringing waqfs under complete state control does not mean that the process by which they achieved this was free of controversy. As might be expected, juristic forces—including mosque imams, seminary students and their teachers, and others associated with them—resisted quite strongly the state incursions.[94] In Guy Bechor's words, "the demand to reform the [waqfs] aroused more passionate debate than any other aspect of the proposed legal reform."[95] Accordingly, in Arab states generally, progress was initially slow, accelerating only over time, with particularly accentuated periods of reform following revolutions or coups throughout the twentieth century.[96]

The effort to project near entire state control over the waqfs in Egypt dates from the start of the nineteenth century. At that time, Mohammad Ali Pasha, Khedive of Egypt, sought to introduce a series of reforms that would ultimately bring the institution of waqf to an end.[97] While ultimately unsuccessful, the debates over waqf that erupted as a result of these efforts continued. By the early twentieth century, leading Egyptian figures began to call for the abolishment of the family waqfs.[98] They met ferocious clerical opposition.[99]

89 *See, e.g.*, Abul Fata Mahomed Ishak & Ors. v. Rasamaya Dhur Chowdhuri & Ors., (1881) ILR 18 (Cal.) 399 (India), https://indiankanoon.org/doc/759864/.

90 *See* Farhat J. Ziadeh, Lawyers, The Rule of Law, and Liberalism in Modern Egypt 132 (1968); Guy Bechor, The Sanhuri Code, and the Emergence of Modern Arab Civil Law (1932 to 1949) 222 (2007).

91 Haider Ala Hamoudi, *Arabs in the (Inter)national*, 10 Santa Clara Journal of International Law 187, 198 (2012).

92 Haider Ala Hamoudi, *The Muezzin's Call and the Dow Jones Bell: On the Necessity of Realism in the Study of Islamic Law*, 56 American Journal of Comparative Law 423, 437 (2008).

93 Hamoudi, *supra* note 91, at 198.

94 Ziadeh, *supra* note 90, at 127 ("describing jurists as fighting 'tooth and nail against . . . proposals to modify' the waqf").

95 Bechor, *supra* note 90, at 223.

96 *See, e.g.*, *id.* at 223–25 (describing reforms in Egypt).

97 Ziadeh, *supra* note 90, at 127.

98 *See id.* at 129–33.

99 *Id.* at 130 (describing case of Mustafa Sabri, described as an apostate for his advocacy in favor of waqf abolition).

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Finally, in 1946, Egypt enacted a law whose chief innovation was to place a time limit of two generations on the family waqf, meaning that the family waqf could last no longer than the grandchildren of the grantor, or other beneficiary designated by the grantor.[100] There are extensive justifications offered for this approach in the Explanatory Memorandum that claim some pedigree in Islamic jurisprudence, even if the use of the classical material is somewhat tendentious.[101]

Syria followed Egypt with its own, more radical law on family waqfs. In 1949, a coup brought the secular military leader Husni al-Za'im to power.[102] Shortly thereafter, the new regime issued Law 76 of 1949, which formally abolished all existing family waqfs and prevented the creation of new ones. The Explanatory Memorandum issued in connection with the legislation is quite remarkable. Its initial section reads as follows:

> Family waqfs and waqfs that are shared between a charitable side and a family side constitute in our social and economic life today a very dangerous problem that obligates the state to take effective legal solutions to treat, in order to end their deleterious effects and ward off their harm, in a manner that accords with the public interest and the interest of the deserving waqfs. What is established and demonstrated by actual observance is that these waqfs have for the most part trespassed beyond the bounds of the intended functions for which they were established and grown distant from the realization of the purpose of their founding. This is because in the passing of eras and the succession of years they have been afflicted with decay, and have a large number of beneficiaries who receive a very small amount of its revenue. [Family waqf] management has become a source of misuse and misappropriation. Thus, disputes have arisen among beneficiaries and trustees, and from the discussions, considerable property resources are lost, which could have been invested in a much better fashion. These tragedies accumulate day by day. . . . What is agreed is that the only means to end this situation is to prohibit the establishment of family and shared waqfs and to dissolve the existing waqfs of this type.[103]

The first thing to note about this striking passage is its refusal to even attempt an Islamic justification for the abolition of the family waqfs. The reasons offered are exclusively on the basis of public interest, with a seeming lack of concern for whether, or how, this assertion of public interest could be rendered consistent with centuries of jurisprudence. Secondly, the idea that the only way to prevent land in a family waqf from being left undeveloped or fallow was through the abolition of the family waqf is quite debatable. In fact, long before colonialism, premodern practice had developed specific strategems and legal fictions to extend lease terms of waqfs to give lessees incentive to develop the land. These were known within shari'a discourse as *hikr*.[104] While Sanhuri, the drafter of the 1949 Egyptian Civil Code, was hostile to the waqfs generally, he saw the advantage of recognizing and reforming the *hikr* to make sure that land under waqf was used productively. Thus, his code imposed an absolute time limit on the *hikr*, caused it to lapse if the lessee did not use the land productively, and confined its application to waqf property.[105] That Syria, in that same year

100 Law Concerning the Rules of Waqf Law No. 48 of 1946, art. 5 (Egypt); J.N.D. Andersen, *Recent Developments in Shari'a Law* IX, 42 Muslim World 257, 260–61 (1952) (quoting Article 5 of the law).

101 Specifically, the Explanatory Memorandum states that Maliki jurists contemplated a reversion of a waqf to the grantor's heirs if the beneficiaries of a family waqf died out. As explored above in the discussion of the nature and purposes of the waqf, this is true, albeit quite different from declaring a waqf to be at an end as a matter of law after a certain amount of time. Andersen, *supra* note 100, at 261.

102 Malcolm Yapp, The Near East since the First World War: A History to 1995 (1996).

103 Legislative Edict No. 76 of May 16, 1949, on the Abolition of the Family and Mixed Waqf, and the Dissolution of Family and Mixed Waqfs and Their Liquidation.

104 Hoexter, *supra* note 57, at 320 n.3, 321.

105 Bechor, *supra* note 90, at 227–31.

and shortly after a military coup, declared that it was "largely agreed" that any attempt to make better use of land under family waqf was hopeless suggests a certain level of disingenuousness on the part of its legislators. It is less likely that reform would prove pointless, and more likely that a secularist and nationalist regime eager to assert control over lands under waqf seized an opportunity to do so, simultaneously weakening jurists and other forces within Syria it regarded as retrograde and antimodern.

Egypt then followed Syria's example of abolition. Specifically, only six years after Egypt had time limited the family waqfs, it abolished them, in Law 180 of 1952.[106] No justification is even attempted in the form of an Explanatory Memorandum, perhaps because none would have been convincing.[107] The real reason for the change was not a reevaluation of centuries of established Islamic jurisprudence, but rather the dramatic political changes that occurred in Egypt only months before the issuance of Law 180. Specifically, King Farouk I had been deposed, and while his infant son was nominally placed in charge of Egypt, real power lay with the Free Officers who led the coup. They were to a person hostile to the monarchy, and eager to seize the lands that the royal elites had themselves placed in waqf.[108] As in Syria, rising leaders were able to successfully advance state interests at the expense of landowners of the ancien regime, as well as at the expense of juristic forces, whose power was rapidly diminishing.

Once these processes were set in motion, they proved impossible to stop, despite the highly contentious debates that accompanied them. Admittedly, the Free Officers never terminated charitable waqfs, as this would have been much harder to justify. However, they were able to take control of their revenue through a strengthening of the powers of the bureaucracies that the Ottomans had initially instituted to exercise supervision of the waqfs. Specifically, they enacted Law 247 of 1952 in the same year that they abolished family waqfs. Article 1 of that Law provides as follows: "If a *waqf* does not designate the needy group which is to be its beneficiary, or it designates it, and it is not present, or it exists, but there is a group more in need, it is permissible for the Minister of Waqfs, with the permission of the High Council of Waqfs and the Shari'a Court, to spend the revenues in whole or in part on the group which [the minister] designates without being restricted by the condition of the grantor."[109]

The change is extremely significant, as it transfers to the state the power to direct waqf revenues in any way it deems appropriate, even if the grantor wished otherwise. The Explanatory Memorandum gives the examples of feeding the poor, which is more important than placing flowers on a grave, or supplying the Egyptian army, where a waqf makes reference to supplying weapons for a premodern regime. In the authoritarian states that characterize the Arab world, which lack any real tradition of independent oversight over financial activities, this change effectively renders the revenue from charitable waqfs into a general supplement to the national budget.[110]

Article 2 of the same law, equally important, places nearly all charitable waqfs under the trusteeship of the Ministry of Waqfs.[111] Specifically, it indicates that the trustee of any charitable waqf

106 Law No. 180 of 1952, art. 1 (Law Abolishing All Waqfs But Charitable [Waqfs]) (Egypt).

107 *Id.*

108 Bechor, *supra* note 90, at 231; *see also* Daniela Pioppi, *Privatization of Social Services as a Regime Strategy, in* Debating Arab Authoritarianism: Dynamics and Durability in Nondemocratic Regimes 131 (Oliver Schlumberger ed., 2007) (describing the royal family and other landed agrarian elites as particular targets of the Nasser reform efforts).

109 Law No. 247 of 1952, art. 1 (Law on Review of the Charitable Waqfs and Reforming Its Revenues [to Serve] Those In Need) (Egypt).

110 Pioppi, *supra* note 108, at 131.

111 Law No. 247 of 1952, art. 2 (Egypt).

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will thenceforth be deemed to be the Ministry of Waqfs unless the grantor reserves the power to "himself, or to one he appoints *by name*." (emphasis added)[112] This effectively means that the Ministry of Waqfs will assume the power of trusteeship of all waqfs except that small fraction of them whose grantor or named trustee happened to still be alive. Article 4 then creates even further disincentives for trustees, in that it requires existing trustees to submit a great deal of paperwork to the ministry to demonstrate their qualifications and capacity to serve as trustee.[113] Article 5 imposes fines on those who fail to do so.[114]

Law 247 thus puts an end to the charitable waqf. All waqfs from 1953 forward are to be administered by the state, with the money directed to whatever public purpose the state deems fit. No rational person would create a waqf under such circumstances, as it amounts to a charitable donation to the state. The effect on jurists was nothing short of devastating. Where prior to the changes, Egyptian seminaries such as the Azhar—the premier center of Sunni learning for centuries—were funded by independent waqfs endowed by wealthy landowners, all of these revenues under Law 247 were effectively expropriated by the state. The Azhar and other juristic training centers throughout Egypt then became entirely dependent on state revenue to support themselves. For this and other reasons, the era of the independent jurist had come to an end.

Several other successive laws are probably worth noting in brief, to demonstrate the extent to which the destruction of the waqf was put into effect. First, there was Law 649 of 1953, which permitted the Ministry of Waqfs to eliminate *hikr*—the long-term-ease strategems historically used to give lessees the incentive to develop waqf lands—when the ministry found it in the public interest to do so.[115] This was soon followed by Law 92 of 1960, which called for an extinguishing of any remaining *hikr* within five years of the date of that law in the southern parts of Egypt.[116] Finally, there were the expropriations. Law 152 of 1957 called for the "exchange" within three years of all agricultural waqf lands dedicated to public purposes, with the land so exchanged turned over to the Agrarian Reform Commission.[117] Law 44 of 1962 completes the process of expropriation by directing the transfer of all sorts of agricultural and fallow lands formerly under waqf, as well as the facilities on them, from the Ministry of Waqfs to the Agrarian Reform Commission.[118]

Similar patterns followed in other Arab states.[119] While the extent of actual land reform might have varied from place to place, the general trend was toward nationalization of the waqfs, and the appropriation of their revenues by the state, as a supplement to the general, national budget. Thus, by the end of the twentieth century, in the Sunni Arab world at least, the era of the waqfs was largely over. There is talk from time to time of reviving the waqf and reforming its administration, and there are no shortage of modern financial and commercial vehicles, developed in Islamic

112 *Id.*
113 *Id.* art. 4.
114 *Id.* art. 5.
115 Law No. 649 of 1953, art. 1 (Law on the Ending of Hikr on Waqf Properties) (Egypt).
116 Law No. 92 of 1960, art. 1 (Law Restating the Organization of the Ending of Hikr on Waqf Properties in the Southern Province) (Egypt).
117 Law No. 152 of 1957, art. 1 (Law on Organizing the Exchange of Agricultural Land Under Waqf to Those In Need) (Egypt).
118 Law No. 44 of 1962 (Law on Delivering the Properties That the Waqf Ministry Manages to the Agrarian Reform Committee and the Local Council) (Egypt).
119 Sait & Lim, *supra* note 41, at 162–63 (offering examples of Libya, Tunisia, the United Arab Emirates, Lebanon, and Kuwait).

finance and elsewhere, seeking funds through establishing what they describe as a waqf.[120] It is fair to say, however, that to the extent that any real revival or reform exists, it lies more in the creation of modern instruments intended to replicate some of the purposes of the waqf than any sort of attempted faithful recreation of the premodern waqf, much less the meaningful reform of existing ones. Among other things, these newer "waqfs" have legal personalities and are governed by concepts derived from modern company law.[121] This renders their classification as waqfs simultaneously baffling, in the sense that no medieval jurist would recognize them as waqfs, and unnecessary, as there is no meaningful legal advantage to calling them waqfs when English trust and company law serves to provide the insulation from state interference that is required. The phrase appears to serve marketing purposes only. There is perhaps no more apt demonstration of the waqf's demise than that it has devolved from the institution that helped to propel forward Islamic civilization over centuries into one that survives largely as an advertising gimmick.

THE WAQF IN IRAQ 1929–2003

Background

Iraq's political history resembles that of Egypt in broad outline. The state began as a monarchy pursuant to a British Mandate that was created by the League of Nations after the First World War.[122] Like Egypt, Iraq's monarchy attempted modest reforms of various Islamic institutions in a somewhat incremental fashion throughout the early part of the twentieth century.[123] Like Egypt, in doing so, it was consistently resisted by more conservative elements, including juristic forces.[124] And finally, like Egypt, following its own military coup, self-styled as a "republican" revolution, secular and nationalist reforms accelerated under a series of strongmen.[125] Hence, to take the most notable and widely commented upon example, for decades, the monarchy had tried, and failed, to pass a uniform Personal Status Code, its failure coming about largely because of vociferous objections from the powerful Shi'i jurists of Najaf.[126] Following the 1958 Revolution, Abdul Kareem Qasim arranged for the enactment of such a law within a year of ascending to power, over juristic objections, in the form of the 1959 Personal Status Code that remains in force today.[127]

Importantly, however, while the patterns were the same, particular institutions within the Iraqi state and beyond it proved quite effective in resisting change in Iraq. Hence, the Personal Status Code aspired in 1959 to create a radical, unified inheritance system wherein men and women inherited in equal shares, in derogation of Qur'anic verse calling for a 2:1 division in favor of males.[128]

120 *See, e.g.*, Maylasia International Islamic Finance Centre, Waqf: Realising the Social Role of Islamic Finance 2 (2015), http://www.mifc.com/index.php?ch=28&pg=72&ac=130&bb=uploadpdf (describing waqfs in Malaysia dedicated to charitable activities).

121 *See, e.g., id.* (referring to the waqfs as corporations with wholly owned subsidiaries).

122 Phebe Marr, The Modern History of Iraq 52–53 (2d ed. 2012).

123 Hamoudi & Cammack, *supra* note 29, at 329.

124 *Id.*

125 *Id.*

126 Kristen A. Stilt, *Islamic Law and the Making and Remaking of the Iraqi Legal System*, 36 George Washington International Law Review 695, 748 (describing a 1947 proposal that ultimately failed).

127 Hamoudi & Cammack, *supra* note 29, at 329.

128 Personal Status Code Law No. 188 of 1959, art. 89(4). The manner in which this was originally achieved was through extending to all property the Civil Code's rules of inheritance as concerns the right of *tasarruf* in '*amiri* lands. J.N.D. Andersen, *Changes in the Law of Personal Status in Iraq*, 12 International & Comparative Law Quarterly 1026, 1028 (1963). The hope seemed to be that Islamist elements would not find the new measures

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Due to strong objection, this was soon repealed, and in its place was oblique reference to the historic, juristic rules of the sect of the decedent.[129] Juristic power over rulemaking in inheritance was thus in effect restored within four years of its having been taken away. Where the Azhar in Egypt was facing a near continuous loss of influence over the course of the twentieth century, Najaf was proving far more durable and successful in limiting—and, indeed, reversing—nationalist and secularist ventures.

Resistance to reform has not always taken the form of formal repeal of comparatively progressive legislation. Iraq's courts have been notably resistant to personal status innovation when interpreting the Personal Status Code, and they are no less resistant in the area of waqf. Courts have over time read legislative reform efforts narrowly, thereby limiting their impact. Social elements, prodded by juristic forces, have also resisted change. The result of all of this is that from the inception of the Iraqi state until the fall of the Ba'ath regime in 2003, there were modest efforts to bring waqfs under greater state control and supervision. However, by and large, such efforts had a rather limited impact due to deep social and institutional resistance to change. Much of this resistance was spearheaded by Najaf and its leading jurists.

Family Waqfs

As was the case in Egypt and Syria, Iraq's reformers first centered their efforts on the family waqfs, which have always been more vulnerable to criticism.[130] In this context, it is quite revealing of Najaf's comparative political strength that what first emerged by way of waqf legislation in Iraq, in 1929, was a law that effectively exempted the family waqf from any state supervision at all. Specifically, Article 4 of the Law of the Administration of Waqfs, No. 27 of 1929, indicated in Articles 4 and 5 as follows:

> Article 4
> As concerns the family waqf, the task of the Minister of Waqfs is limited to recording them in accordance with Article 5 of this Law, preventing change in ownership, and instituting suit with the relevant court if he learns about the occurrence of such change.
> Article 5
> The Minister of Waqfs should record without any fees waqfs, religious certificates, and property registrations—new ones and old—in a special registry.

These provisions probably reflect what Najaf and its political allies had in mind with respect to all waqfs when drafting Article 43 of the current constitution of Iraq; namely, that the state would simply record the waqf, and then presume that other nonstate elements would manage it. The state's sole role would then be to ensure that the property was never legally alienated or encumbered given its status as waqf. As this section shall reveal however, what might have been possible with respect to family waqfs in 1929 could hardly be imagined in 2003 with respect to all waqfs,

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troublesome, given that the Civil Code provisions had been in force for some time, and they did not seem to garner significant resistance. Unsurprisingly, the ploy did not seem to work. It was far less controversial for the state to adjust rules of succession over what are technically state granted rights of use of state owned lands than it is for the state to derogate from Qur'anic verse as to the inheritance rights of private owners of property.

129 Andersen, *supra* note 128, at 1029; Mahkamat al-Tamyīz [Court of Cassation], Personal Status Panel, decision No.11 of March 28, 1964 (Iraq); Mahkamat al-Tamyīz [Court of Cassation], Personal Status Panel, decision No. 2512 of 2007 (Iraq).

130 Ahmed Al-Kubaisi, 2 Personal Status in the Fiqh, The Courts and the Law 283–84 (2d ed. 2007).

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given the dramatic expansion of the Iraqi nation-state in the interim, and its assumption of nearly all lawmaking functions.

Juristic and other conservative elements were able to prevent any further significant reforms to the family waqf in Iraq for a period of decades. It was not until the middle of the twentieth century that significant efforts to eliminate the family waqfs arose once again.[131] The Shi'i juristic academies grew so concerned about these calls for abolition that five religious leaders drew up a petition on Najaf's behalf that, *inter alia*, called for not tampering with the waqf or interfering in the affairs of the Shi'i holy cities Najaf and Kerbala.[132] Witnessing that which was occurring in Egypt, Najaf recognized the threat to their interests and independence that waqf reform presented, and used their significant influence to thwart it.

Due to this juristic opposition, as well as the opposition of comparable Sunni clerics,[133] the emerging reformist piece of Iraqi legislation on family waqfs, enacted in 1955, proved more modest than the outright ban that had been enacted three years earlier in Egypt, and six years earlier in Syria, described above. The specific law was entitled Edict No. 1, Permitting the Dissolution of Family Waqfs [hereinafter, "Dissolution Edict"]. Relevant portions of the Edict, as it stood until the year 2016, are below:

> Article 2
> This Edict covers family and shared[134] waqfs. However, as for charitable waqfs, they remain subject to the rules of the shari'a and applicable laws concerning them.
> Article 3
> Upon a request from one of those entitled to receive proceeds, or one of their heirs entitled to receive in accordance with this Edict, the Court must dissolve the family or mixed waqf whether it was created before the implementation of this Edict or thereafter.
> Article 8
> a. Ten percent of every waqf that is dissolved is set aside. This portion is given over to the court in cash or kind depending on the circumstances so that a special regulation can be set up to spend it on civic, charitable projects.[135]
> . . .
> e. After the allocation to the charitable projects, what remains of the waqf is distributed to the beneficiaries according to the provisions of this law.
> Article 10
> a. Upon the initiation of a suit for dissolution, the court will publicize in local papers the date of the proceeding for three [consecutive] days at least 15 days before its occurrence.

Plainly, as the above passages make clear, the Edict is not a ban on family waqfs, but rather creates a private right to dissolve them. In this sense, the changes imposed upon waqfs are both more limited and more radical than those of Egypt's 1946 law, which had temporally limited family waqfs to no more than two generations.[136] They are more radical in the sense that there is even less juristic support for the idea of a waqf coming to an end by the will of a beneficiary than

131 Liora Lukitz, Iraq: The Search for National Identity 129 (Taylor & Francis e-Library 2005) (1995).
132 *Id.*
133 *Id.*
134 Article 1 of the same law defines a shared waqf as one where only part of the proceeds benefit family members, with the rest going to another religious or charitable purpose.
135 Such a regulation, which is beyond the scope of this article to review, was in fact issued later the same year. Al-Kubaisi, *supra* note 130, at 287.
136 *See* Law Concerning the Rules of Waqf Law No. 48 of 1946, art. 5 (Egypt).

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there is in its coming to an end by operation of law. The whole point of a waqf, like a trust, is to keep the endowed property tied up and therefore out of the control of the state and the beneficiaries.[137] The idea that the beneficiaries could seize hold of the endowed property itself whenever they want to, by virtue of a state edict, seems to defeat its very purpose.

That said, the Edict is also more limited in its scope than Egypt's 1946 law in that it does not in fact bring an end to any family waqf, except with the consent of a beneficiary. It is possible that the drafters of the Dissolution Edict believed that, religious justifications aside, it was more *politically* palatable to cause waqfs to end upon demand by a beneficiary than declaring them at an end as a matter of law. It is also possible that the drafters presumed that over time, most beneficiaries would eventually seek the dissolution of the waqf because it is in their obvious economic interest to do so. Dissolving the waqf permits them each to take a share of it, and, upon doing so, distribute that share to their heirs upon their death, rather than to other beneficiaries in later classes, which will include their heirs, but potentially many others as well.

Whatever the intent of the Iraqi legislators, it is fair to say that they miscalculated rather dramatically. Reliable statistics are hard to come by in Iraq, but in my review of over one thousand published cases on waqf in Iraqi courts over the past several decades, there are only a handful that attempt to interpret the 1955 Edict at all. For the most part, the ones that do exist seek to narrow its effect in deference to classical Islamic principles.[138] The reasons for this are easy enough to surmise. In an environment where juristic pronouncements are taken very seriously, and social structures are tightly knit,[139] a formal request to dissolve a waqf is equivalent to a declaration to one's family of an intent to sin by usurping property that has been properly endowed to God. Few Iraqis are willing to suffer such social sanction.

Interestingly, despite the Edict's limited impact, various Iraqi regimes did not seek to further restrict the family waqf through subsequent legislation. Rather, within three months of taking power, the Iraqi leaders who brought about the 1958 Revolution embarked upon quite an ambitious agrarian reform that, despite its very broad scope, generally left family waqfs alone.[140] The sole provisions of the Agrarian Reform Code that dealt with family waqfs seemed designed to ensure that a person could not avoid the reform provisions by designating themselves, or a family member, a beneficiary of a waqf.[141]

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137 Sait & Lim, *supra* note 41, at 152–53.

138 *See* Iraq Mahkamat al-tamyīz [Court of Cassation] decision No. 1595 of 1955 (limiting the effect of a provision of the 1955 Edict prohibiting a grantor from excluding female beneficiaries, as Islamic law would permit the grantor to do).

139 *See, e.g.,* Hamoudi & Cammack, *supra* note 29, at 664–65 (respecting the manner in which tightly knit social structures prevent extensive commingling of men and women in social settings).

140 Agrarian Reform Law No. 30 of 1958 (Iraq).

141 For example, Article 1 sets limits on how much agricultural land any individual can own, and further indicates that one cannot be a beneficiary in waqf of land exceeding this amount. *Id.* at art. 1; *see also* Agrarian Reform Law No. 117 of 1970, art. 3(2) (Iraq) (containing a similar provision). This does not, importantly, force the liquidation of family waqfs, no matter how vast, because the focus is on the interest of each individual *beneficiary*, not the land under waqf as a whole. Article 5(2) deems family waqfs created after the date of the enactment of the law invalid to the extent that they result in any individual reducing their outright ownership of agricultural land below the limits imposed by law. *Id.* at art. 5(2); *see also* Article 7(2) of Agrarian Reform Law No. 117 of 1970 (Iraq). In other words, an individual with large landholdings cannot avoid the forced redistribution of the 1958 law by placing the land in waqf for the benefit of family members. Quite plainly, these laws have only the most modest of effects on the operation of family waqfs. *See also* Batatu, *supra* note 44, at 15 (describing estates under waqf as "unaffected" by the 1958 Agrarian Reform Law).

Along the same lines, post-Revolution legislative bans on the long-term leases known as the *hikr*[142] were limited to leases of indefinite duration, while nearly all leases of family waqf land in Iraq are for definite, if extended, duration.[143] Accordingly, to this day, there is no meaningful constraint on the use of *hikr* on family waqf land.

There are many reasons that the Iraqi state, both before and after its nationalist revolution, might have chosen to tread carefully as concerns the family waqf, relative to states like Egypt and Syria. One reason might be that family waqf reform was not a particularly high priority for a state whose main revenue is oil, not agrarian land.[144] That a great deal of agrarian land within Iraq was classified by the Ottomans as *'amiri* land was helpful as well, given that a waqf could technically not be established on *'amiri* land.[145]

It is hard to discount as a central factor, however, the power and influence that Najaf's jurists brought to bear on the matter. As with personal status law, Najaf regarded waqf law to be within its ambit, not that of the state. As such, it resisted quite strongly any efforts to erode its power. Najaf proved remarkably successful in limiting the scope of reform as a result.[146] As will be seen in the next section, a similar pattern emerges as concerns charitable waqfs, which were even more important to Najaf because of their direct economic implications on Najaf's revenue.

Charitable Waqfs

As with the parallel developments elsewhere in the Arab world, the Iraqi reforms to the charitable waqf in the early stages aimed to place the waqfs under firmer state control, so that the state could then distribute the revenues in the manner that it saw fit. Iraq met with modest success in this regard. However, the changes proved more limited than in Egypt, they were met with fierce juristic resistance from the start, and they came almost entirely undone after 2003.[147]

The first real legislative efforts to exert greater control over waqfs were made about four years after Iraq's inception as a state, and specifically in the already referenced 1929 Law on the Administration of Waqfs.[148] That law deserves closer consideration, because it introduces the framework upon which all future laws concerning waqf management were modeled until the end of the Ba'ath regime.

The major purpose of the law was to classify waqfs into different legal categories, which resemble in part juristic classifications, and then specify the extent of state control over each category of waqf. Specifically, Article 1 of the 1929 law provides the following primary classifications:

142 On *hikr* in the context of Egypt, see the discussion in the previous section, pertaining to the death of the *waqf* in much of the Sunni world.

143 ZIADEH, *supra* note 45, at 66; Federal Judicial Authority Law No. 3 of 1983, art. 1 (Iraq); The Law of Extinguishing of the Right of Hikr Law No. 138 of 1960, art. 1 (Iraq).

144 According to the U.S. Energy Information Administration, in 2017, Iraq earned 88 percent of its government revenue from oil. U.S. Energy Information Administration, *Iraq's Oil Production Has Nearly Doubled over the Past Decade*, TODAY IN ENERGY (January 11, 2019), https://www.eia.gov/todayinenergy/detail.php?id=37973.

145 VAN LEEUWEN, *supra* note 46, at 108–09.

146 HAMOUDI & CAMMACK, *supra* note 29, at 28–29.

147 In fact, Shi'i objections to Sunni state control over Shi'i waqfs predate the Iraqi state, which is the focus of the main text. Specifically, as early as 1838, Shi'i jurists raised concerns over Ottoman era Tanzimat reforms that asserted control over Shi'i waqfs. Ultimately, the Ottomans relented and settled for indirect control, rather than exacerbate relations with Shi'i Iran. YITZHAK NAKASH, SHI`IS OF IRAQ 236 (1994).

148 Law of the Administration of Waqfs No. 27 of 1929 (Iraq).

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> Sound waqfs—Waqfs that were privately owned (*mulk*) and then were given in waqf to a group [of beneficiaries].
> Unsound waqfs—Waqfs that were *'amiri,* and the usufruct (*tasarruf*), its lease receipts, its received fees or its tithes, or all of them, were placed under waqf and designated to a group [of beneficiaries].
> Regulated waqfs—Waqfs designated for charity which do not have a designated trustee, nor is there an older method of determination in place.
> . . . .
> Supplemental waqfs—Waqfs that are administered by trustees charged with spending all or part of their revenues on places of worship or charitable causes.
> Family waqfs or nonsupplemental waqfs—Waqfs whose revenue is designated for those whom the grantor selects from his family or otherwise.[149]

Articles 2–4 then lay out the role of the Ministry of Waqfs over each of these different types of waqf.[150] In the previous section I showed how the ministry exercises very little control over family waqfs as per Article 4.[151] By contrast, under Article 2, the state manages entirely the regulated waqfs, which have no designated trustee, nor any means by which one might be designated.[152]

Article 3 presents the most interesting case, in that it covers every charitable waqf with a designated trustee or trustees. As to such a waqf, the ministry is empowered under the 1929 Law to "monitor it, the charitable institutions [designated as beneficiaries], its improvements, its revenues, and its expenditures, and to hold the trustees to account."[153] The ministry is supposed to receive 5 percent of the revenue generated from each supplemental waqf as compensation for such monitoring.[154] Later provisions then set forth specifics respecting the types of practices waqf trustees should use when managing waqfs, all of which are subject to state monitoring. These include a ban on *hikr* arrangements (Article 7), requiring auctions for the lease of waqf properties (Article 8), and imposing competitive bidding for reconstruction projects (Article 9).[155]

A post-Revolution 1964 law replaced the 1929 law, and that later law was itself replaced in 1966.[156] These laws largely retain the same basic structure of the original law, though they extend state exercise of control of the waqfs in three important ways. First, they include family waqfs within the definition of supplementary waqfs, thereby subjecting them to greater state control.[157] Second, the 1960s-era laws require all unsound waqfs to be placed under direct state administrative control.[158] This is not difficult to justify, given that the unsound waqfs are by definition those created on state-owned *'amiri* land.[159] The development is, however, quite important, given that most land in Iraq is *'amiri*. Finally, the 1964 and 1966 laws seem to liberalize the principles under which waqf lands can be exchanged. Specifically, Article 6(1) of the 1964 law reads as follows: "The

149 Law of the Administration of Waqfs No. 27 of 1929 (Iraq) [hereinafter 1929 Waqf Administration Law].
150 *Id.*
151 *Id.* at art. 4.
152 *See* NAKASH, *supra* note 147, at 236–37 (referring to "tight" government control over Shi'i waqfs).
153 1929 Waqf Administration Law art. 3.
154 *Id.*
155 *Id.* at arts. 7–9.
156 *See* Law on the Administration of Waqfs Law No. 107 of 1964 (Iraq) [hereinafter 1964 Waqf Administration Law]; Law on the Administration of Waqfs Law No. 64 of 1966 [hereinafter 1966 Waqf Administration Law].
157 1964 Waqf Admin Law art. 1(7); 1966 Waqf Admin Law art. 1(7)
158 *See* 1964 Law, art. 1(6)(b) (classifying all unsound waqfs as "regulated"), and art. 2(1)(indicating that all regulated waqfs are administered by the status Waqf Bureau). The 1966 Law has identical provisions. 1966 Law arts. 1(6)(b), 2(1).
159 1964 Waqf Administration Law art. 1(5); 1966 Waqf Administration Law art. 1(5).

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Ministry may exchange properties where there is an interest in the exchange, for property or for cash, whichever is more beneficial to the waqf. It occurs on the approval of the [Waqf] Council, certification by the Shari'a Court, and the issuance of a Decree from the Republic."[160]

The 1966 Waqf Administration Law liberalized this even further by removing the requirement that a court or government ministry approve an exchange sought by the trustee.[161] Gone seem to be long established rules under Islamic law (described above in the discussion of nature and purposes of the waqf), that in order for waqf property to be exchanged, the waqf must be entirely unproductive, and that even in such a case, the property must be exchanged for an equivalent item whenever feasible.[162] In its place seemed to be a rule that permitted a trustee to liquidate a waqf whenever there was an identifiable interest in doing so, with the trustee then responsible for managing the liquid assets in waqf.

This legislative innovation, however, is one to which courts have long proved resistant. Hence, in Consolidated Cases 1 and 2 of 1973, a General Panel of the Court of Cassation, which is an expanded panel of the highest court of general appeal, ruled on a case where a trustee seemed to be engaging in a series of fraudulent transactions with his brother over family waqf property.[163] The Court indicated as follows:

> [W]aqf properties cannot be sold except in two instances. The first instance is if the original grantor conditions to himself or to the trustee a right to exchange, and the second is . . . the judge may permit the exchange if he sees it as a necessity. Thus, if there is no benefit to the properties entirely, and the waqf does not have the proceeds to develop [the properties], then it is possible to sell a portion of [the waqf], to develop the rest.[164]

In so ruling, the Court seems to act as if Article 6 of the Waqf Administration Law of 1966 does not even exist, quoting historic juristic rules for the exchange of waqf property rather than legislative ones. Moreover, following this passage, the Court lays out a series of administrative steps not mentioned in the legislation that are so stringent that it is almost impossible to imagine any trustee wanting to go through them except in extreme conditions.[165] Plainly, judicial resistance to waqf exchange appears to have made this particular innovation of the Iraqi Waqf Administration Laws into something of a nullity, reviving instead the historic juristic rules to govern exchanges.

Despite such judicial resistance, the trends in favor of broader state control over the waqfs continued over the succeeding decades. Perhaps the most significant legislative development after 1966 was the issuance of a regulation on trustees in 1970, shortly after the Ba'ath had come to power and at the zenith of Iraq's nationalist, secularist era.[166] Ostensibly, the purpose of the regulation was to specify the precise functions and duties of waqf trustees more clearly than the Waqf Administration Laws did. In fact, it did far more than this. A closer examination of its provisions reveals an attempt by the state to take over waqf administration nearly entirely. The regulation reads in relevant part as follows:

> Part One—Authorization of Trusteeship
> Article 1
> Trusteeship in a sound waqf is in accordance with the shari'a sources, based on what is established as a

160 1964 Waqf Administration Law art. 6(1).
161 1966 Waqf Administration Law art. 6(1).
162 See *supra* the discussion of nature and purposes of the waqf.
163 Mahkamat al-Tamyīz [Court of Cassation] Decision No. 1 and 2 (Consolidated) of March 17, 1973 (Iraq).
164 *Id.*
165 *Id.*
166 Regulation of Trustees Law No. 46 of 1970.

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condition by the waqf explicitly or by established conduct, whenever capacity and piety are realized.
Article 2
The trustee in a charitable waqf and in a mixed waqf is appointed through a nomination from the shari'a court, and a certification from the Council of Scholars.
Article 3
The capacity of the trustee, as well as his jurisdiction, for the administration of the waqf, are determined by an examination which the Council of Scholars administers on all that concerns the waqf, administratively and in terms of accounting, and the rules that apply to it in shari'a, law, and regulation.[167]

Thus, as a form of regulation of trustee conduct, the Regulation subjects trustees to examination and oversight,[168] under the auspices of a state appointed council of religious scholars.[169] Even more importantly, pursuant to Article 2 of the same law, *trustees for charitable* waqfs *are to be appointed by that state council* following nomination of a state court. The goal, quite clearly, was to bring the very idea of privately administered waqfs to an end, at least as concerns charitable waqfs.[170] The effort would be gradual to be sure, in that the Regulation does not actually seek to replace existing trustees, so much as delineate a state supervised method of appointing new ones upon the death or dereliction of duty of an existing one. Nevertheless, over time, the result of the Regulation would be that all trustees would be state appointed and state supervised.

One final state legislative intervention during this period deserves brief mention. Only one year after the Trustee Regulation was issued, a new Real Property Registration Law was enacted.[171] The law has very little to do with waqfs, though it does introduce one significant innovation. Article 259 indicates that "[t]ransactions of revocation of waqfs shall be recorded on the basis of a certificate issued from a competent court or a final judicial ruling."[172] The clear import of this is that a waqf that had already been recorded in the state registries, and that had a deed designating the land as waqf, could nonetheless have the deed revoked through court order, at which point the land would return to the private ownership of the grantor.[173] This notion of waqf revocability is clearly inconsistent with the broad position of jurists across various schools of Islamic thought.[174]

The net effect of all of this legislation was a dramatic expansion in the exercise of state control over waqfs. A state body[175] had been established with considerable control over waqf revenues that administered large numbers of waqfs and monitored others to ensure their conformity to state requirements. A mechanism had been put in place to subject all charitable waqfs to eventual

167 Regulation of Trustees Law No. 46 of 1970 arts. 1–3.
168 *Id.* at art. 3.
169 *Id.*
170 Notably, the law has no provisions respecting state administered appointment of trustees for family waqfs. This is probably because, as noted in the discussion of family waqfs, secularist and nationalist efforts as concerned the family waqfs were directed not toward exercising control over them, but rather toward abolishing them entirely.
171 The Law on Registration of Real Property No. 43 of 1971.
172 *Id.* at art. 259.
173 Al-Kubaisi, *supra* note 130, at 291.
174 *Cf.* Sait & Lim, *supra* note 41, at 153 (noting alternative positions among some Maliki and Shi'i jurists).
175 The name of the state body charged with administering waqf law and policy has changed many times over Iraqi history. At the time of the 1929 Waqf Administration Law, there was a Ministry of Waqfs. 1929 Law art. 2. The same is true in the 1964 Waqf Administration Law. 1964 Law art. 2. However, by Order No. 18 of 1966, the Ministry of Waqfs was transformed into the Waqf Bureau (Diwan al-Awqaf). Currently, as noted in the discussion of the Waqf Bureau Laws of 2012, there are two Waqf Bureaus, one for Shi'i waqfs and the other for Sunni waqfs. These sorts of administrative changes are beyond the scope of this article, as they do not appear to relate in any meaningful way to the level of state control over the waqf so much as the particular entity exercising that control on behalf of the state.

state control. Waqfs could seemingly be revoked rather easily as well. While there was some judicial resistance, and while the laws were not as extensive as those in Egypt, the trend lines were clear. They seemed to suggest that the waqf in Iraq would meet the same end as it had in Egypt, even if the process would take somewhat longer to complete.

The Administration of the Holy Shrines

Before turning to the resumption of juristic control of the waqfs following 2003, the subject of the discussion at the end of this article, it is important to discuss state regulation of one special category of waqfs of particular importance to the jurists. These are the Shi'i Holy Shrines, which are primarily the burial places of the Imams and other revered figures interred throughout Iraq, and pilgrimage destinations for devout Shi'is across the globe. Primary among them are the Holy Shrines of Kerbala and Najaf, the latter of which is the burial place of the First Imam and the home of the juristic seminaries. Given the centrality of the Holy Shrines in Shi'i theology and legend, and given their identity as a primary locus from which Shi'i juristic power is projected, their regulation has long raised particular sensitivities for Iraq's Shi'a.[176] This section shows how the state was much more deferential to the exercise of juristic authority over the Holy Shrines than it was to the balance of waqfs.

The earliest regulations concerning the Holy Shrines were issued shortly after the Second World War, relatively late into the monarchy.[177] These regulations centered on the state appointed personnel responsible for managing the Holy Shrines,[178] the actual operation of the Holy Shrines, and the proper conduct of pilgrims in and around them.[179] The only real reference to revenues concerned gifts left by pilgrims in the Holy Shrines, which the shrines' primary custodian must report to the Waqf Directorate, and which are not likely to be a major source of revenue.[180] There are references to the Najaf jurists, but they are relatively oblique and limited. Most notably, there is a definition of the "designated jurist" as the head of the public waqfs and a role for him in appointing and supervising the primary custodian and the shrine attendants.

The more significant regulations are those that follow the 1958 Revolution. Specifically, Law 25 of 1966 created within the Waqf Bureau a separate office known as the Directorate of the Management of the Holy Shrines.[181] Included within its portfolio are the allocation of revenues from waqfs endowed to the Holy Shrines and the administration of Shi'i waqfs generally. The scope of the 1966 law is thus much broader than the monarchy era regulations, which dealt only with the Holy Shrines themselves.[182] Articles 3 and 4 of the 1966 law read as follows:

176 *See, e.g.,* Nakash, *supra* note 147, at 237 (discussing Shi'i complaints in 1931 that there was an insufficient allocation of state-generated waqf funds to the Holy Shrines).

177 *See, e.g.,* Regulation of the Holy Shrines Law No. 42 of 1950 [hereinafter 1950 Shrines Regulation], *replacing* Regulation of the Holy Shrines Law No. 25 of 1948. 1950 Shrines Regulation, *supra*, at art. 35.

178 1950 Shrines Regulation, *supra* note 177, at arts. 2–7 (concerning the appointment and functions of the *sadin*, or primary custodian responsible for the general operation and maintenance of the Holy Shrines); arts. 8–13 (concerning the appointment and functions of the shrine attendants).

179 *Id.* at arts. 24–26.

180 *Id.* at art. 3(2). *See also id.* at art. 17(b) (indicating that the primary custodian may be discharged for failure to report a gift to the Waqf Directorate).

181 Law on the Administration of the Holy Shrines Law No. 25 of 1966 [hereinafter 1966 Holy Shrines Law].

182 *Id.* at art. 5(4).

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> Article 3
> A waqf is a Ja'fari [Shi'i] waqf if the grantor is Ja'fari unless there is a clear condition which delineates the type of waqf and the group [to which it belongs].
> Article 4
> Trusteeship in a Ja'fari *waqf* is based on the condition set by the grantor. The trustee in a Ja'fari waqf [without a trustee][183] is appointed by an order from the relevant court, after his being validated by the highest religious jurist with the most followers in that period among the sect to which the grantor belongs.[184]

Thus, if a Shi'i endows a waqf, whether or not related to the Holy Shrines, the waqf is then Shi'i. At that point, the waqf's trustee is determined by the grantor, and, if not specified by him, then by a court, *but only if Najaf's highest jurist certifies the trustee as qualified*. The highest jurist is defined as the one with the most followers (*`a'la al-muqallid*). This definition relies obliquely upon the Shi'i religious obligation that each lay person select a single jurist as the most knowledgeable to "emulate." The follower must then comply with that jurist's rulings absolutely and turn over to him the obligatory tithe.[185] The law thus grants to the single jurist who has the most such emulators the legal power to consent to the nomination of waqf trustees where the waqf was endowed by a Shi'i.

The power handed explicitly to Najaf's highest jurist is then significant, certainly more than in previous legislation. As a result, the risks of entanglement with the state grow, not least because the definition given to the highest jurist is subject to manipulation. There is no reliable way to know which jurist is the one with the most followers. In the words of Harith Hasan al-Qarawee,

> The Grand Marjaʿ [i.e., the highest jurist] is a relatively novel invention that evolved in the nineteenth century and never gained a clear institutional framework. There are no written rules regulating the selection of the Grand Marjaʿ, which can be seen more as a status than a position. Nor does this selection follow a consensually identified series of steps. Therefore, reaching this status is not simply a matter of identifying a person who meets its criteria; it is also a process influenced by the socio-political context. On several occasions in the past, senior clerics could not agree on a single Grand Marjaʿ and the status was contested between—or shared by—several senior clerics. Realizing that, the B.S.E. law[186] defined the Grand Marjaʿ as the [jurist] with the largest number of emulators who follow him in their religious practices. However, there is no easy way to know exactly who the most emulated [jurist] is; nor is the practice of emulation straightforwardly measurable.[187]

While the prominent role afforded to the Najaf jurists in the 1966 Holy Shrines Law proved enormously influential in the post-2003 era, the law itself did not last very long. Less than twenty years after its enactment, and specifically during the height of the Iraq-Iran war, when suspicion of the Iraqi juristic seminaries was at its highest, the Iraqi regime amended it.[188] Specifically, Article 4

183 The precise term that I have translated as "waqf without a trustee" in Article 4 is "al-waqf al-munhal," or the dissolved waqf. This surely is not what is intended, as there is no need for a trustee for a waqf that has already been dissolved.

184 1966 Holy Shrines Law arts. 3–4.

185 Haider Ala Hamoudi, *You Say You Want a Revolution: Interpretive Communities and the Origins of Islamic Finance*, 48 Virginia Journal of International Law 249, 267–69 (2008).

186 This passage is commentary on a 2005 law, discussed at length *infra,* in the section of juristic assumption of state control over the waqfs in Iraq since 2003. It suffices to note here that the definition used in that law is nearly identical to the one used in the 1966 law referenced in the main text and therefore the commentary is equally applicable here.

187 Harith Hasan al-Qarawee, *The "Formal" Marjà: Shìi Clerical Authority and the State in Post-2003 Iraq*, 46 British Journal of Middle Eastern Studies 481, 494 (2019).

188 Law No. 108 of 1984 (Iraq) (amending 1966 Holy Shrines Law).

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was changed to permit the Personal Status Court to appoint the trustee of the waqf, thereby stripping the jurists of their most important role in the previous law.[189]

Thus, by 2003, the Iraqi state had made some progress in its efforts to assume greater control over charitable waqfs and the Shi'i Holy Shrines. Nevertheless, the steps it had taken were modest relative to other states, and they were fiercely resisted at every step, not only by nonstate forces such as jurists, but also by the courts themselves, which seemed in many cases to be siding with the jurists. In the next section I describe how, after 2003, the state has not only abandoned its efforts to assert more control, but in fact has ceded the controls it established back to the jurists, who now have a largely unfettered hand to administer waqfs and allocate their revenues however they wish. I also lay out the manner in which this renders Najaf more vulnerable to formal interference in its affairs than it has been since the inception of the Iraqi state.

JURISTIC ASSUMPTION OF STATE CONTROL OVER THE WAQF IN IRAQ SINCE 2003

Early Measures

The previous section demonstrated that until 2003, Iraq was following the general path of most other Arab and Islamic states in extending state control over the waqfs and ending their relative insulation from state interference. The trend in Iraq may have been more gradual than it was elsewhere, but nonetheless, it was unmistakable through the 1970s. From 1980 through 2003, there did not seem to be very much legal change, undoubtedly due to war and subsequent U.N. sanctions.[190] Despite this stasis, there was no reason to think that nonstate actors in general, and jurists in particular, were going to be able to resist the trends that prevailed throughout the region in a manner that would enable them to reassert authority over the administration of waqfs and the allocation of their revenue. The realities of modernity seemed very much toward an expansion of the state's role. Indeed, as discussed in the introduction, it was these realities, grasped as early as the latter half of the twentieth century, that led Ayatollah Ruhollah Khumayni to assert his novel juristic theory that jurists should effectively rule the state.[191]

It took the rupture of foreign invasion, the uprooting of a totalitarian regime, and the consequent, highly predictable chaotic aftermath of these undertakings to cause a rather dramatic shift in expectations. Suddenly a broad swath of regulation relating to the management of public order fell to nonstate authorities to administer, almost without constraint.[192] For perhaps obvious reasons, the same was not, and could not be, true vis-à-vis the waqfs, given that they were fundamentally endowments of real property, and recorded as such in state registers. Any effort by nonstate authorities to manage the land in a manner that diverged from state rules would therefore be tenuous, and hardly an ideal state of affairs as concerns the regulation of endowments that are supposed to be permanent. Najaf could therefore either try to turn back the clock and restore some sort of premodern balance to waqf management in a manner that most modern states would regard as

189 *Id.* at art. 2.

190 *See* MARR, *supra* note 122, at 266, 319–20 (noting onset of war against Iran in 1980 that lasted eight years, followed shortly thereafter by a war against Kuwait that began in 1990, which itself was followed by the imposition of U.N. sanctions, which lasted until the fall of the Ba'ath regime in 2003).

191 *See* notes 13–15 *supra* and accompanying text.

192 Haider Ala Hamoudi, Wasfi H. Al-Sharaa & Aqeel Al-Dahhan, *The Resolution of Disputes in State and Tribal Law in the South of Iraq: Toward a Cooperative Model of Pluralism*, *in* NEGOTIATING STATE AND NON-STATE LAW: THE CHALLENGE OF GLOBAL AND LOCAL LEGAL PLURALISM 215–60, at 244 (Michael A. Helfand ed., 2015).

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unthinkable, or it could assert control over all state bureaucratic machinery that pertained to the state in a manner that diverged from its own theory of its relationship to the state. Ultimately, it chose the latter, as I discuss below.

The method by which Najaf proceeded in this regard was neither swift nor deliberate. As I note in the introduction, jurists and their allies initially seemed somewhat ambivalent as to how to proceed after the fall of the Ba'ath. In particular, the deep Shi'i suspicion of the state proved difficult to dislodge immediately, even if demographic realities pointed rather clearly to Shi'i ascendance and, indeed, future political domination. The distrust resulted, most notably, in the bizarre spectacle of a constitutional crisis precipitated by a Shi'i *majority* demanding a strong form of federalism out of mistrust of the central government of Baghdad, over which they exercised effective control.[193]

In the context of the waqf, Shi'i jurists and their political allies were likewise apprehensive of the state and thus placed most of their emphasis on dismantling the state structures that had existed during the Sunni dominated regimes of Iraq's past. Hence, on August 30, 2003, while Iraq was still under U.S. occupation, the Iraq Governing Council, an Iraqi body established by the United States occupying authority whose members were handpicked by the United States,[194] passed Resolution 29, purporting to dissolve the Ministry of Waqfs and Religious Affairs.[195] The Resolution also expressed an intention to create "administrative offices for the *waqfs* of all religions and sects."[196] Importantly, however, it did not create those replacement offices. To the Governing Council, it was more important to obliterate the state structure that regulated waqfs than it was to put in its place any other form of regulation. This is not a surprise—beyond the desire to wrest control of waqfs from a state body, the ministry in the Ba'ath era had engaged in heavy handed forms of repression by monitoring Friday sermons and only permitting those loyal to the regime to serve as imams.[197] In any event, the immediate abolition meant that for a period—extending nearly two months—there was no body that managed the administration of waqfs *at all*.

Eventually, the rising Shi'i power elite seemed to have grasped the need to do something beyond repealing existing regulation relating to waqf. Accordingly, in October of 2003, the Governing Council issued Resolution 68, which purported to create two waqf bureaus, one Shi'i and one Sunni, which would administer waqfs for each respective sect.[198] The Resolution further appointed a president and vice president for the Shi'i bureau, and a president for the Sunni bureau.[199] Shi'i political intentions respecting juristic control of waqf administration were made even clearer when the two people appointed to the positions of president and vice president of the Shi'i

193 Andrew Arato, Constitution Making under Occupation: The Politics of Imposed Revolution in Iraq 228–29 (2009).

194 *Id.* at 22–23.

195 Talmon, *supra*, note 35 at 292.

196 *Id.*

197 Harith Hasan, Religious Authority and the Politics of Islamic Endowments in Iraq (Carnegie Middle East Center, March 29, 2019), https://carnegieendowment.org/files/03_19_Hasan_Islamic_Endowments_final.pdf.

198 Talmon, *supra* note 35, at 330 (reproducing Governing Council Resolution 68 of October 22, 2003 (Iraq)). While beyond the scope of this article, it is worth noting that in the aftermath of the division of waqf administration by sect, disputes erupted as to which endowments were Sunni and which were Shi'i. In general, Sunni administrators wished to rely on the designations laid out by the Ba'ath-era ministry, and their Shi'i counterparts insisted that these designations had long been biased against the Shi'a, and that a new means of categorization was necessary. A committee was formed to address this, and yet it rarely reached consensual resolution with respect to contested sites. Hasan, *supra* note 197. The disputes between the sects respecting which waqfs were Sunni and which were Shi'i is worth a separate article of its own.

199 Talmon, *supra* 35, at 330.

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Waqf Bureau turned out to be Husayn al-Shami and Jalal al-Din al-Saghir.[200] Both are prominent clerically trained political figures.[201] The extent of Najaf's control over the Shi'i Waqf Bureau, even at this early date, was confirmed when, at Najaf's insistence, Shami was replaced as waqf bureau president with Saleh al-Haydari, a prominent Baghdad-based Shi'i cleric who has long been close to Sistani.[202]

Resolution 68 is remarkably short on specifics, in that it does not delineate the operations or rules of administration of the respective waqf bureaus in any level of detail. Nevertheless, it is quite telling that the bureaus are by definition state bodies, created by a state power—the Iraq Governing Council[203]—and led by individuals who hold their position by virtue of a state decree. The entanglement of the juristic forces of Najaf and the political powers in Baghdad in rulemaking, management, and governance in the vital field of waqf law had begun in earnest.

As I explain in the introduction, despite these early developments, juristic forces were not entirely committed to an assumption of state power in the area of waqf even as late as the drafting of the constitution. This is why the constitution rather puzzlingly refers to a "right" of Iraqis to establish waqfs managed in accordance with the rules of their sect—akin to a right to practice religious rituals—and yet indicates the need for this "right" to be organized in law, in a manner that would be unthinkable in the case of actual religious rituals.[204]

Eventually however, certain realities set in. Among them was the fact that as a consequence of the American invasion, the Shi'a were firmly in control of the Iraqi state, and would seemingly remain so for the foreseeable future.[205] As a result, the state did not need to arouse the same suspicion as previous governments, which had always been Sunni dominated.[206] Even more importantly, there simply was no viable way in a modern state to return to a premodern form of shared governance as concerned the waqfs. The state's role in administering property law was

200 *Id.*

201 *See* HAMOUDI, *supra* note 23, at 139–40 (noting Saghir's affinity to the clerical elite); *see also* Husayn al-Shami, FACEBOOK, https://www.facebook.com/%D8%A7%D9%84%D8%B3%D9%8A%D8%AF-%D8%AD%D8%B3%D9%8A%D9%86-%D8%A8%D8%B1%D9%83%D8%A9-%D8%A7%D9%84%D8%B4%D8%A7%D9%85%D9%8A-755633621174646/ (Arabic) (last checked December 6, 2019) (noting affiliations with clerical elites, juristic training, and current position as president of a Baghdad-based Shi'i university).

202 *See* HASAN, *supra* note 197 (noting that much of Najaf's discontent with Shami arose from accusations of corruption and mismanagement made against him).

203 Interestingly, it was not clear at the time that the Governing Council, derided by most commentators as toothless and a form of "window dressing" to obscure near total American control over Iraq, had any authority to implement its resolutions concerning the waqf. *See* ARATO, *supra* note 193, at 20. This position is reinforced by the fact that the United States blocked a highly publicized Governing Council Resolution reasserting juristic rules in personal status law on the theory that Iraqi law could only be created by the occupiers during the period of occupation. HAMOUDI, *supra* note 23, at 99. By contrast, nobody within the United States occupying authority seems to have objected to the rather brazen assumption of legislative power as concerns the waqf reflected in Resolution 68, discussed in the main text. Instead, Resolution 68, which never received the imprimatur of the occupation authority, was fully recognized within Iraqi courts. *See* Personal Status Court of Adhamiyya decision No. 443 of November 7, 2005 (Iraq); Mahkamat al-Tamyīz [Court of Cassation], decision No. 2338 of November 7, 2005 (Iraq) (both referencing waqf "bureaus" rather than a waqf ministry). The entire episode demonstrates not only the intense and long-standing distaste of the rising Shi'i leaders toward the traditional state administration of the waqfs, explored at length in the main text, but also the relative indifference of other forces to stand in their way, in contradistinction to personal status. *See id.* at 386 (describing buildup to and subsequent invasion of Iraq in 2003).

204 *See supra* notes 30–32 (discussing Article 43 of the Iraq Constitution).

205 *See* VALI NASR, THE SHIA REVIVAL: HOW CONFLICTS WITHIN ISLAM WILL SHAPE THE FUTURE 189 (2007) (describing the confirmation of Shi'i dominance in Iraq as early as the January 2005 elections).

206 HAMOUDI, *supra* note 23, at 37.

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simply too deep and too extensive to render that viable. If the jurists were to exercise their power, they would have to do it through the state, and thereby risk whatever entanglements arose as a consequence.

Thus, the Governing Council Resolutions were only the very start of the legislative effort to hand over state function of waqfs to the Najaf jurists. The next development came in the form of a new Holy Shrines Administration Law, enacted in 2005. The law addresses how the Holy Shrines and nearby cemeteries are to be managed, and how their substantial revenues, including revenues from waqfs dedicated to their upkeep, are to be allocated. The law is particularly important because it reintroduces, for the first time since 1966,[207] a reference to the highest jurist, defined in the 2005 law as "the jurist with the highest number of Shi'i followers in Iraq, from among the jurists of Holy Najaf."[208] As noted earlier, there is no reliable data on which to rely to make this sort of determination, and yet the highest jurist is empowered to play a significant role in determining who administers each of Iraq's Holy Shrines, and spend revenues derived therefrom.[209] What this means for the future is that state institutions will necessarily have to decide who Najaf's highest jurist is, at least for purposes of interpreting and applying state law as it pertains. This is a rather significant development, and one that runs against Najaf's deeply ingrained preferences for autonomy from political power.

The Waqf Bureau Laws of 2012

The references to the high jurists of Najaf remained confined to the area of Holy Shrines management in the 2005 law, where the dangers of entanglement were real, but reasonably contained. Far more consequential were the enactment of two laws, Numbers 56 and 57 of 2012, which set up and defined the operation of each of the Sunni and Shi'i waqf bureaus, respectively, in a manner that devolves almost all state function in the area of waqf to jurists and juristic authorities.[210] I focus on Law 57, which creates the Shi'i Waqf Bureau, which is most relevant to this article.

As summarized below, Article 2 of Law 57 lays out six purposes for the Waqf Bureau in Article 2:

(1) Management of waqfs that do not have a private trustee, and oversight of waqfs that do;
(2) Investment of revenues of the waqfs that it manages, as per the first purpose;
(3) Addressing the concerns of mosques and other charitable and religious institutions and giving due regard to their development;
(4) Strengthening Islamic culture and revitalizing Islamic heritage;
(5) Deepening ties to the broader Islamic world; and
(6) Protecting the interests of the Holy Shrines.[211]

207 *See supra* the discussion of the administration of the Holy Shrines (noting legislative reference to the highest jurist in Najaf).

208 Law on the Management of the Holy Shrines and the Distinguished Shi'i Cemeteries Law No. 19 of 2005, art. 4 (Iraq).

209 *See* note 187 *supra* and accompanying text.

210 *See* Law of the Sunni Waqf Bureau Law No. 56 of 2012 (Iraq) [hereinafter Sunni Waqf Bureau Law]; Law of the Shi'i Waqf Bureau Law No. 57 of 2012 (Iraq) [hereinafter Shi'i Waqf Bureau Law].

211 Shi'i Waqf Bureau Law art. 2.

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Effectively, any state activity that relates to the practice of Islam for Iraq's Shi'a appears to be a function of the Waqf Bureau. This is rather important in a state that has made Islam its official state religion and has committed itself to protecting the Islamic identity of its Muslim population.[212]

Under Article 4, the head of the bureau is responsible for executing the policies of the bureau, with the power to issue regulations, form committees, and direct particular resources within the bureau.[213] The position of bureau head is explicitly described as equivalent to that of a government minister, and its appointee is chosen by the prime minister and the cabinet. Quite importantly, *the law requires that the government obtain the consent of Najaf's highest jurist prior to any appointment taking effect*.[214] This means that there is a de facto seat in the Iraqi cabinet reserved to a government official with considerable powers to ensure the Islamic character of the state. This seat cannot be filled without the permission of a single "Quietist" religious authority who supposedly has no affiliation with the state, and seeks none.[215] By contrast, as might be expected in a parliamentary democracy, and perfectly in keeping with a more traditional view of Shi'i Quietism, the de jure members of the cabinet, as well as the prime minister, must be approved by the legislature, and require the imprimatur of no religious authority.[216]

While the primary responsibility for execution of bureau policy lies with the head of the bureau, the Waqf Bureau also has a board of directors, which sets bureau policy.[217] The bureau head is the president of the board, and three of its members are religious scholars selected by its head.[218] Another two are the deputies of the bureau head, and the balance are director generals of the various constituent units of the Shi'i Waqf Bureau, such as the Research Directorate, the Revitalization of the Husayni Rituals Directorate, and the Directorate of Planning.[219] Thus, the head of the Waqf Bureau, whose position requires the support of Najaf's highest jurist, plays an important role in the selection of all members of the board of directors, and alone appoints the religious scholars who serve on the board.[220]

The powers of the board of directors are quite vast. Beyond setting bureau policy, the board's responsibilities include control over budget matters, and review of the establishment of mosques and religious institutions.[221] The board also studies and approves investment opportunities for waqfs under bureau management.[222] In connection with this, it is worth noting that the revenues from waqfs under bureau management are under the control and management of the board as well.[223]

212 Article 2, Iraq Constitution of 2005.

213 Shi'i Waqf Bureau Law, *supra* note 210, at art. 4(1).

214 *Id.* at art. 4(2). Interestingly, the comparable Sunni provision requires the permission of "a consensus of the Distinguished Jurists for Proselytization and Fatwas," thereby similarly devolving power to a body of nonstate authorities, though not to any single individual. Sunni Waqf Bureau Law art. 4(2). The distinction is logical, given the lack of any sort of hierarchy within Sunni Islam that compares to that which exists within contemporary Shi'ism.

215 Respecting the supposed commitment of the Najaf juristic authorities generally, and Sistani in particular, to Quietism, *see supra* the discussion in the introduction.

216 Article 43, Iraq Constitution of 2005. Indeed, this may very well be why the Waqf Bureau is not a ministry, yet its head has all of the powers and perquisites that attend to a minister. If the head were an actual minister, then under Article 43 of the Constitution, parliamentary approval would be required to seat the position.

217 Shi'i Waqf Bureau Law, *supra* note 210, at art. 7(1).

218 *Id.* at art. 6(1).

219 *Id.*

220 *Id.*

221 *Id.* at art. 7.

222 *Id.*

223 *Id.* at art. 12.

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Two other powers of the Waqf Bureau are worth mentioning in brief. First, it is responsible for making final approval of the reconstruction of facilities on waqf land, or the exchange of waqf land.[224] As indicated above in the discussion of charitable waqfs, the power to approve exchanges was historically allocated to the Iraqi courts.[225] Second, the Scientific Council of the Shi'i Waqf Bureau is given the task of appointing trustees for Shi'i waqfs that have no trustee.[226] The members of the Scientific Council are selected by the bureau head.[227]

Therefore, Najaf's senior jurist plays an extremely important formal state role in the appointment of personnel who (1) set the policies respecting the management of waqfs and maintenance of the Islamic character of the state, (2) execute those same policies, and (3) actually manage significant amounts of waqf land.

Perhaps even more significantly, the level of control exercised by Najaf's senior jurist over the Waqf Bureau extends well beyond appointment of personnel. Article 14 reads as follows:

> The administration of waqfs, and the regulation of their affairs, among them the appointment of the trustee and his dismissal, shall be conducted in accordance with the widespread opinion of the Imami Shi'a jurists. In the event that there is no widespread [opinion], then the opinion of the Highest Jurist shall be taken, and this means the jurist with the most Shi'a followers in Iraq among the jurists of Najaf.[228]

In other words, should questions arise respecting how waqfs are supposed to be managed, the Waqf Bureau's personnel are required to defer to the opinions of the jurists generally, and, where there is doubt, Najaf's highest jurist in particular. As with the process of appointing the Waqf Bureau head, which also makes reference to Najaf's highest jurist, this provision requires the state to make a determination as to which jurist is in fact Najaf's highest jurist, and thereby to play some role in the determination of the question where it is in doubt. This is precisely the sort of entanglement that Najaf had spent the entire course of Iraqi history avoiding. In this context, however, they seem to have concluded that they had little choice. Either they assumed governance of the waqf through state offices, with the consequent risks of entanglement, or they would lose control of the waqfs, as had occurred in Egypt, Syria, and other Arab states.[229] The former may have been distasteful, but the latter was unthinkable.

For the most part, the system seems to have worked rather well for the jurists. Obviously, the jurists have achieved their primary objective, which has long been to consolidate and centralize authority in Najaf over the Shi'i waqfs and their associated revenue.[230] Moreover, they have done so while maintaining a thin veneer of separation between the high jurists and the Shi'i Waqf Bureau, allowing them to maintain at least a pretense of alienation from the state even as they dominate the waqfs. Given the bureau's function in not only managing waqfs, but also maintaining the Islamic character of the state, this has the added advantage to the jurists of leaving the bureau to enter into highly charged and controversial matters respecting Islamicity, while the jurists appear above the fray. Hence, for example, it was the Shi'i Waqf Bureau and not the jurists who decried the 2019 appearance of a female Lebanese violinist playing the Iraqi national anthem while wearing a sleeveless shirt and slacks in a soccer stadium just before an international soccer

224 *Id.*
225 *See supra* notes 163–65 (concerning Court of Cassation approach for the approval of waqf exchanges).
226 Shi'i Waqf Bureau Law, *supra* note 210, at art. 10(1).
227 *Id.* at art. 10(2).
228 *Id.* at art. 14.
229 *See supra* the discussion of the death of the Sunni waqf.
230 HASAN, *supra* note 197.

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tournament.[231] Had the jurists spoken out, they would have surely faced a backlash from more secular elements as well as disaffected youth. Had there been no reaction, Islamist forces would have objected. Permitting the bureau to condemn the appearance while remaining silent allowed the jurists to insulate themselves from more severe forms of criticism while still making sure their views were known.

At the same time, Najaf's jurists are clearly aware that there are dangers that attend to the overlap in function between a state office such as the Shi'i Waqf Bureau on the one hand, and Najaf's jurists and seminaries on the other. The law seeks rather clumsily to solve this problem in a manner that only makes it worse. Specifically, Article 15 of the Shi'i Waqf Bureau Law reads as follows: "The Bureau does not administer the religious schools, and other *waqfs* tied to the Shi'i seminaries. Nor shall it interfere in their affairs *except with the permission of the Highest Jurist*." (emphasis added)[232]

The problem is easy enough to identify. The law only insulates the juristic seminaries from intervention on the part of the bureau, and indeed the state, *to the extent that Najaf's highest jurist does not seek such intervention*. As noted earlier, there is no easily recognizable way to determine the highest jurist.[233] The state *already* must make a determination as to whom the highest jurist is, in order to appoint the Waqf Bureau head and administer the waqfs in accordance with the law. This provision further grants the state the opportunity to *intervene directly* in Najaf's affairs, in order to defend the interests of the person whom the state has determined serves the role of Najaf's highest jurist.

The provision is in many ways shocking, and would have been unthinkable in the recent past. Not even Saddam Husayn's regime was brazen enough to seek this level of formal, legal authority over Najaf's successorship system. The only reason that it does not seem to have garnered much reaction at the moment is that there is little opportunity for the state to make use of the intervention opportunity that Article 15 provides it. This is because the highest jurist of Najaf is agreed to be Grand Ayatollah Sistani, it would be impossible to credibly claim otherwise given the depth of that consensus, and Sistani has never had the need, much less shown the inclination, to turn to the state to protect his position in Najaf.[234] However, Sistani is nearly ninety years old.[235] Upon the passing of a jurist, internal juristic power struggles are common, opaque to the outsider but nonetheless quite real.[236] The temptation of the state to tip the scales in one direction or the other, and to use Article 15 as giving the state a clear legal basis to do so, will be strong indeed.

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231 John Davison, *In Iraq Holy City, Row over Female Violinist Shows Social Rift*, Reuters (August 7, 2019), https://www.reuters.com/article/us-iraq-society/in-iraqi-holy-city-row-over-female-violinist-at-soccer-match-shows-social-rift-idUSKCN1UX146.

232 Shi'i Waqf Bureau Law, *supra* note 210, at art. 15.

233 The ambiguities inherent in the definition of whom the highest jurist might be, and the consequent possibilities of state interference, are also noted by al-Qarawee. *See supra* notes 186–88 and accompanying text ("there is no easy way to know exactly who the most emulated *mujtahid* is, nor is the practice of emulation straightforwardly measurable. It can be argued that in formalizing this authority, the Iraqi state became an actor in determining to whom this status would be given after Sistani."). Al-Qarawee also raises the possibility that other nonstate actors, and in particular the Shi'i militias formed to combat the Islamic State after its takeover of Mosul, may also play a role. Al-Qarawee, *supra* note 187, at 15.

234 Hamoudi, *supra* note 23, at 37; *cf.* Hasan, *supra* note 197 (noting a competition of sorts between Sistani and another prominent senior jurist, Muhammad Sa'eed al-Hakeem, over control of the waqfs).

235 *See* Paul McGeough, *The Struggle to Succeed Grand Ayatollah Ali Sistani*, Foreign Affairs (May 23, 2012), https://www.foreignaffairs.com/articles/middle-east/2012-05-23/struggle-succeed-grand-ayatollah-ali-sistani (referencing Sistani as being eighty-two years old in 2012).

236 *See* Devin J. Stewart, *The Portrayal of an Academic Rivalry: Najaf and Qum in the Writings and Speeches of Khomeini, 1964–78*, *in* Most Learned of the Shi'a: The Institution of the Marja' Taqlid 216, 222 (Linda

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CONCLUSION

The devolution to jurists over all matters pertaining to waqf continues unabated. Legislators search for any remaining areas in which Shi'i rules do not control Shi'i waqfs, and Shi'i jurists do not administer them, in order to return them back to juristic control. The most recent example of this phenomenon is Law 41 of 2016, enacted on January 16, 2017.[237] In it, Iraq amended the Edict Permitting the Dissolution of Family Waqfs so as to exclude from its purview any waqfs created by Shi'i grantors.[238] As noted above in the discussion of family waqfs, that Edict, which permitted the dissolution of a waqf if a beneficiary sought it, was virtually a nullity in practice, and has been for well over half a century.[239] This did not prevent Shi'i Islamist forces from repealing it in their zeal to remove any state legislation of any sort relating to waqf that derogated from juristic rules. Without the Edict, the rules concerning waqf dissolution are those set forth in the 2012 Waqf Bureau Law. This means that, in effect, a waqf can only be dissolved or otherwise terminated if it would be deemed permissible according to the rules of Najaf's highest jurist.[240]

Indeed, the extent of the deviations that Iraq has taken as concerns waqf law relative to its Arab brethren are revealed by the fact that the repeal of the Dissolution Edict did not purport to change the rules for Sunni family waqfs—only Shi'i ones. From a purely doctrinal standpoint, this makes no sense at all, as neither Sunni nor Shi'i rules permit family waqf dissolutions at the request of beneficiaries.[241] Nor is there any obvious political benefit to Shi'i politicians in seeking to exclude the Sunni waqfs from the purview of the law. The most likely explanation is that Sunni forces were not particularly interested in ensuring the continuation of Sunni family waqfs, and that if they had exhibited such concern, they could have had the law exempt their waqfs from the possibility of dissolution as well. In other words, Sunni religious forces have largely accepted modern trends as concerns the family waqfs, and acquiesced to their administration by conventional state authorities, even as supposedly Quietist Shi'i jurists have resisted such trends in the manner I describe here.

The result of all of this has been an explosion of waqfs throughout southern Iraq, even as the institution has withered away in almost all of the rest of the Islamic world. On an even casual stroll through the holy cities of Najaf and Kerbala, an observer is confronted with billboards, pamphlets, and radio and television advertisements describing one or another form of good works being established by waqfs bearing names of revered figures familiar to the Shi'a devout. Hospitals, universities, and even airports have been established from revenues derived from waqf, as have various traditionally for profit concerns in fields varying from agriculture to construction and beyond.[242]

In many ways, therefore, this is an apex for the direct exercise of power by the Shi'i jurists within the context of modern Iraq. They are not only the spiritual source of the conception of the waqf, they are also its rulemakers and its administrators, albeit in an indirect fashion. In exercising this power, the jurists have avoided the marginalization that has befallen their Sunni counterparts throughout the Islamic world. This is no small matter, and provides an example of the manner

S. Walbridge ed., 2001) (describing struggle between Khomeini and Abul Qasim al-Khu'i for position of Najaf's highest jurist upon the death of Muhsin al-Hakim in 1970); Al-Qarawee, *supra* note 187, at 14.

237 Law No. 41 of 2016, art. 1, Amendment to the Law Permitting the Dissolution of Family Waqfs No. 1 of 1955 (Iraq).

238 *Id.* at art. 1.

239 *See supra* notes 134–39 and accompanying text.

240 Shi'i Waqf Bureau Law, *supra* note 210, at art. 14.

241 *See supra* notes 50–66 and accompanying text (noting the permanent and irrevocable nature of the waqf across schools and sects).

242 HASAN, *supra* note 197 (noting that much of this comes from revenue derived from the Holy Shrines themselves).

in which Najaf has adapted to modern conditions in order to preserve its position where so many religious institutions across the world have had more trouble.

The adaptation, however, comes at a cost. When the state had ignored and sidelined Najaf, holding the seminaries and the jurists who led them in some sort of thinly veiled contempt, Najaf was at least able to maintain its autonomy from the state while still preserving its legitimacy among the Shi'a devout. By entangling itself in state affairs and the management of state bureaucracies so deeply, Najaf has exposed itself much more directly to the possibilities of state interference of a perfectly legal sort. After all, entanglement works simultaneously in both directions—it empowers juristic involvement in state activity even as it enables the state to influence who within juristic circles is entitled to exercise powers that the state has conferred. As the poorly functioning, highly corrupt, and woefully ineffective Iraqi state continues to founder, and as it continues to turn to Islam to attempt to legitimate itself, at times in fashions that seem patently demagogic, it is hard to believe that the entanglement will not prove over time to be increasingly difficult to manage. The state might find the potential cooptation of Najaf too tempting to abjure from, and play a more prominent role in ensuring that Najaf's highest jurist is a person who will loyally serve the state's interests. If this were to come to pass, Najaf may find itself regretting the bargain it has struck.

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