

NĀẒIR WAQF FROM SHARI'AH PERSPECTIVE AND
ALGERIAN LAW: AN ANALYTICAL STUDY

BY

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ABSTRACT

Throughout history, waqf has provided religious, social and economic assistance. However, and for many reasons, waqf in general has become underdeveloped and lost its real role in Muslim societies including Algeria. The weak legal framework that Algeria provides for the waqf contributes to the deterioration of the waqf. One of the major element in the management and administration of the waqf is the nāẓir as he is the only person in direct contact with the waqf property. However, the articles of law dedicated to fix his issues are inadequate and insufficient. This research relies on inductive approach in examining the Muslims scholars' discussions on the nāẓir as well as analyzing the articles of the law related to him, from the perspective of the Algerian waqf experience. This study also, relies on qualitative approach by conducting interviews with experts, who have direct dealing with the waqf. In addition, to people from Shari'ah background as well as from legal and administrative ones. This is done to identify the gaps of the law and providing right recommendations for the position of nāẓir. The findings of this research show that the articles of the law of waqf related to the nāẓir are insufficient and need review and update in the light of contemporary developments in waqf sector in general and in the governance of waqf institutions in particular. Mostly the findings show that the nāẓir under the Algerian law is under-qualified in terms of knowledge and skills, which unable him to fulfil his functions. In addition, the articles related to the set of his functions are general and not precise. This research also finds that Algeria lacks a reliable process to upgrade the level of the nāẓir. Furthermore, this research finds that Algeria opts for a vertical model of managing and administrating the waqf. This leads to slow decision-making and hinders the spirit of motivation, creativity and innovation of the nāẓir. Furthermore, this research finds that bureaucracy in Algeria is preoccupied by the rules and hierarchy rather than by the results. The research recommends that the starting point to the legal reform is to reformulate the eligibility requirements stipulated for this position, in terms of level of knowledge and skills. The nāẓir should be a person with creativity, innovation, and integrity and teamwork spirit. Furthermore, the research suggests that the nāẓir should fulfil a set of functions that are in line with contemporary requirements in terms of scientific accuracy and quality governance. The research also suggests developing an accounting system and using modern technological means to enhance transparency, which is one of the most important elements in the requirements for a good governance of waqf institutions.

خلاصة البحث

يعتبر الوقف رافدا أساسيا في الحضارة الإسلامية فقد كان يوفر الدعم الاقتصادي والاجتماعي والديني. لكن مع مرور الزمن فقد الوقف مكانته وتخلف عن دوره الفعال في حياة المسلمين وذلك لعدة أسباب، والجزائر ليست استثناء للوضع العام للوقف في العالم الإسلامي. إن الأرضية القانونية التي توفرها الجزائر للوقف ساهمت كثيرا في تخلفه عن دوره الريادي. يعتبر ناظر الوقف في الجزائر من أهم الأشخاص في عملية تسيير وإدارة الوقف، حيث يعتبر هذا الأخير الشخص الوحيد الذي يتعامل مباشرة مع الممتلكات الوقفية. لكن ما يوفره القانون الجزائري للأوقاف من مواد قانونية تتعلق بالناظر تعتبر غير كافية ولا ملائمة لطبيعة عمله. اعتمدت هذه الدراسة على المنهج الاستقرائي في بحث المسائل المتعلقة بناظر الوقف والتي ناقشها الفقهاء، فضلا عن تحليل المواد القانونية المتعلقة بالناظر من منظور تجربة الوقف في الجزائر. كما اعتمدت هذه الدراسة أيضا على المنهج النوعي عن طريق إجراء مقابلات ميدانية مع المتخصصين في مجال الوقف في الجزائر، ممن لهم علاقة مباشرة بالوقف، وكذلك أصحاب الخلفيات الشرعية والقانونية والإدارية قصد تسليط الضوء على النقائص المتعلقة بالمواد القانونية واقتراح الحلول من أجل تحسين المواد القانونية المتعلقة بناظر الوقف في الجزائر. كشفت هذه الدراسة أن المواد القانونية المتعلقة بناظر الوقف في الجزائر غير كافية ولا ملائمة في ظل التطورات المعاصرة لنظام الوقف عموما ولحوكمة المؤسسات الوقفية على وجه الخصوص. فناظر الوقف في الجزائر غير مؤهل للتسيير والإدارة بحكم نقص العلم والمهارات المشتركة لهذا المنصب. كما أن المواد المتعلقة بمهام ناظر الوقف تتسم بالعمومية وعدم الدقة والوضوح. كما كشفت هذه الدراسة أيضا عن وجود ضعف في إعادة تأهيل النظار ورفع مستواهم. فضلا عن ذلك، اتضح من خلال هذه الدراسة أن التسيير في الجزائر يعتمد على النموذج العمودي والذي يتسم بالبيروقراطية مما يؤثر سلبا على سرعة اتخاذ القرارات ويتسبب في كسر روح الابداع والمبادرة لدى الناظر. فالإدارة في الجزائر مهتمة باحترام القوانين واللوائح أكثر من اهتمامها بالنتائج. تقترح هذه الدراسة أن يبتدأ الإصلاح القانوني من إعادة صياغة الشروط التأهيلية للناظر من حيث المستوى المعرفي والمهارات. فالناظر ينبغي أن يتمتع بالكفاءة اللازمة وبروح الإبداع والمبادرة والانتماء وروح العمل الجماعي. من جهة أخرى فالدراسة تقترح أن تضاف مهام جديدة للناظر تتوافق مع متطلبات العصر من حيث الدقة العلمية ومتطلبات جودة الحوكمة. كما تقترح الدراسة تطوير نظام المحاسبة واستغلال وسائل التكنولوجيا المعاصرة لتعزيز الشفافية والتي تعتبر من أهم عناصر حوكمة المؤسسات الوقفية الرشيدة.

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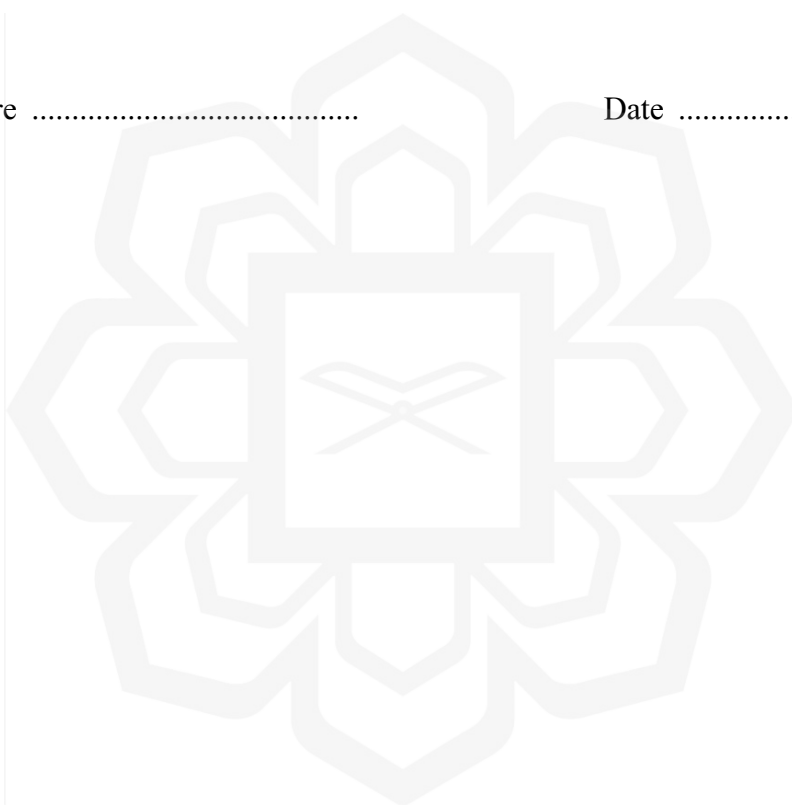
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TABLE OF CONTENTS

Abstract	ii
Abstract in Arabic	iii
Approval Page.....	iv
Declaration	v
Copyright Page.....	vi
Acknowledgements	vii
List of Tables	xvi
List of Glossory.....	xvii
CHAPTER ONE: INTRODUCTION	1
1.1 Background of the Study	1
1.2 Statement of the Problem	8
1.3 Research Objectives	11
1.4 Research Questions	11
1.5 Motivation of the Research	12
1.6 Scope of the Study	13
1.7 Significance of the Study	13
1.8 Organisation of the Study.....	14
CHAPTER TWO: <i>WAQF</i> AND ITS FUNDAMENTALS	17
2.1 Introduction	17
2.2 Previous Studies	17
2.3 History of <i>Waqf</i>	26
2.4 Definition of <i>Waqf</i>	26
2.4.1 Ḥanafī School of Law	27
2.4.2 Mālikī School of Law.....	27
2.4.3 Shāfi‘ī School of Law	28
2.4.4 Ḥanbalī School of Law.....	28
2.4.5 The Definition of <i>Waqf</i> in Algerian Law	28
2.5 Categories of <i>Waqf</i>	30
2.5.1 Family <i>Waqf</i> (<i>Waqf Dhurri</i>).....	30
2.5.2 Philanthropic <i>Waqf</i> (<i>Waqf Khayrī</i>).....	31
2.5.3 General and Private <i>Waqf</i> in Algerian Law	32
2.6 The Pillars of <i>Waqf</i>	33
2.6.1 The First Pillar: The Endower (<i>Wāqif</i>).....	33
2.6.1.1 Maturity (<i>Bulūgh</i>)	34
2.6.1.2 The Sanity of the <i>Wāqif</i>	34
2.6.1.3 The <i>Waqf</i> of the Drunkard	35
2.6.1.4 The Legal Entitlement of the Endower to the Property	36
2.6.1.5 Free Will	38
2.6.2 The Second Pillar: The Formula (<i>Al-Sighah</i>).....	39
2.6.3 The Third Pillar: The <i>Waqf</i> Asset (<i>Al-Mawqūf</i>).....	39
2.6.3.1 <i>Waqf</i> of Moveable Assets	40
2.6.3.2 <i>Waqf</i> of Common Property (<i>Mushā‘</i>).....	40
2.6.4 The Fourth Pillar: Beneficiary (<i>Al-Mawqūf ‘Alayhim</i>)	40

2.6.5 The Pillars of the <i>Waqf</i> according to Algerian Law.....	41
2.6.5.1 The <i>Wāqif</i>	41
2.6.5.2 <i>Al-Mawqūf</i>	42
2.6.5.3 Formula (<i>Sīghah</i>)	43
2.6.5.3.1 <i>Al-Tanjīz</i>	43
2.6.5.3.2 Perpetuity (<i>Al-Ta' bīd</i>)	43
2.6.5.3.3 The Legality of the Formula	44
2.6.5.4 Beneficiaries (<i>al-Mawqūf 'Alyhim</i>).....	44
2.6.6 Characteristics of <i>Waqf</i> Property According to the Algerian Law of <i>Awqaf</i>	44
2.6.6.1 <i>Waqf</i> as a Charitable Contract.....	45
2.6.6.2 <i>Waqf</i> is the Transfer of a Special Right	47
2.6.6.2.1 The Impact of <i>Waqf</i> on the Ownership of the <i>Waqf</i> Property According to the Algerian Law	47
2.6.6.2.2 The Legal Personality of the <i>Waqf</i> According to the Algerian Law of <i>Waqf</i>	49
2.6.6.3 Legal Protections of <i>Waqf</i>	50
2.6.6.3.1 The Legislative Protection	50
2.6.6.3.2 The Civil Protection	50
2.6.6.3.2.1 The <i>Waqf</i> Property cannot be Appropriated because of Time (<i>Taqādum</i>)	51
2.6.6.3.2.2 The <i>Waqf</i> Properties are Excluded from the Right of Preemption <i>Shuf'ah</i>	51
2.6.6.3.2.3 The <i>Waqf</i> Property cannot be Under Seizure (<i>Hajz</i>).....	52
2.6.6.3.2.4 <i>Waqf</i> Property cannot be Subject of Mortgage	52
2.6.6.3.2.5 No Disposition Over the <i>Waqf</i> is Allowed	52
2.6.6.4 Penal Protection	53
2.6.6.5 The Administrative Protection of the <i>Waqf</i>	54
2.6.6.6 The Judicial Protection.....	54
2.6.6.7 Legal Form of the <i>Waqf</i>	54
2.6.6.8 The <i>Waqf</i> Properties are free from Taxes	54

CHAPTER THREE: ADMINISTRATION AND MANAGEMENT OF *WAQF* IN ISLAMIC LAW 55

3.1 Definition	55
3.2 Categories of <i>Wilāyah</i>	56
3.2.1 According to the Origin and Source.....	56
3.2.2 According to the Subject of the Guardianship	57
3.2.3 According to the Size of the <i>Wilāyah</i>	57
3.2.4 According to the Domain	57
3.3 The <i>Shari'ah</i> Ruling in <i>Al-Wilāyah</i> on the <i>Waqf</i>	57
3.4 Categories of <i>Wilāyah</i> on the <i>Waqf</i>	58
3.4.1 The Private <i>Wilāyah</i> on the <i>Waqf</i>	58
3.4.2 General <i>Wilāyah</i>	59
3.5 The Contract of <i>Nazārah</i>	59

3.6	Conditions of the <i>Nāzir</i>	60
3.6.1	Islam	60
3.6.2	Adulthood.....	61
3.6.3	Sound Mind.....	61
3.6.4	Adālah	62
3.6.5	Efficiency	63
3.7	Appointing the <i>Nāzir</i>	63
3.7.1	The Right of the <i>Wāqif</i> To Appoint A <i>Nāzir</i>	63
3.7.2	The Right of the Beneficiaries to Appoint A <i>Nāzir</i>	64
3.7.3	The Right of the Ruler to Appoint <i>Nāzir</i>	64
3.8	The Functions of the <i>Nāzir</i>	64
3.8.1	Implementing the <i>Wāqif</i> 's Stipulation	64
3.8.1.1	Types of Conditions	67
3.8.2	To Protect the <i>Waqf</i> Asset.....	68
3.8.3	Exploitation of the <i>Waqf</i>	69
3.8.4	Collecting the Revenue	69
3.8.5	Paying the <i>Waqf</i> Debt and the Rights of the Beneficiaries	69
3.8.6	The Amount of Work that is the Duty of the <i>Nāzir</i>	70
3.9	The Rights of the <i>Nāzir</i>	71
3.9.1	The Right to Wage	71
3.9.2	The Right to Appoint Another Manager As Agent.....	73
3.9.3	The Investment of the Remaining of the Yield of <i>Waqf</i>	75
3.9.4	Changing the <i>Waqf</i>	75
3.10	Accountability of the <i>Nāzir</i>	77
3.10.1	Category of Trusted Hand.....	78
3.10.1.1	<i>Sharī'ah</i> Ruling on the Unauthorised Hand.....	79
3.10.1.2	<i>Sharī'ah</i> Ruling in the Trusted Hand	79
3.10.1.3	Cases that Trustees' Guarantee	80
3.10.1.4	Violation.....	81
3.10.1.5	Negligence.....	81
3.10.1.6	<i>Al-Tajhīl</i>	81
3.10.1.7	Custom	81
3.10.1.8	Benevolence of the Trustee to Guarantee	82
3.10.1.9	Maṣlaḥah	82
3.10.1.10	Accusation.....	82
3.10.1.11	Stipulation of Guarantee Upon the Trustee.....	83
3.10.1.11.1	The First Opinion	84
3.10.1.11.2	The Second Opinion.....	85
3.10.1.11.3	Third Opinion: Freedom in Stipulating Conditions in Contract	87
3.10.2	The <i>Sharī'ah</i> Ruling in Supervising the <i>Nāzir</i>	88
3.10.3	Release of the <i>Nāzir</i>	90
3.10.3.1	<i>Nāzir</i> Releases Himself.....	90
3.10.3.2	The <i>Wāqif</i> 's Release of the <i>Nāzir</i>	91
3.10.3.3	The Ruler's Release of the <i>Nāzir</i>	91
3.10.3.4	Causes to Release the <i>Nāzir</i>	91
3.10.3.4.1	<i>Fisq</i> Transgression.....	92
3.10.3.4.1.1	Ignorance	92
3.10.3.4.1.2	Mistake	92

3.10.3.4.1.3 Coercion.....	93
3.10.3.4.1.4 <i>Ta'wīl</i> Allegorical Interpretation	94
3.10.3.4.1.5 The Person Should Not Be an Imitator (<i>Muqalid</i>)	94
3.10.3.4.2 Betrayal (<i>khiyānah</i>)	95
3.10.3.4.3 Inability to Perform the Functions.....	97
3.10.3.4.4 The Benefit (<i>al-Maṣlahah</i>)	97
3.10.3.4.5 Madness	97

CHAPTER FOUR: EXPERIENCE OF *WAQF* MANAGEMENT: FROM CLASSICAL TO MODERN..... 98

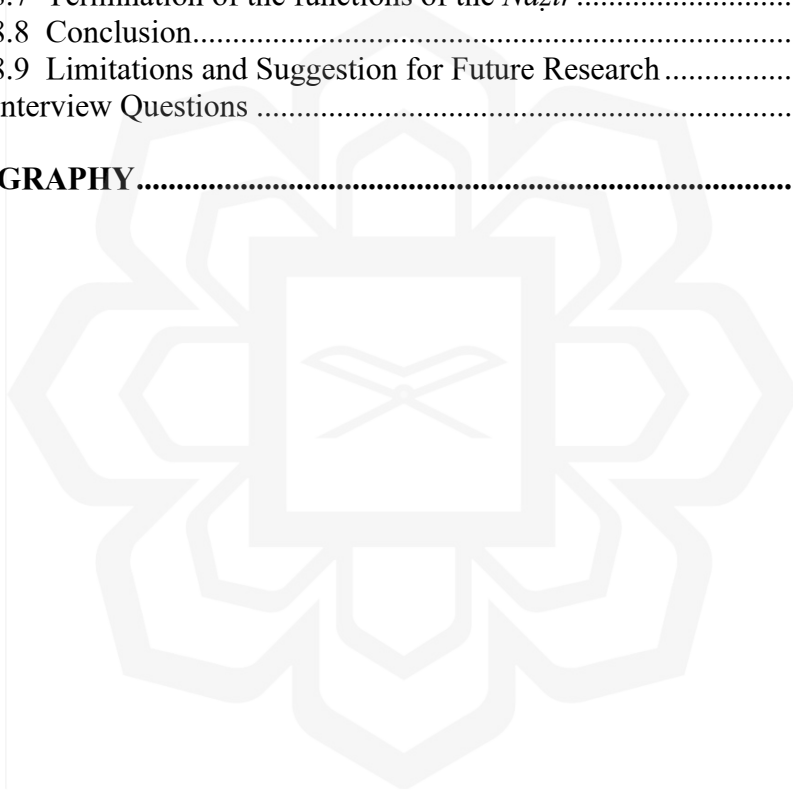
4.1 The Development of the Administration and Management of the <i>Waqf</i> ..	98
4.1.1 The Classical Administration of <i>Waqf</i>	99
4.1.1.1 The Family Administration of <i>Waqf</i>	99
4.1.1.2 <i>Diwān al-Waqf</i>	100
4.2 The Administrative Legacy of the <i>Waqf</i> During the Ottoman Period....	104
4.2.1 Accounting <i>Diwān</i> (<i>Diwān al-Muḥāsabah</i>)	104
4.2.2 <i>Diwān</i> of Sustenance (<i>Diwān al-Rizq</i>)	104
4.2.3 The Supreme <i>Diwān</i> (<i>Diwān al-ʿĀlī</i>)	104
4.3 The Organisation of the Administration of the <i>Waqf</i>	105
4.3.1 The <i>Sulṭān</i> 's Administration	105
4.3.2 <i>Al-Wullāt</i> Supervision	105
4.3.3 The Role of the Judicial Body	105
4.3.4 The <i>Nāẓir</i> of the <i>Nāẓirs</i> (<i>Nāẓir al-Nuzzār</i>)	106
4.4 Characteristic of the Traditional Administration of <i>Waqf</i> Institutions....	107
4.4.1 <i>Nāẓir</i> : The Centre for the Administration	107
4.4.2 The <i>Wāqif</i> 's Stipulations and the Administration of the <i>Waqf</i>	108
4.4.3 Self-Management	108
4.4.4 Judicial Supervision	108
4.5 The Governmental Administration of the <i>Waqf</i> In Modern Times	109
4.5.1 Circumstances for the Emergence of Governmental Control of <i>Waqf</i>	109
4.5.2 The Development of the <i>Waqf</i> Institution under the Government Administration	110
4.5.3 Reason for the State Supervision of the <i>Waqf</i> Institution	113
4.5.3.1 Legal Reasons	114
4.5.3.2 Political Reasons	114
4.5.3.3 Economic Reasons	115
4.5.3.4 Administrative and Managerial Reasons	116
4.5.4 The Characteristics of the Governmental Administration of the <i>Waqf</i>	117
4.5.4.1 Centralisation	117
4.5.4.2 Integration in the Government Structure	117
4.5.5 Problems of the Modern Approach to Managing and Administering the <i>Waqf</i>	119
4.6 Contemporary Attempts to Revive the <i>Waqf</i> : The Sudan and Kuwait Experience	120
4.6.1 Sudan Experience	120

4.6.2	<i>Al- 'Amānah al- 'Āmmah li al-Awqaf</i>	122
4.6.2.1	The Administrative Establishment of the <i>'Amānah</i>	123
4.6.2.2	Bureaus for Investment	123
4.6.2.3	<i>Al-Ṣanādīq al-Waqfiyyah</i> and Projects	124
4.6.3	Main Features of the <i>'Amānah</i> of <i>Waqf</i>	124
CHAPTER FIVE: ALGERIAN ADMINISTRATION OF WAQF		125
5.1	The Administration of the <i>Waqf</i> in Algeria at the End of the Ottoman Period	125
5.2	The Organisation of the Administration of the <i>Waqf</i> at the End of the Ottoman Period	125
5.2.1	The Scientific Council (<i>al-Majlis al- 'Ilmī</i>)	125
5.2.2	<i>Al-Shaykh al-Nuzār</i>	126
5.2.3	<i>Al-Wukalā'</i> or <i>Nuzār</i>	126
5.3	The <i>Waqf</i> During Colonisation	127
5.4	The Administration of <i>Waqf</i> in Algerian Law	127
5.5	The Development of the Algerian Legislation of the <i>Waqf</i>	128
5.5.1	The first Stage	128
5.5.2	The Second Stage	130
5.6	The Model of the Administration of the <i>Waqf</i> According to Algerian Law	131
5.6.1	The Administrative Structure of <i>Waqf</i> in Algeria	133
5.6.1.1	The Central Departments within the Ministry of Religious Affairs and <i>Awqaf</i>	133
5.6.1.2	The Minister	134
5.6.1.3	General Inspection and Department of <i>Awqāf</i> , <i>Zakāt</i> , <i>Hajj</i> and <i>'Umrah</i>	135
5.6.1.3.1	General Inspection	135
5.6.1.3.2	Department of <i>Awqāf</i> , <i>Zakāt</i> , <i>Hajj</i> and <i>'Umrah</i> ..	135
5.6.1.3.3	Sub-Directorate for Inventory and Registration of <i>Waqf</i> Properties	136
5.6.1.3.4	The <i>Awqāf</i> Committee (<i>Lajnat al-Awqaf</i>)	137
5.6.1.3.4.1	Composition of the Committee	138
5.6.1.3.4.2	Functions and Duties of the Committee of <i>Awqāf</i>	139
5.6.1.3.4.3	Modus Operandi of the Committee ...	139
5.6.1.4	The Local Services to Manage the <i>Awqaf</i>	141
5.6.1.4.1	The Local Services Charged with Indirect Management	141
5.6.1.4.2	Department of Religious Affairs and <i>Waqf</i> and Mosque Institution	141
5.6.1.4.2.1	Department of the Religious Affairs and <i>Waqf</i>	141
5.6.1.4.2.2	Mosque Institution	144
5.6.1.4.3	The Wakīl of <i>Waqf</i>	145
5.6.1.4.4	The Direct Local Managing Structure: <i>Nāzir</i>	147
5.6.1.4.4.1	Definition of the <i>Nāzir</i>	147
5.6.1.4.4.2	Appointment of the <i>Nāzir</i>	148
5.6.1.4.4.3	Conditions to Appoint the <i>Nāzir</i>	148

5.6.1.4.4.4 Functions of the <i>Nāzir</i>	149
5.6.1.4.4.5 The Rights of the <i>Nāzir</i>	150
5.6.1.4.4.6 Termination of the Functions of the <i>Nāzir</i>	152
CHAPTER SIX: METHODOLOGY.....	155
6.1 Introduction	155
6.2 Qualitative Approach	158
6.3 Research Methods	158
6.4 Sampling of the Semi-structured Interviews.....	163
6.4.1 Interview Questions	163
6.5 Content Analysis	165
6.6 Interview Process	166
6.7 During the Interview	167
6.8 After the Interview	168
6.9 Conclusion.....	169
CHAPTER SEVEN: FINDINGS AND DISCUSSION.....	170
7.1 Introduction	170
7.2 Question 1: The Qualifications That Make a Good <i>Nāzir</i>	171
7.2.1 Focused Coding.....	171
7.2.1.1 (A) Loving Waqf as a Religious Matter.....	171
7.2.1.2 (B) Ability to Work in a Group.....	172
7.2.1.3 (C) Truthfulness and Integrity.....	173
7.2.1.4 (E) Knowledge and Skills	174
7.3 Question 2: The Relationship of the <i>Nāzir</i> with Other Parties That Manage and Administrate the <i>Waqf</i>	175
7.3.1 Focused Coding.....	175
7.3.1.1 (A) Bureaucracy	175
7.3.1.2 (B) Slow Decision-making.....	176
7.4 Obstacles Faced by the <i>Nāzir</i> in his functions	178
7.4.1 Focused Coding.....	178
7.4.1.1 (A) Lack of Official Documentation and <i>Waqf</i> Contracts .	178
7.4.1.2 (B) Lack of Knowledge and Skills.....	179
7.4.1.3 (C) Bureaucracy	181
7.4.1.4 (D) Safety	181
7.5 Audit Committee	182
7.5.1 Focused Coddng.....	182
7.5.1.1 (A) Algeria Lacks <i>Waqf</i> Mechanisms	182
7.6 Functions of the <i>Nāzir</i> and the <i>Wakil</i> of the <i>Awqāf</i>	183
7.6.1 Focused Coding.....	183
7.6.1.1 (A) Wrong Distribution of Duties and Absence of the <i>Nāzir</i> in Districts.....	184
7.6.1.2 (B) The Law Misses Some Functions for the <i>Nāzir</i>	185
7.7 Requirements for the Position of <i>Nāzir</i> in Algerian law	186
7.7.1 Focused Coding.....	186
7.7.1.1 (A) Weak and Inadequate Requirements	186
7.7.1.2 (B) The Requirements Do Not Meet the Needs of <i>Waqf</i> in Algeria	188

7.7.1.3 (C) Need for A Serious Review of These Articles.....	189
7.7.1.4 (D) Individual vs Teamwork.....	190
7.7.1.5 (E) Changing Some Requirements Can Help Reduce the Harm While Waiting for Radical Changes.....	191
7.8 The role of technology	192
7.8.1.1 (A) Technology Is Not Used in Algerian <i>Waqf</i>	192
7.8.1.2 (B) Modern Technology Is Important for the <i>Waqf</i> Sector	193
7.9 Improving the <i>Nāzir</i> 's Qualification	194
7.9.1 Focused Coding.....	194
7.9.1.1 (A) Seminars and Workshops	194
7.9.1.2 (B) Training the <i>Nāzir</i> or <i>Wakīl</i>	196
7.9.1.3 (C) Changing the Law	196
7.10 Questions Related to Fiqh and Legal Issues	196
7.10.1 Question 1: the Concept of Public Interest <i>Maṣlaḥa</i>	196
7.10.1.1 (A) <i>Waqf</i> is Built Upon the <i>Maṣlaḥah</i>	197
7.10.1.2 (B) The Concept of <i>Maīlaiah</i> Helps Develop <i>Waqf</i> Management And Related Decisions.....	198
7.10.1.3 (C) <i>Maīlaiah</i> is a Matter for Scholars.....	199
7.11 Question 2: Shortcomings of Algerian Law Concerning the <i>Nāzir</i>	199
7.11.1 Focused Coding	199
7.11.1.1 (A) Articles Are Too Broad and General	199
7.11.1.2 (B) Under Qualified Requirements for the Position of <i>Nāzir</i>	200
7.11.1.3 (C) Absence of Articles on Important Issues	201
7.11.1.4 (D) Absence of Law Reviewing And Updates.....	201
7.12 Question 3: Legal Framework.....	202
7.12.1 Focused Coding	202
7.12.1.1 (A) 1991 Algerian Law of <i>Waqf</i> Has Not Been Reviewed.....	203
7.12.1.2 (B) Detailed Law Is the Key to the <i>Awqāf</i> Framework	203
7.12.1.3 (C) Explicit Decrees Are Necessary.....	204
7.12.1.4 (D) Need for A New <i>Awqāf</i> Law	204
7.13 Questions Related to the Administration and Management of <i>Awqaf</i> ...	205
7.13.1 Question 1: The Elements That Constitute Good Management and Administration of the <i>Waqf</i> Including the <i>Nāzir</i>	205
7.13.1.1 (A) Developing Human Capital	205
7.13.1.2 (B) Decentralisation is a Necessity	206
7.13.1.3 (C) Strong Legal Framework	207
7.13.2 Question 3: Teamwork and individual work	209
7.13.2.1 (A) No Place for Individual Work in Contemporary Times.....	209
7.13.2.2 (B) Teamwork Gathers Expertise.....	210
7.13.2.3 (C) Algerian Universities Are Providing People from Various Backgrounds.....	211
7.13.3 The use of Technology.....	212
7.13.3.1 (A) Algeria Is Below Expected Standards of Technology Use	212
7.13.3.2 (B) Need for A Strong Database	212

7.13.3.3 (C) Technology is Key to Waqf Development and Revival	213
7.13.3.4 (D) Technology Will Promote a Waqf Culture in Algerian Society.....	213
7.14 Question 5: Suggestions.....	214
7.15 Conclusion.....	215
CHAPTER EIGHT: CONCLUSION AND RECOMMENDATION.....	221
8.1 Introduction	221
8.2 The <i>Nazzārah</i>	224
8.3 Condition to Appoint the <i>Nāzir</i>	224
8.4 Functions of the <i>Nāzir</i>	225
8.5 The Rights of the <i>Nāzir</i>	226
8.6 The <i>Nāzir</i> shall not do the Following.....	227
8.7 Termination of the functions of the <i>Nāzir</i>	227
8.8 Conclusion.....	228
8.9 Limitations and Suggestion for Future Research	235
Interview Questions	236
BIBOLGRAPHY	238



LIST OF TABLES

Table 1.1	Waqf Institutions based Revenue	3
Table 5.1	Summary of the Study Population	236



LIST OF GLOSSORY

<i>‘Adālah</i>	: Justice
<i>‘Imarah</i>	: Building
<i>Ḥabs</i>	: Is the Word Used By The People Of Maghreb For The Word Waqf
<i>Ḥadith</i>	: Narrations of the Prophets Peace Be Upon Him
<i>Ḥajz</i>	: Seizure
<i>Ḥanaḥī School</i>	: The School of Islamic Jurisprudence Founded By Imam Abu Ḥanīfah
<i>Ḥanbalī</i>	: The School of Islamic Jurisprudence Founded By Imam Aḥmad Ibn Ḥanbal
<i>Ḥarramtu</i>	: I Have Forbidden
<i>Ḥākim</i>	: Ruler
<i>Ḥubūs</i>	: Plural Of ḥabs
<i>Abbadtu</i>	: I Have Donate For Perpetuity
<i>Ajhizah Ḥukūmiyyah</i>	: Government Departments
<i>Al-Ḥijr</i>	: To limit someone’s Legal Competence
<i>Al-Aḥbās</i>	: Plural of Ḥabs
<i>Al-Awqāf Al-Ḥukūmiyyah</i>	: Donations of the State
<i>Al-Diwān</i>	: Is a Place to Register Actions and Wealth of the Government
<i>Al-Majlis Al-‘ilmī</i>	: Scientific Council
<i>Al-Manqūl</i>	: Moveable
<i>Al-Mawqūf ‘alayhim</i>	: The Beneficiaries from Waqf
<i>Al-Mawqūf</i>	: The Asset Donated as Waqf
<i>Al-Mushā‘</i>	: Common Property
<i>Al-Sīghah</i>	: Formula
<i>Al-Ta’bīd</i>	: Perpetuity
<i>Al-Tanazūl</i>	: Waiver
<i>Al-Thawrah Al-Zirā‘iyyah</i>	: Agriculture Revolution
<i>Al-Waqf Al-Khāṣ</i>	: Private Waqf
<i>Amānah</i>	: Trust
<i>Awqāf</i>	: Plural of Waqf
<i>Basha</i>	: A Person Appointed by the Sulṭān
<i>Baytu Al-Māl</i>	: State Treasury
<i>Bāṭil</i>	: Void
<i>Bulūgh</i>	: Maturity
<i>Dawābiṭ Fiqhiyyah</i>	: Legal Maxims
<i>Dayā‘</i>	: Lost
<i>Diwān Al-Muḥāsabah</i>	: Accounting Diwān
<i>Diwān Al-‘ā‘lā</i>	: The Supreme Diwān
<i>Diwān Al-Rizq</i>	: Diwān of Sustenance
<i>Fasid</i>	: Invalid
<i>Fāsiq</i>	: Someone Who Violates Islamic Law
<i>Fiqh</i>	: Islamic Jurisprudence
<i>Fisq</i>	: Transgression

<i>Ghaflah</i>	: Simple-Mindedness
<i>Haq Istighlāl</i>	: The Right of Exploitation
<i>Haq Isti'māl</i>	: The Right of Use
<i>Haq Taṣaruf</i>	: The Right of Disposal
<i>Hawā</i>	: Inclinations of Human Beings
<i>Idārat Al-Waqf</i>	: Management of the Waqf
<i>Ijmā'</i>	: Consensuses.
<i>Ijtihād</i>	: The Process of Deriving the Laws of Sharī'ah from Its Sources.
<i>Indithār</i>	: Extinction
<i>Istibdāl Waqf</i>	: Substitution of Waqf
<i>Istiṣlāh</i>	: Seeking the Interest
<i>Istikhḷāf</i>	: Succession
<i>Istinābah</i>	: Accreditation
<i>Kātib</i>	: Secretary
<i>Khiyar Al-Ru'yah</i>	: Opting to revoke a sale contract after seeing the good
<i>Khiyar Al-Sharṭ Li Muddah</i>	: A stipulation by one party of the contract to cancel The contract for any reason within a fixed period.
<i>Lajnat Al-Awqāf</i>	: Council of Waqf
<i>Ma'siyah</i>	: Transgression
<i>Maḥmūm Mukhālafah</i>	: Divergent Meaning
<i>Mafṣadah</i>	: Harm
<i>Maḥjūr</i>	: Under Restriction
<i>Maṣlahah</i>	: Benefit
<i>Majlis Al-Wilāyah</i>	: Council of the District
<i>Manfa'ah</i>	: Usufruct
<i>Mālikī School</i>	: The School of Islamic Jurisprudence Founded By Imam Mālik
<i>Mudārabah</i>	: Contract Whereby the Investor Provides Capital to Somebody to Undertake the Work.
<i>Mufatish Al-Waqf</i>	: Inspector of Waqf
<i>Mughaffal</i>	: Simple-Minded
<i>Muhājirīn</i>	: Migrant of the Companions From Mecca to Medina
<i>Mu'alaq</i>	: Suspended
<i>Muqalid</i>	: Imitator
<i>Mushkilāt</i>	: Means Problems
<i>'aqār</i>	: Real State
<i>'ariyyah</i>	: Guaranteed Loan
<i>'awārid Al-Ahliyyah</i>	: Deficiencies of the Legal Capacity
<i>Nazārah</i>	: The Act of Managing and Adminitring the Waqf Property
<i>Nazilah</i>	: New Occurrence that Requires New Sharī'ah Ruling.
<i>Nāẓir</i>	: The Waqf Manager.
<i>Nāẓirs</i>	: Plural of Nāẓir
<i>Nuzzār: Pular of Nāẓir</i>	
<i>Qawā'idah Fiqhiyyah</i>	: Legal Maxim
<i>Qānūn Al-Milkiyyah</i>	: Law of Ownership
<i>Qiyās Ṣaḥīḥ</i>	: Sound Analogy
<i>Qiyās</i>	: Analogy

<i>Riba</i>	: Usury
<i>Sadaqah</i>	: donation
<i>Safah</i>	: Imbecility
<i>Safih</i>	: Imbecil
<i>Scholars Of Ḥadith</i>	: Experts on the Science that Deals with the Narrations of the Prophet Peace Be upon Him
<i>Sharī'ah</i>	: Islamic Law
<i>Shāfi'ī School</i>	: The School of Islamic Jurisprudence Founded By Imam <i>Shāfi'ī</i>
<i>Shuf'ah</i>	: The Right of Pre-Emption
<i>Ta'wīl In Uṣūl Fiqh</i>	: Is Taking a Word Away from Its Apparent Meaning
<i>Taṣadaqtu</i>	: I Have Put a Charity
<i>Uṣūl Fiqh</i>	: Principles of Islamic Jurisprudence
<i>Wadī'ah</i>	: Safekeeping of a Deposit.
<i>Waṣiyyah</i>	: The Will
<i>Wajib Kifā'ī</i>	: Obligation Put Upon the Society as a Whole
<i>Wakālah</i>	: Agency.
<i>Waqf</i>	: Bequeathing the Property and Dedicating the Fruit
<i>Waqf Dhurri</i>	: Family Waqf
<i>Waqf Khayri</i>	: General Waqf
<i>Waqf</i>	: Endowment
<i>Waṣiyyah</i>	: Testament
<i>Wājib 'Aynī</i>	: Obligation Put Individuals
<i>Wālī</i>	: Guardian
<i>Wāqif</i>	: The Person Who Dedicates the Waqf Property
<i>Wilāyah</i>	: Guardianship
<i>Wudū'</i>	: Ablution
<i>Yad Al-Hā'iz</i>	: Refers to the Person who Acquires Something Unjustly with the Intention of whether to Possess It or to Use It
<i>Yad Amānah</i>	: Trustee
<i>Yad Ḍaman</i>	: Guarantee
<i>Yamān</i>	: Oath

CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND OF THE STUDY

The people of the central Maghreb, where Algeria is situated, have been very keen to develop *Awqāf* since the arrival of Islam. Uqba Ibn Nāfi' al-Fihri first introduced Islam to the Maghreb. Since then, the community has eagerly contributed to developing social Takaful, especially in terms of *ṣadaqah* and *waqf*. Concerning the culture of *waqf*, like many other Muslim societies, the community started donating *waqf* for the establishment of mosques. At that time, the *Awqāf* of mosques included the shops that helped maintain the academic and cultural roles that mosques traditionally played. *Waqf* then spread to cover lands, gardens, shops, bakeries, and other types of properties that generate income to meet the social, cultural, scientific, and economic needs of life in Algeria (Al-Hāshmī, 2006).

For the Algerian context, the administration of the *waqf* during the Ottoman period was given to the *nāzir* who was appointed by the authorities represented by the Basha or by the judicial authority represented by the Mufti (Ibn Hamūsh, 1997).

The role of the *nāzir* was often one of prestige as was the case of the *Nāzir* of *Mu'asast al-Haramayn* the biggest *waqf* institution at that time and a leading figure in the administration of Algeria because of its religious importance (Masdūr and Kamāl, n.d). In terms of the number of *waqf* donations, Algeria witnessed a sharp increase during the Ottoman period from the 15th to the start of the 16th century. The *Awqāf* increased twelvefold in 1750 from the year 1600, as reported by the Religious Ministry of Algeria (Mudiriyat Al-Awqāf, 1998). This sharp increase in number also

witnessed a variation in the nature and type of *waqf* property. *Waqf* spread to cover properties, agriculture lands, shops, hotels, bakeries, wells, orchards, and others (Mudiriyat Al-Awqāf, 1998).

Mu'asat al-Ḥaramayn al-Sharīfayn was considered to be the oldest *waqf* institution in Algeria (al-Hāshimī, 2006). This *waqf* was donated for the poor of Makkah and Madinah (S'īdūnī, 1986). S'īdūnī reports that some early colonial reports such as the report of Genty De Bussy records that the properties of the *Awqāf* of *al-Ḥaramayn* comprised 1373 properties (1986).

The second largest *waqf* in Algeria was the *waqf* of *al-Jami' al-'Aḍīm*. Alone, this institution in the capital Algiers possessed at that time 550 properties comprising shops, houses, and others (S'īdūnī, 1986). *Mu'asasat Awqāf Subul al-Khayrāt al-Ḥanafīyyah* was established by 1590, and was directed towards meeting public needs such as repairing roads, providing water for agriculture lands, helping people suffering from disasters, people suffering from various handicaps, building mosques, creating learning centres, and buying books for students (al-Hāshimī, 2006).

A fourth institution was the institution of *Awqāf Bayt al-Mal*, which gained considerable support from the Ottomans (Masdūr & Mansūrī, 2006). It used to help the poor and needy, travellers, and orphans.

The fifth institution of *waqf* came into existence after Andalusia fell and was called the *Waqf al-Andalusiyyin*. The institution was created in 1572 to help the Muslims forced to leave Andalusia out of fear of death known as *Maḥākīm al-Taftīsh*. This institution grew to become the cultural, scientific, and religious complex called *Zāwiyyah al-Andalusiyyīn*. Al-Hāshimī says that in the year 1837, the institution's income reached 408072 golden Francs (2006).

The sixth *waqf* was the *awqāf of al-Marāfiq al-'Amah* provided for the public interests. This *waqf* was designated to contribute to the development of technical aspects of the capital Algiers (S'idunī, 1986). It was aimed to build roads, dig wells, and provide water to the public (Masdūr & Mansūrī, 2006).

The seventh institution that flourished and developed during the Ottoman period was *Mu'asasah al-Awqāf*. This institution was donated for military purposes. It is worth to note that the beneficiaries themselves used to appoint the *nāẓir* of the *waqf* accommodation for the soldiers.

The table below shows some of the revenue of a sample of *Awqāf* institutions in the past according to a report referred to the financial director of the French administration, and the currency is the French Franc. The Religious Ministry of Algeria in 1981 revealed the following table:

Table 1.1 Waqf Institutions based Revenue

The year	<i>Awqaf al-Haramayn al-sharifayn</i>	<i>Awqaf Subul al-khayrat</i>	<i>Awqaf al-Andalūs</i>
1836	10571.15	9750.40	
1837	109895.99	13341.27	3870.80
1838	109937.25	13903.70	3978
1839	143068.62	12192.709	4141.24
1840	166495.25	12712	3384.20
1841	177268.91	10615.55	2775.20

Source: *Majalt al-Asalah. Wizarat al-Shuun al-Dinniyah*, number 89/90, 1981

The zeal of the Algerians towards benevolent donation as characterised in *waqf* flourished and spread to cover various aspects of life. It was a positive indicator for the religious, cultural, and social life and an important indicator of the health of the Algerian economy.

However, the French colonial invasion destroyed the *Awqāf* in Algeria. The French colonial forces seized the properties and passed them to the French natives in order to help them settle in Algeria. They also usurped the *Awqāf* properties to serve as colonial administrative centres. It is very important for the history of *waqf* in Algeria to note that the French invaders had breached the contract signed on 5 July 1930, where they gave guarantees and concluded that the *waqf* properties would be protected by the colonial authority. Unfortunately, the colonial forces did not respect the concluded contract between Algeria and France, and soon afterwards, the French army began usurping *Awqāf* properties in Algeria. The ill intentions of the colonial forces were clear in the series of laws they issued. On 8 September 1830, Di Bermon issued a decree which gave the colonial authority the right to take all *Waqf* properties and giving the French army the right to manage the *Awqāf* and all religious properties (Masdūr & Mansūrī, 2006). Two months later, the colonial forces issued a second decree on 7 December 1830. This time the politics of the French army towards the Algerian *Awqāf* became clear and direct, by giving Europeans the right to take possession of the *Awqāf* properties of the Algerians. Two years later, in 1832, the French proposed that all the *Awqāf* properties must be under the control and management of the general director of the state properties. In 1838, they issued the decree of 31 October 1838. This new regulation gave full control to the French over all *Awqāf* properties, causing *Awqāf* in Algeria to lose its legal immunity (Mudiriyyat al-Awqāf, 1998).

After many other laws and decrees including the law of 1 October 1943, which robbed the *waqf* from any protection and allowed Europeans to take possession of the Algerian *Awqāf* properties. The Europeans by the force of this law took possession of the agricultural lands dedicated for *waqf* and which covered 50% of the agricultural

land of Algeria (Mesdūr & Mansūrī, 2006. Mudiriyat al-Awqaf, 1998). The laws that came later were more aggressive and indicative that France wanted to put an end to the *waqf* institution. Blanqui wrote “the properties of the Ḥubūs -as called by the Maghreban people- is an inviolable obstacle to the reforms that can transform the territories occupied by our army to a real colony” (Masdūr, Mansūrī, 2006). In addition, Zeys wrote that “the *Awqāf* contradict the politics of the colonial forces and it opposes the economic principles of the existence of the French army in Algeria” (Masdūr, Mansūrī, 2006).

After independence, the French laws continued to control the administration of state properties including the *Awqāf* according to decree 157-62 issued on 31-12-1962. The legal reforms in independent Algeria do not consider the *waqf* as an economic force nor does it considered it as a social platform for social Takaful. The new politics added much to the crises of the *waqf* in Algeria by introducing new obstacles in reinstating the culture of *waqf* in the social life of Algerians (Masdūr, Mansūrī, 2006).

As for the development of the *waqf* in Algeria as an independent country, the in 1965 Ministry of Religious Affairs and *Awqāf* was renamed, the Ministry of Religious Affairs and the word *Awqāf* was removed. This was an indication that *waqf* will continue to suffer in independent Algeria. Things became worse in 1968 were the *Awqāf* were transformed into a small issue run by a branch of the Ministry of Religious Affairs. For nearly 20 years, the *Awqāf* did not see any development in Algeria, and in 1989 the administration of the *Awqāf* was put under a new branch called *Mudiriyyah al-Awqāf wa al-Sha‘ā’ir al-Dīniyyah*. This was the only bureau to manage the *Awqāf* of 48 districts extended over 2.381 million square kilometres.

One of the major laws that affected the *waqf* in Algeria was the decree 73-71 that calls for the nationalisation of all properties to the state. In this way, many *Awqāf*