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KUDÜS VAKIF ARAZİLERİNİN ÖZELLEŞTİRİLMESİ MESELESİ: BİR ÖRNEK OLAY OLARAK 1950'DEN İTİBAREN BEYTÜLLAHİM VE BEYT CALA ARAZİLERİ

Öz: *Bu çalışma, Kudüs'teki İslami vakıf yönetimi ile Beytüllahim ve Beyt Cala'nın Hıristiyanları arasındaki toprak mülkiyeti üzerine olan uzlaşmazlıkları aydınlatmaya çalışmaktadır. Bu uzlaşmazlık bu insanların ellerindeki arazilerin sahih vakıf olduğunu kabul etmeyi reddetmesi üzerine 20. yüzyıl ortalarında ortaya çıkmıştı. Bu anlaşmazlığı temel alan çalışma, çatışmanın tarihsel köklerini izleyerek bu hukuki konu hakkında alınacak bir mahkeme kararına kadar konuyu açıklamaya çalışmaktadır. Araştırmanın temel soruları ise şunlardır: Bu dönemde taraflar arasındaki anlaşmazlığın kaynağı nedir? Daha önce neden ortaya çıkmadı? Dini farklılığın bu çatışmada bir rolü var mıdır? Veya kişisel ve maddi bir menfaat meselesi midir?*

Anahtar Kelimeler: *Kudüs, Vakıf, Özelleştirme, Toprak Mülkiyeti, Beytüllahim, Vakıf İdaresi, Hıristiyan Nüfus, Sahih ve Gayr-i Sahih Vakıf*

THE QUESTION OF THE PRIVATIZATION OF JERUSALEM WAQF LAND: THE LAND OF BETHLEHEM AND BEIT JALA AS A CASE STUDY SINCE 1950

Abstract: *This study tries to shed light on the conflict between the Islamic waqf administration in Jerusalem and the Christian populations of Bethlehem and Beit Jala over the land ownership in these two cities. This conflict emerged in the mid-twentieth century after these people refused to acknowledge that the land in their possession was an Islamic waqf and not private property. The present study attempts to shed light on this legal issue by tracing the historical roots of this conflict and up to the time it was taken to the court for a decision. The main question in this research is: What were the origins of the dispute between the two*

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parties that broke out at this particular time? Why did it not break out before this date? Did the difference in religion have a role in this conflict? Or was it a matter of personal and material interests?

Key Words: *Jerusalem, Waqf, Privatization, Land Property, Bethlehem, Waqf Administration, Christian Population, Sound and Unsoud Waqf*

Introduction

The Ottoman Tanzimat period witnessed many procedures related to the *waqf* system; new classification systems appeared which were not known before, such as *Maḍbûṭ* (Controlled) and *Mustathna* (Excluded) *waqf*. Moreover, a number of laws and regulations were issued to regulate the Ottoman land system in its two parts: *waqf* and non- *waqf*. Thus, the Ottoman land law came into existence in 1858. This law mentions in its first article the definition and explanation of the various land types in the Ottoman Empire and divides it into five categories, including the *waqf*. Article four of the law states the division of the *waqf* land into two types: *Ṣaḥîḥ* (correct) and *Gayr-i Ṣaḥîḥ* (incorrect) *waqf*. The application of these new concepts started immediately after the issuance of the law. This process did not end when the the region seceded from the Ottoman Empire, but continued during the periods of British Mandate and Jordanian and Israeli rule.

A legal and jurisprudential conflict broke out during the application of these new concepts to some *waqf* properties that were affiliated to ancient *waqf* foundations such as Takiyya Khassaki Sultan *waqf* in Jerusalem — founded by the wife of Sultan Suleiman the Magnificent. Among the endowed *waqfs* for this foundation were the two villages (today, cities) of Bethlehem and Beit Jala, both with a Christian majority. The basis of this dispute was whether these two villages were correct or incorrect *waqf*. These concepts have serious consequences related to land ownership in these areas. The legal conflict has not yet been resolved until today.

The present study attempts to shed light on this legal issue and on the differences in the application of the concepts of correct and incorrect *waqf*. It also discusses the impact of self-interests as well as of

ideological differences in understanding and properly applying these waqf concepts.

The main question addressed by this study is the following: What were the origins of the dispute between the two parties, the Islamic *waqf* administrations and the residents of Bethlehem and Beit Jala, that broke out at this particular time? Why did it not break out before this date? Did the difference in religion have a role in this conflict? Or was it only personal or material interests that lay at the basis of this conflict?

This research for this study is based on an in-depth analysis of the Jerusalem Islamic Court Records, the documents of the Heritage Revival and Islamic Research Institution, and those found in the Archive of the Palestinian Ministry of Waqfs and Religious Affairs. These archives contain a number of records of court cases concerning the Bethlehem and Beit Jala *waqf*. These are also compared with the other *waqf* properties subject to the same formula and involving the concepts of correct and incorrect *waqf*.

The Historical Roots of the Issue

Since the mid-sixteenth century, the territories of Bethlehem and Beit Jala were considered by the Ottoman laws and regulations as an Islamic *waqf* affiliated to the Khassaki Sultan Waqf in Jerusalem. In this context, I do not intend to dwell for long on the Khassaki Sultan Waqf, since this topic has been discussed at great length by many Arab and non-Arab researchers.[1] But I shall give only a quick historical

[1]See Muḥîbish, Ghasân, 2004, *Waqfiyyat Khaṣṣakî Sultan Waqf : Dirâsawataḥlîl*. Unpublished Ph.D dissertation, Ein ShamsUniversity; al-Asalî, Kâmil Jamîl,2009,*Min Âthârunafi Bayt al-Maqdis*. Amman: Wizârat al-Thaqâfa,p. 28-29; p. 9-40;Shûka, Khalîl. 2000. *Târîkh Bayt Laḥîmfî al-'Ahd al-'Uthmânî*, Bayt Laḥim; Myres, David, 2000, « al-'Imara al-'Amira the Charitable Foundation of Khassaki Sultan (959/1552) » in Sylvia Auld (éd.), *Ottoman Jerusalem : the Living City : 1517-1917*, London, Altajir World of Islam Trust, vol. 1, p. 539-583; Singer, Amy, 1997, « The Mülknâmes of Hürrem Sultan's *waqf* in Jerusalem », in Gülru Necipoglu (éd.), *Muqarnas : an Annual on the Visual Culture of the Islamic World*, Leiden, Brill, p. 96-102; Singer, Amy, 2002, *Constructing Ottoman Beneficence : an Imperial Soup Kitchen in Jerusalem*, NewYork, University of New York Press; Singer, Amy, 2003, « The Privileged Poor of Ottoman

overview to make it easier for the reader to understand the historical background of the case. The case itself has not received proper attention from researchers due to a number of various reasons including lack of interest, failure to see the archival documents due to the well-known problems of access related to this issue, or the sensitivity of the topic, leading to a reluctance to uncover new information that could call into question the rightful claims of the residents of Bethlehem and Beit Jala to the land in their possession. Do they have the ownership documents, or is it only traditional occupancy that is meant to serve as proof of their ownership of the lands in question?

The documents of the Khassaki Sultan Waqf indicate that in the month of Sha'ban 964 AH| June 1557, Roxelane, the wife of Sultan Suleiman the Magnificent (1520-1566), who became famous under the name Khassaki Sultan ("the Sultan's beloved") endowed a *waqf* (*Takiyya*) in Jerusalem, near Al-Aqsa mosque, to serve the poor of the holy city.[2] This *Takiyya*, also called *al-'Imara al-'Amira* ("the Charitable Foundation"), included an architecturally important complex that still exists today.[3] The place on which this complex was constructed also housed the *waqf* of the Sultan's wife (*Aqabat al-Takiyya*). This complex

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Jerusalem », in Jean-Paul, Pascual (dir.), *Pauvreté et richesse dans le monde musulman méditerranéen*, Paris, Maisonneuve et Larose, p. 257-269; Peri, Oded, 1992, « *Waqf* and Ottoman welfare policy : the Poor kitchen of Hasseki Sultan in eighteenth-century Jerusalem », *Journal of Economic and Social History of the Orient,* vol. XXXV, part 2, p. 167-185; Sroor, Musa, 2010, *Fondation Pieuses en Mouvement : De la Transformation du statut de Propriété des biens waqfs à Jérusalem 1858-1917*, Aix-en-Provence et Damas, IREMAM et Ifpo; Stephan, ST. H., 1944, « An Endowment Deed of Khasseki Sultan Dated 24th may 1552 », *The Quarterly of the Department of Antiquities in Palestine*, vol. 10, p. 170-194.

[2] For more information about this Sultan, see: Myres, David, 2000, « al-'Imara al-'Amira the Charitable Foundation of Khassaki Sultan (959/1552) » in Sylvia, Auld (éd.), *Ottoman Jerusalem: the Living City: 1517-1917*, London, Altajir World of Islam Trust, vol. 1, p. 540.

[3] Sroor, Musa, 2012, «Dawr al-Awaqâffî al-Tanmiyya al-'Umraniyyafî al-Quds»,v *Majalat Ḥawliyyat al-Quds,* N. 14, p. 68; Sroor, Musa, 2012, « The Role of the Islamic Pious Foundations Waqf in Building the Old City of Jerusalem during the Islamic Periods 637-1917», in Robert Carvais (ed.), Nuts & Bolts of Construction History, Culture, Technology and Society, Paris, Picard, Vol. 2, p. 233.

included a large kitchen that served daily meals to the poor of Jerusalem, to the passers-by, and to those who dwelt close to Al-Aqsa mosque, as stated in the *waqf* document.[4] The kitchen of the complex daily prepared and distributed 2000 loaves of bread. The document also contains an accurate description of the daily meals and their ingredients, with a special focus on Fridays and on the month of Ramadan. On normal days the kitchen offered broth with rice for lunch, and wheat and gravy for dinner. The gravy was made up of the following ingredients: rice, homos, onion, salt, wheat, sour milk. On Fridays and on special occasions meat, honey and rice with saffron were offered. This complex also included a mosque, fifty-five rooms, a khan, two bathrooms, one for males and one for females, and a school that was known by the founder's name. The endowment also identified the mechanism of the work of this foundation in detail, in particular the jobs and the salaries of its employees.[5]

For securing the independence of the Islamic *waqf*, providing protection against interventions of the government and its various branches, and ensuring the functioning of this huge institution, the endower endowed dozens of real estates, most of them in Palestine, to spend on this institution. These properties included *qaryat* (villages) and *mazra'at* (farms), khans, shops, mills, and bathrooms. The document indicated the shares of the *waqf* in these villages and farms. They were either completely or partially endowed, as shown in the following table [6]:

No	**Name of the village / *mazra'a***	**Administrative Dependence**	**Percentage** **100%**
1	Qaryat Amyûn + Mazra'a Qîqba	Tripoli al- Shâm	100%
2	Qaryat al-Ludd	Nâḥiyat al-Ramla	100%

[4] Khassaki SultanWaqfiyya document, *Jerusalem Islamic court records (Sijill)*, No. 270, 1557/964, p. 8-27.

[5] Ibid.

[6] Ibid.

3	*khân*s et *dukkân*s (shops)	Maḥallat al-Shîkh Ṭutmâj / (Tripoli)	100%
4	*Qaysariyya*	Maḥallat Khân al-'adîmî/ (Tripoli)	100%
5	4 *Ṭâḥuna*s (mills)	Qaryat Rashḥîn / (Tripoli)	100%
6	4 *Ṭâḥuna*s	Qaryat Bashnîn / (Tripoli)	100%
7	2 *Ḥammâm*s	Jérusalem	100%
8	Qaryat Bayt Iksa + Mazra'at al-Kharûba	Jerusalem	100%
9	Qaryat Kufr Jins	Nâḥiyat al-Ramla	75%
10	Qaryat Kufr 'Ânâ + Mazra'at Kufr Ṭâb	Nâḥiyat al-Ramla	100%
11	Qaryat Baqî' al-Ḍân	Nâḥiyat al Quds	100%
12	Qaryat Bayt Liqyâ + Mazra'at Nûshif et Rakûbîs	Nâḥiyat al-Quds	100%
13	Qaryat Bayt al-Laḥm	Nâḥiyat al-Quds	75%
14	Qaryat Bayt Jâlâ	Nâḥiyat al-Quds	75%
15	Qaryat al-Kanîsa	Nâḥiyat al-Ramla	100%
16	Qaryat Bîr Mâ'în	Nâḥiyat al-Ramla	100%
17	Qaryat Sbitâra	Nâḥiyat al-Ramla	50%
18	Qaryat 'Inâba	Nâḥiyat al-Ramla	100%
19	Qaryat Sâfriyya	Nâḥiyat al-Ramla	85%
20	Qaryat Kharbatha	Nâḥiyat al-Ramla	100%
21	Qaryat Jindâs	Nâḥiyat al-Ramla	25%
22	Qaryat Yâzûr	Nâḥiyat al-Ramla	100%
23	Qaryat al-Yâhûdiyya	Nâḥiyat al-Ramla	100%
24	Qaryat Bayt Dajan	Nâḥiyat al-Ramla	18.75

25	Qaryat Bayt Shina	Nâḥiyat al-Ramla	100%
26	Qaryat Ranṭiyya	Nâḥiyat al-Ramla	100%
27	Qaryat Na'lîn	Nâḥiyat al-Ramla	75%
28	Qaryat Qâqûn + Mazra'at Dîr Sâlim	Nâḥiyat Nâblus	100%
29	Mazra'at Ḥîthân al-Jamâsîn	Nâḥiyat Banî Ṣa'b / (Naplouse)	25%
30	Qaryat al-Jîb	Jérusalem	100%
31	Qaryat Ḥâra	Nâḥiyat Ṣaydâ	100%
32	Mazra'at Kanîsa	Nâḥiyat Ṣaydâ	75%
33	Mazra'at Ṣûfya	Nâḥiyat Ṣaydâ	100%
34	Mazra'at Jalyûba	Nâḥiyat Ṣaydâ	100%

In memory of his deceased wife, Sultan Suleiman the Magnificent endowed new properties in favor of this institution. These were recorded as an appendix to the original *waqf* document in the Jerusalem Islamic Court. The *waqf* continued to perform its function for the first three centuries of the Ottoman rule of Jerusalem.

The critical developments in the 19th century also impacted upon this important institution when Ibrahim Pasha, son of Mohammad Ali Pasha, the governor of Egypt, wrung Palestine away from the Ottoman Empire in 1831. Mohammad Ali's anti-*waqf* policy, launched in Egypt, culminated in the confiscation of all the *waqf* properties in Palestine, including the Khassaki Sultan Waqf. This move put an end to this charitable institution, since its revenues had been completely drained by this new policy. It should be noted that these *waqf* properties were given back to their original owners after the restoration of Palestine and Jerusalem to the Ottoman Empire in 1841. The Ottoman government continued the policy of the Egyptians, but upon the protest of the people of Jerusalem, especially the beneficiaries of the *waqf*, the Ottoman authorities were forced to pay an annual sum

of 1150 Turkish Lira as a substitute for the *waqf* revenues they had confiscated.[7]

After the British occupation of Palestine in 1921, the Mandate authorities handed the *waqf* institution over to the Supreme Muslim Council, which the British government had established in 1921 with the Mufti of Palestine, Ḥaj Amin Al-Ḥusaynî, at its head.[8] The Mandate authorities followed the same Ottoman policy towards the *waqf*, by allocating a lump sum of 2950 Palestinian pounds annually to run its kitchen. This sum, of course, was paid in return for controlling the revenues of all the villages affiliated to the *waqf*. These revenues were estimated in 1948 as 12 thousand Palestinian pounds in a year.[9] After Jerusalem came under the control of Jordan in 1948, the *waqf* was run by the Jordanian Ministry of Waqfs, like all other *waqf*s in Jerusalem and the West Bank, and remained as such after the Zionist occupation of the historic Palestine in 1967. The bonds between the Jordanian government and the *waqf*s of Jerusalem did not break until the formation of the Palestinian National Authority in 1994 and the establishment of the Palestinian Ministry of Waqfs.

The Khassaki Sultan Waqf between Traditional Jurisprudence and Modern Legislation: Correct or Incorrect?

One of the most important conditions unanimously approved by the jurists concerning the correctness of the *waqf* is that the *waqf* should be known to the endower at the moment of signing the *waqf* contract and it also should be owned by the endower when he or she endows such a *waqf*; otherwise the *waqf* is considered incorrect.[10] But with the notable spread of the phenomenon of *waqf* in the late Ayyubid and especially Mamluk periods, and the ensuing establishment of

[7] Sroor, Musa, Fondation Pieuses en Mouvement : De la Transformation du statut de Propriété des biens waqfs à Jérusalem 1858-1917, Aix-en-Provence et Damas, IREMAM et Ifpo, 2010, p. 302.

[8] al-Asalî, Kâmil Jamîl, op. cit. p. 28-29.

[9] Ibid.

[10] 'Ashûb, Abd al-Jalîl, 1935, *Kitâb al-Waqf*, 2 edition, al-Qâhira, Maṭba'at al-Rajâ', p. 21-23.

many foundations such as mosques, schools and *zawiyya*s (places for Sufis) by the princes and sultans, it was necessary to provide these institutions with continuous economic resources after their death. Thus, it became necessary for the princes and sultans to endow vast agricultural lands with villages and farms as sources of revenue. However, the problem here issued from the jurisprudential provisions that required the ownership of the property by the *wâqif* himself or herself, especially since the rulers did not differentiate between their own properties and the properties of the state treasury. Due to the huge influence that this group enjoyed in the local society, they did not abide by this jurisprudential condition and created hundreds of *waqf* foundations funded by agricultural land belonging to the state treasury. This situation created a dilemma for the state scholars who were required to develop relevant jurisprudential rules to justify this illegal activity, a task they could not refuse.

In the face of this dilemma, senior Muslim religious scholars (*'ulamâ'*) of Syria (*al-Shâm*) created what was named Al-Irṣad or Al-Takhṣîṣât Waqf. The scholars defined this kind of *waqf* as follows:

> The Imam endows a land from the *Bayt al-Mâl* (State Treasury), which is known to be a state land for the public interest with facilities like mosques, hospitals and schools, or endows such a land to those who have a right to the *Bayt al-Mâl*, such as scholars, judges, the poor and the needy. But this is not a real *waqf* because of the lack of the condition of ownership in it… and it can't be invalidated or returned as a property to the *Bayt al-Mâl*, or its sources spent for other purposes than those set at the beginning."[11]

Thus, the scholars legalized the endowment of state property by the sultan or the prince.

[11] My translation, 'Ashûb, Abd al-Jalîl, *op. cit*., p. 24; al-Ḥusaynî, MuḥammadAs'ad, 1982, *al-Manhal al-Ṣâfifî al-WaqfwaAḥkamah*, al-Quds, al-Maṭba'at al-waṭaniyya, p. 15, 30.

It should be noted from studying the endowments of Palestine in general and Jerusalem in particular that the most important *waqf* foundations in the Old City of Jerusalem were established by the Mamluk and Ottoman princes or sultans, and the documents of their *waqf*s do not indicate their ownership of the endowed *waqf*, in contrast to all other endowments. It should also be noted that there were about 160 villages in Palestine that were endowed by these princes and sultans on the Jerusalem *waqf*.[12] These villages and farms continued to be considered a *waqf* until the occupation of Palestine by Ibrahim Pasha in 1831, when he confiscated the *waqf* and abolished the prescription of *waqf* of these villages and farms, returning them to the state treasury. One of these was Khassaki Sultan Waqf. After the return of the Ottomans, the *waqf* institutions retained the prescription of *waqf* despite the confiscation of their revenues in continuation of the policy of the Egyptian era. But this procedure was not in line with the jurisprudential rules that were prevailing in the Ottoman Empire, which guaranteed immunity for these properties against the state and its policies. Therefore, it was necessary to issue new laws and regulations that legitimized the process of confiscating and owning these properties by the state. If the properties in question continued to be *waqf*, this would not only deprive the state from the revenues they brought, but also from extending the state's control over the people benefiting from these *waqf* properties, including the notables of the holy city or the peasants who were subject to the authority of the notables rather than the state.

In 1858, in the context of its reform policy, the Ottoman Empire issued the land law, or what was known as the Land Registry Act and its subsequent laws, which illustrated and complemented its gaps. With this new law came a justification for the state's policy and procedures regarding the *waqf* institutions and properties established by princes and sultans over the preceding five centuries. The first article of this law divided the Ottoman Empire land into five categories: owned land, *miri* (state) land, *waqf* land, abandoned land

[12] Sroor, Musa, *Fondation Pieuses en Mouvement,* op. cit., p. 184-194.

and uncultivated land.[13] Article 4 of the Act defined what was meant by the *waqf* land as follows:

> The waqf land is divided into sections. The first section is the land that is rightly owned and has become *waqf* according to the Islamic religion. Thus, the ownership of such land and the rights of its disposition refer back to the *waqf* itself and is not subject to legal transactions. The second section is the land taken from the *miri* land and endowed by the sultans or endowed by others with the permission of the sultans. The revenues of such land go to a party related to the state authority. The land endowed in this way is considered incorrect *waqf*, and most of the land endowed in various districts is of this type. Such land is owned by the *Bayt al-Mâl* and therefore subject to legal transactions.[14]

In this article, the concepts of correct and incorrect *waqf* emerge for the first time, and it is understood that the *waqf* owned by the endower is considered a correct *waqf*, not subject to the new land laws, while the *waqf* endowed by sultans and owned by the *Bayt al-Mâ*l is considered incorrect *waqf*; meaning it did not qualify to be a *waqf* and was returned to the *Bayt al-Mâl*. That is, its ownership reverted to its status before being converted into *waqf*. Thus, it was subject to the provisions of *miri* land.

The question here is, what about the properties of the Khassaki Sultan Waqf? Were they classified as correct or incorrect *waqf*? Through searching in the archives, I found a decree from the sultan to the Ottoman governor of Jerusalem named Thurayya Pasha dated mid-Jumada I, 1275 AH / December 21, 1858, which indicates that the properties affiliated to Khassaki Sultan *Takiyya* found in al-Wad in Jerusalem were confiscated by the state treasury. Here the decree does not refer to the land affiliated to the *waqf*, but to some of properties located inside the old city of Jerusalem. It should also be noted that

[13] *The Ottoman Land Law for the year 1858*, article one.
[14] My translation, *The Ottoman Land Law for the year 1858*, article four.

most of the villages affiliated to the *waqf*, after this law, became subject to the rules and the regulations of *miri* land. It was permitted for the users to register the lands in these villages in their own names, or in other words, to turn them into their properties, whenever these were classified as incorrect *waqf*. The only exceptions were the lands of the villages of Bethlehem and Beit Jala, which were still considered as belonging to the Khassaki Sultan Waqf and were subject to the *waqf* provisions that allowed leasing these lands to the residents of Bethlehem and Beit Jala on a special lease known as *al-Ḥikr*. This allowed the tenant to rent the property for an indefinite period in order to build on it or to plant trees in it. This kind of contract gave the tenant (*mustaḥkr*) the right to own the buildings on the rented *waqf* land as long as he paid the fare of the land. The *waqf* did not have the right to nullify this contract and expel the tenant from the land as long as his buildings remained standing and as long as he paid the fare. The *mustahkr* had the right to do whatever he wanted with the buildings or the trees in terms of sale or inheritance, as if he were the owner.[15]

The slow implementation of land registration in Palestine according to the new classifications in the Land Act of 1858 lasted for dozens of years and did not end with the exit of the Ottomans from Palestine, but remained in place throughout the British Mandate period. This process created a problem in reclassifying the *waqf* villages as correct or incorrect *waqf*. The re-registration of land in the government departments according to the new classification system was not carried out in a regular and comprehensive manner. This was due to the fear of the users of the land that they would have to pay taxes to the state and get conscripted in the army (conscription being linked with land registration). This prompted some people to register their lands under the names of wealthy landowners or other elites in the Palestinian society. The second issue was the dispute about the interpretation and classification of *waqf* land (as correct or incorrect *waqf*), which took place between the Waqf and the Land Registry Departments. This disagreement was due primarily to the absence of

[15] About the *Ḥikr* see: Qadrî Bâshâ, 1928, *Qânnûn al-'adlwal-inṣâflil-qaḍâ' 'alâMushkilât al-awqâf*, al-Qâhira, article 3, p. 147; al-Ḥusaynî, MuḥammadAs'ad, *op. cit*., p. 229.

the original *waqfiya* that indicated the ownership of the *waqf*. Moreover, this disagreement was due to the failure of the *waqf* department in registering the correct *waqf* properties in the Land Registry records.[16]

Updating the jurisprudential rules concerning the *waqf* during the Ottoman Tanzimat period created a serious problem in the understanding and interpretation of the new provisions by the stakeholders, there was a conflict between those who would benefit from the continued validity of the ancient inherited jurisprudential rules, and those who would benefit from the modification of these provisions. This problem resulted in legal disputes that broke out after the withdrawal of the Ottomans, who would have been capable of interpreting the confusing articles in the laws they had issued. The British who replaced them in Palestine did not only fail to understand these laws and regulations, but also exploited them to serve their own interests and policies.

Khassaki Sultan Waqf between Recognition and Denial

As noted earlier, Sultan Hürrem had endowed 18 out of 24 *qiraṭs* (with 24 *qiraṭs* amounting to 100% of the land of Bethlehem and Beit Jala) in favor of her *Takiyya* in Jerusalem. The other 6 carats were endowed by the Mamluk sultan Qaytbây, "with his own money" as claimed by Jerusalem Waqf Department, and this was registered in the Khanqani notebook in Istanbul. Therefore, the entire land of Bethlehem and Beit Jala became "correct *waqf*" as claimed by the Jerusalem Waqf Administration. The residents of Bethlehem and Beit Jala used to benefit from the land of these cities as tenants of the *waqf*, which became *hikr* for them as they paid an annual fare. All the *hikr* contracts emphasized that the land rented by them was affiliated to Khassahi Sultan. Since the people of Bethlehem and Beit Jala felt for this reason that they were only tenants and not owners of the land, they repeatedly tried to get rid of the *hikr* contract.

[16] *The Archive of Heritage Revival and Islamic Research Institution*, Abû Dîs, Ministry of Palestinian Waqfs, file no., 2/64/1.7/2/3/70.

During the British Mandate, an attempt was made to prove that the land of Bethlehem and Beit Jala was not a correct *waqf*, but it failed. Another lawsuit was filed by the Mandate Land Court in this regard, and the court issued a decision that the whole of the land of Bethlehem and Beit Jala was correct lslamic *waqf*.[17] When the West Bank and East Jerusalem came under Jordanian rule in 1948, these attempts to deny the recognition of the land as belonging to the *waqf* were renewed by the residents of Bethlehem, since they preferred to own the land and not pay a fare for it. In 1952, one of Bethlehem residents named Ḥanna Issa Qawas filed a lawsuit to the Jerusalem Court of First Instance, registered under the number 52|110, to nullify this *waqf*. But he failed in his lawsuit and the court ruled that the land of Bethlehem and Beit Jala was a correct *waqf*.[18] However, this attempt was not the last.

In June 1956 Mr. Salim Jiryis Raba' and others from Bethlehem filed a lawsuit against the Attorney General and the officers of Jerusalem and Bethlehem *waqf* officers as well as against the General Manager of *waqf*s to abolish the *hikr* and to correct the documents related to the land in their possession as well as to nullify the designation of the land as *waqf* land. The plaintiffs requested the Waqf Department to stop asking them to pay the *hikr* fare until the court arrived at a decision. On in 15.7.1956 the court agreed to the request that the *hikr* should be stopped, but heard only one of the parties.

In response, the General Manager of Waqfs in Jerusalem filed a request asking to abolish the decision of stopping the *hikr* payments. According to him, ceasing to pay the *hikr* was not a light matter and it would expose the Waqfs Department to great damage. The court heard the request in the presence of the two parties. Based on this new development, the plaintiff –the General Manager of Waqfs through his attorney- provided evidence to prove that in the past the defendants used to pay the *hikr* for the claimed land. Mr. Ahmad Hosni Abu-

[17] *The Archive of Heritage Revival and Islamic Research Institution, op. cit.,* file no., 2/64/1.7/2/3/70.

[18] *The Archive of Heritage Revival and Islamic Research Institution, op. cit*., file no., 2/53/04 /3/70.

alsoud, one of the *waqf* employees, testified in this regard, saying that the thirteen defendants used to pay the *hikr* for their lands in the previous years, and produced 19 receipts that show the money paid by the defendants to the Waqf department for the years 1953 and 1954.[19]

The defendants also brought their evidence, which was mainly the testimony of Mr. Salaḥ al-Dîn al-Ḥusaynî, the deputy of the official responsible for registering the lands in Jerusalem. He testified about the method followed by the Department of Land Registration in the renewed registration of the lands of Bethlehem and Beit Jala. He said:

> During the British Mandate, the Department used to send a notification to the Waqf Department, telling it to charge the *hikr* if it became clear from the documents that the property was *waqf*. But if there was nothing in the documents indicating that the property was *waqf*, the Department of Land registration did not send any notifications, and this applied to the transactions of the renewed registration.[20]

The witness pointed out that at the time of the case

> Instructions were issued one and a half years ago to the registration officials, warning them not to register any land or to do any transaction concerning Bethlehem or Beit Jala lands unless they sent a notification to the Department of Waqf indicating that they had received the *hikr* fare. He also testified that a lot of the land in Bethlehem and Beit Jala was privately owned and miri.[21]

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[19] My translation. *The Archive of Heritage Revival and Islamic Research Institution, op. cit*., file no.,2/64/1.7/2/3/70 .

[20] My translation. *The Archive of Heritage Revival and Islamic Research Institution, op. cit*., file no.,2/64/1.7/2/3/70 .

[21] *The Archive of Heritage Revival and Islamic Research Institution,* op. cit., file no. 2/64/1.7/2/3/70.

After the pleadings came to an end, the court made its decision on 19.2.1957. It read as follows:

> The court finds from the evidence that the defendants used to pay *hikr* to the Waqf Department whether they had transactions or not, as is clear from the receipts shown. The court also sees that the land is registered in the Department of Land Registration as *waqf* and requires *hikr* payments. Thus, *hikr* must be paid until a decision is issued to stop it. We decide therefore that the Waqf Department has the right to get the *hikr*, and we also rule to abolish the court's previous decision dated 15.7.1956. But no *hikr* is going to be paid for the lands not indicated in the documents indicating it to be a *waqf*. The court also rules that the plaintiff has the right to be compensated with the fees and expenses as well as with five Jordanian dinars for the lawyer's fees.[22]

The case did not with this decision, and it was not the final attempt to change the status quo. In the month of April in 1958, the people of Bethlehem and Beit Jala moved against the Waqf Department, trying to prove once again that Bethlehem and Beit Jala were not correct *waqfs*. They used different methods in this attempt, according to the *waqf* lawyer Mr. Abdul-Ghani Kamlah in his letter dated 23 April 1958 and directed to the General Controller of Waqfs in Jerusalem. Fourteen people from Bethlehem and Beit Jala filed a new lawsuit against the Waqf Department to the Jerusalem Court of First Instance and authorized lawyers for this purpose. The Department of Waqfs claimed in front of the court that the land of Bethlehem and Beit Jala was a correct *waqf*, and it relied in its defense on the document of the Khassaki Sultan *waqf* and others that proved that the residents of

[22] My translation. *The Archive of Heritage Revival and Islamic Research Institution,* op. cit., file no. 2/56/1.8/2/3/70.

Bethlehem and Beit Jala had been paying the *hikr* fares. However, the court did not decide in one session and kept postponing the verdict.[23]

The people of Bethlehem and Beit Jala did not wait passively for the final decision of the court against the Waqf Department. In a letter dated 20.11.1958 to the military governor of Jerusalem and Hebron, the Deputy General Manager of Waqfs in Jerusalem, Mr. Abdul-Ghani Kamlah, reported a verbal and physical attack on the levy collector of the *waqf*. He filed the following complaint against them:

> In 19.11.1958, the Jerusalem Waqf official, accompanied by the levy collector Mr. Shakîb Al-Daqqâq and the policeman Fahmî Al-Ja'barî from Bethlehem, went to the house of ʿAṭṭallah Sam'ân Al-ʿAraj to get the due *hikr*. As they were approaching his house, his wife stepped out and asked them to bring Al-Mukhtâr (head of the village) and her brother Ḥanna Sâbâ Al-ʿAraj. When the policeman and the levy collector returned, Ḥanna Sâbâ Al-ʿAraj attacked the *waqf* levy collector and started slapping him on the face, while the others attacked the policeman and tried to take away his rifle. In the meantime, Ḥanna Sâbâ Al-ʿAraj was cursing the employees, the state and the chief judge, and insulting them with obscenities in front of the audience present there.[24]

After relating the incident, the lawyer of Abdul-Ghanî Kâmlah proceeded to ask the military governor of Jerusalem and Hebron to investigate this complaint and bring the accused to trial by military means. He contended that the personnel of the Waqf Department

[23] *The Archive of Heritage Revival and Islamic Research Institution, op. cit*., file no. 2/64/1.7/2/3/70 .

[24] My translation.A letter from the attorney of the General Manager of Awqaf in Jerusalem Abdul-ghaniKamleh to the military governor of Jerusalem and Hebron: *The archive of Heritage Revival and Islamic Research Institution,* op. cit., file no. 70/3/2/1.7/64/2.

would not be able to collect the due *hikr* money from the residents of Bethlehem unless they felt they were protected by the government.[25]

The pleadings continued between the people of Bethlehem and Beit Jala and the Waqf Department over the question whether the lands of Bethlehem and Beit Jala were correct or incorrect *waqf*. On 18.3.1964 the people of Bethlehem, represented by Salim Jiryis Raba' and another seven people, filed a lawsuit against the General Manager of Islamic Waqfs. They demanded the issue of a verdict stating that the ownership of the properties in their possession was a *takhṣîṣât waqf* and not a correct *waqf* that had to pay the *hikr*. They also asked for a verdict confirming that these lands were their own private property. The defendant, the *waqf* attorney, opposed this indicating that the lands in question were part of the Khassaki Sultan and Sultan Qaytabay *waqfs*, as registered in the Turkish Khaqanî notebook issued in the 81st fiscal year according to the permanent registration documents. At the end of the pleadings, the court arrived at the following resolution:

> The court finds itself obliged to consider the *waqf* correct, as mentioned in the registration documents, until proven otherwise. In that case the *waqf* would be turned into a *takhṣiṣat waqf*. The court did not see the plaintiffs bring any evidence that proves that the *waqf* is incorrect. Therefore, the *waqf* is correct.[26]

The plaintiffs, Salim and his group, did not accept this resolution and their attorney filed an appeal to refute the decision, pointing out that the court was mistaken in failing to deal with all the legal points they had raised, and the following in particular:

- The court did not deal with the legal consequences caused by the Lands Law for the ancient *waqf*.
- The court did not consider the Land Registry documents on the properties of Bethlehem and Beit Jala, which were

[25] Ibid.

[26] My translation. *The Archive of Heritage Revival and Islamic Research Institution,* op. cit., file no. 70/3/2/1.7/64/2.

registered either as privately owned or as a *waqf* affiliated to Khassaki Sultan before 1331 Maliyya / 1915, which completely negates the possibility of considering these properties as correct *waqf*.

- The court did not consider the legal consequences of the fact that the disputed properties and the other lands of Bethlehem and Beit Jala had not been registered as affiliated to the *hikr* system, as indicated in the attached documents.
- The court did not deal with the legal consequences of the payment of the taxes raised on property.
- The court did not deal with the legal and pragmatic claims that were raised about the possibility that in fact there are not two types of *waqf* (correct and incorrect).[27]

In response to this appeal, the *waqf* attorney requested that the court reject the appeal and support the decision of the Court of First Instance regarding the verdict. He refuted the claims of the appellants in the following words: "How can evidence be presented now, after more than 400 years, that neither Khassaki Sultan nor Qaytbay owned what they endowed?" He justified this by saying that the plaintiffs were bringing witnesses who stated that to their knowledge Khassaki Sultan and Qaytbay had not owned these *waqf* properties. The evidence included documents that proved the proprietorship of the ancestors of the appellants over the lands in question through the previous 400 years, by virtue of inheritance sale. He also wondered how the appellants could expect that the court would decide a case in defiance of a verified Islamic verdict found in the Islamic Court of Jerusalem records, which went back 400 years and stated that Khassaki Sultan owned the lands of Bethlehem and Beit Jala. He also inquired into how a court could abolish a previous legal verdict without the appellants providing any evidence to the contrary. He also stated that the appellants were not allowed to file a lawsuit simply because they had already practically acknowledged the correctness of the *waqf*: The evidence presented by the *waqf* proved that all the appellants had already paid the *hikr* money on the claimed lands. Accordingly, they

[27] Ibid.

could not claim that it was an incorrect *waqf*, according to the article 50 of the Evidence Law.[28]

The pleadings came to an end at this point, and a final decision was postponed without appointing a specific date so that the court would have sufficient time to study all the details involved. The case has been in a perpetual state of suspension since the end of the Jordanian rule due to the Israeli occupation of the West Bank and Jerusalem in 1967. The sole development was a suggestion made in 1966 by the Governor of Jerusalem, who proposed a compromise between the two parties. It involved the replacement of the *hikr* by a lump sum paid by the residents of Bethlehem and Beit Jala to the Department of *waqf*. It is clear from the letter of the *waqf* attorney, Ibrahim Baker, dated 10 June 1966 and sent to the president of *waqf* and Islamic Affairs Council, that the Council had tentatively agreed to conduct negotiations in this regard and to form a committee representing the *waqf*. The people of Bethlehem and Beit Jala, in turn, established a committee comprised of the two mayors and their deputies as well as the notables of the two towns. The two committees would conduct negotiations under the auspices of the Governor of Jerusalem.[29]

Conclusion

The legal and jurisprudential controversy and conflict between the *waqf* and the people of Bethlehem and Beit Jala has not come to an end until today, and needs, in my opinion, a political decision in the absence of a fair judicial one. But, if we go back to the origins of the case in historic precedent, as apart from the religious conflicts and personal interests, this can be done by returning to the original Khassaki Sultan Takiyya Waqf document itself. The analysis of this document leads us to the conclusion that the *waqf* document divides the *waqf* properties into two parts. Regarding the first part, it clearly

[28] Ibid.

[29] A letter from *waqf* attorney Ibrahim Bakir sent to the president of *Waq*fs and Islamic Affairs Council dated 10.6.1966, *The archive of Heritage Revival and Islamic Research Institution*, op. cit., file no. 70/3/2/1.7/64/2.

indicates that the endower Hürrem Sultan (Roxelana) owned some properties that she now endowed in favor of her foundation, as supported by the legal documents. As for the second part, it mentions another group of *waqf* properties without any indications as to the claims of the endower to them. The document reveals clearly that the real estate belonged to the endower herself. The relevant passage reads as follows:

> Her highness endowed the entire village of Bâmûn in the district of Tripoli with the farm called Baqbaqa, the entire village named Lud in the district of Ramlah, the entire share, estimated at 2500 dirham, from the tenth of the village named al-Jîb, in the district of Jerusalem, according to the noble sultan's document which clearly indicates their borders.[30]

This excerpt clearly proves the legal claims of the endower to the above-mentioned properties. The document then mentions the rest of the properties endowed to the *Takiyya*, among which are Bethlehem and Beit Jala, although it fails to indicate whether the endower actually owned these villages and properties:

> …and including the entire share of the village of Bethlehem, amounting to 18 of 24 *qirât*s, the borders of which are known to the neighbors, and including the entire share of the village of Beit Jala, amounting to 18 out of 24 *qirât*s, the borders of which are known by its inhabitants; this is in addition to the facilities, roads and tracts that are part of these lands. These properties are considered correct *waqf*, as confessed by Ja'far Aghâ bin Abdul-Rahîm.[31]

Hence, we can see that there is no indication about the legal claims of the endower to these properties, unlike the case of the first part of the properties. Accordingly, based on the jurisprudential classifications and legal application of the concept of correct and incorrect *waqf*, we can say that the villages of Khassaki Sultan Waqf

[30] My translation. Khassaki Sultan Waqfiyya document, op. cit., p. 18-27.
[31] My translation. Khassaki Sultan Waqfiyya document, op.cit., p. 18-27.

were divided into two parts. The first of these included what was proved to belong to the endower herself, and it was therefore considered a correct *waqf* subject to the terms of the endower rather than to the laws of the state. The second included what was *not* proved to belong to endower, and was therefore considered an incorrect *waqf*. This invalidated the *waqf* status of these properties according to the Land Law of 1858, which stipulated that such properties should be returned to the state and their current users should be allowed to own them. This applies not only to Bethlehem and Beit Jala, but to all the villages mentioned in the *waqf* document, other than those listed in the first section of the document. It can be simply said that the lands of Bethlehem and Beit Jala are incorrect *waqf*, and what applies to the other *waqf* villages classified as incorrect *waqf* and owned later by their users should equally apply to them as well. Here, I am referring to all the villages listed the *waqf* document and inhabited by Muslims, such as Yâzûr, Ni'lin, Bayt Dajan, Qâqûn, Baytt Liqiy, Bayt Iksa, Baytt Ḥanîna, ʿAnnaba and others. In this case, both parties committed errors in analyzing the contents of the *waqf* document, and each of them interpreted its contents according to its own interests. The first party, represented by the Waqf Administration, took the first part of the document that stated the claims of the endower to some of the properties mentioned in the *waqf* document, and generalized it to all the properties mentioned there. The second party, represented by the people of Bethlehem and Beit Jala, assumed that all of what the Sultan had endowed was incorrect *waqf*, and thus the endowed lands of Bethlehem and Beit Jala did not belong to the endower. Their purpose in this was to justify the legitimacy of their claims to the lands of these two cities and to find legal justification for not paying the land taxes for the lands in their possession like the rest of the inhabitants of the villages mentioned in the *waqf* document.

Finally, we can say that the refusal of the Waqf Administration in Jerusalem during the different periods- Ottoman, British, Jordanian, and Israeli- to consider the lands of Bethlehem and Beit Jala incorrect *waqf*, like the other 30 villages affiliated to the same *waqf*, could be attributed to the fact that the beneficiaries of this *waqf* were non-Muslims. For this reason, in my opinion, the concepts of correct and

incorrect *waqf* were not correctly applied to the properties they used. In addition, the refusal of these villages to continue paying their dues in return for their use of the properties of the *waqf* villages, despite their documented historical commitment for four centuries from 1557 to 1953, appears to be a desire to acquire these properties by benefiting from the political change in Palestine that occurred when Jerusalem came under the Jordanian administration between 1948-1967.

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Appendix 1

المملكة الأردنية الهاشمية

دائرة أوقاف القدس الشريف

صندوق البريد : — ٤

التلفون : — ٣١٣

الرقم : أ/ ٢٦/ ١/ ٢٤٠١

التاريخ : ١٥/ ٧/ ١٩٥٦

(٣٠)

٧٧٠٦
٢/ م/ ٥٦/٣٢٤
١٩٥٦/٧/١٥

مأمور الاوقـــــاف

القدس

الاشارة — كتابكم المؤرخ في ٩/ ٢/ ٥٦ رقم ٢٢٦ الموجه الى مراقب الاوقاف العام ونسخة عنه الي بصدد اراضي الوقف في بيت لحم .

بما انه ثبت لدى محكمة التمييز ان اوقاف خاصكي سلطان هي وقف صحيح ، وبما ان قيود التسجيل التي يحملها المحتكر تثبت بان الارض تابعة للحكر والحكر لا يكون الا في الوقف الصحيح ، فلا ارى مانعاً من استيفاء بدلات الاحكار المستحقة بناء على طلب مأمور التسجيل ، ومن ثم رفع بدل الحكر بالنسبة للقيمة المخمنة .

على ان يلفت نظر مأمور التسجيل الى تصحيح سند الطابو بابدال كلمة مسـ... بوقف صحيح ، وذلك عند تصحيح الحدود ، وان تطلبوا اليه الرجوع الى التسجيل السابق لتاريخ التسجيل الاخير الواقع في ١٨/ ٥/ ١٩٤٢ .

ان استيفاء بدل الحكر يؤيد دعوانا ولا يجوز التقاعد عن استيفائه لان تأدية المحتكر ما هو مستحق بذمته من بدلات احكاره اعتراف منه بان رقبة الارض موقوفة وقفاً صحيحاً . فينبغي استيفاء الحكر والعمل بما اسلفنا اعلاه .

والسلام عليكم .

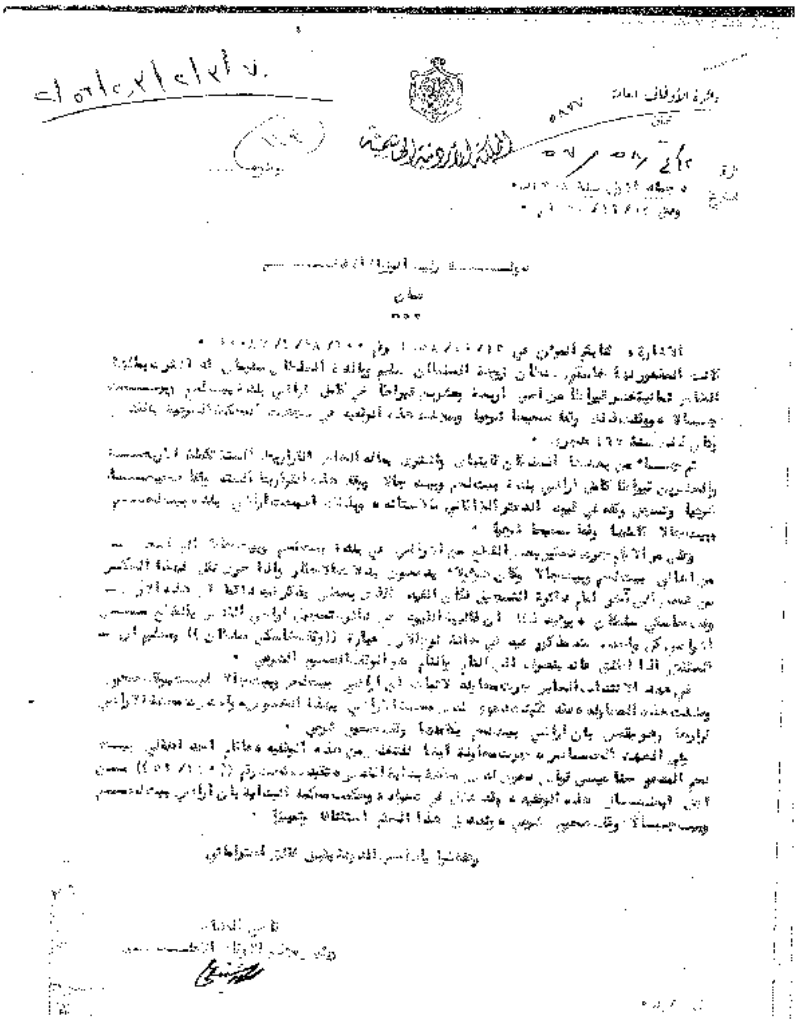
قاضي القضاة

ورئيس مجلس الاوقاف الاعلى

(محمد الامين الشنقيطي)

صورة طبق الاصل

Appendix 2



Appendix 3

المملكة الأردنية الهاشمية

دائرة أوقاف القدس الشريف

الرقم ....

التاريخ ....

الرقم المتسلسل	اسم دافع الحكر	رقم حكار الملف	المبلغ المدفوع بالفلس/دينار	رقم الوصل	تاريخ الوصل	السنة
١	سليم جريس إبراهيم رباع	٤٧/٩١	٢٫٨٠٠	٤٥٠٣٩	٥/٥/٩٤٥	٩٤٥–٩٤٨
٢	ناجي سليمان العرجا		١٫٩٠٠	٤٨٦٨	١٤/٣/٩٤٤	٩٤٤–٩١٠
٣	" " "		١٫٥٠٠	٥٣٣٦١	١٥/٥/١٤٥	٩٤٥
٤	[illegible] عياد	٣٤/٤١	١٫٧٠٠	٥١/٤١٧٥٥	١٧/٥/٩٤٤	٩٤٤–٩٣٩
٥	جادالله محسن نزال	١٤/٣٢	٣٫٣٣٠	٥١/٤٨١٢٩	٢٥/٧/٩٤٣	٩٤٣–٩٣٩
٥	متري وهبة الله أولاد سعفان الأعرج	١٩/٣٨	١٫٨٧٥	٤٤/٤٨١١٧	٢١/٧/٩٤٢	٩٤٣–٩٤١
٥	نقولا توفيق [illegible]	١٠٠/٣٩	١٫٦٤٤	٥٢/٤٨١٩٩	٢٦/٧/٩٤٣	٩٤٣
٦	جادالله محسن نزال	١٤/٣٢	١٫٣٣٣	٤٥١٥٣	٢٠/٣/٩٤٥	٩٤٥–٩٤٤
٧	سلامة سالم متري	٣٨/٤٩	١٫٩٨٠	٢٨/٤٤٨١٦	١٠/٦/٩٤٥	٩٤٥–٩٣٧
٧	سلامة سالم متري	٣٨/٥٠	١٫٢٩٠	٢٧/٤٤٨١٨	٧/٢/٩٤٥	٩٤٥–٩٣٧
٨	سالم ميخائيل جرار	٣٦/٣٩	١٫٩٠٠	٦٣/٤٨٦٦٤	١٥/٦/٩٤٤	٩٤٤–٩٤١
٩	" " "	٣٦/٣٤	١٫٥٥٠	٧٢/٥٨٧٤٠	٢١/١٢/٩٤٤	٩٤٥–٩٤٤
١٠	ميخائيل جرار	٣٥/٦٦	١٫٨١٥	١٤/٥٨٠٤٤	٢١/١٢/٩٤٥	عن سنين سابقة لغاية ٩٤٥
١١	سالم ميخائيل جرار	٥٦/٦٨	١٫٧٣٤	٧٣/٥٨٧٤١	٢١/١٢/٩٤١	٩٤٨–٩٤١
١٢	حنا عبدالله كردوش	٢١/٧٨	١٫٢٥٠	٤١١١	١٢/٦/٩٥١	٩٥١
١٣	متري عطاالله سعفان الأعرج	١٤١/٣٣٢	١٫٨٠٠	٤٥٢٤٤	٧/٤/٤٥	٩٤٥–٩٤١
١٤	حنا عيسى [illegible]	١٢١/٣٥٤	١٣٫٧٣٠	٤٧/٥٥٧٧٣٣	٣٠/٦/٤٦	٩٤٦–٩٣٣
١٥	موسى أبو عطاالله	١٧١/٤٠/٣٣٣/١٢٥	٨٫٦٨٠	٨٩٨٨٧	٢٦/٧/٥٥	٥٥/٥٤–٩٤٧
١٦	نقولا إبراهيم [illegible]	٣٤٤/٣٦١/٣٢٨/٥٨	٢٫٥١٠	١١/٥٣٧٦١	١٣/١٠/٩٥٠	٩٥٠–٩٤٠
١٧	" " "	٣٤٣/٥٨/٢٦٦	٤٫٣٥٠	٨٤٥٥١/٨٤٥٥٦	٦١/٨/٥٢	٩٥٢–٩٤٨
١٨	يوسف يعقوب [illegible]	١١٦/٣٠٢	٣٫٥٧٥	٤٥٥٦٦	//٣/٤٧	٩٤٣–٩٣٠
١٩	" " "	١١٦/٣٠٧	٢٫٣٠٠	٥١٧٣٣	١٤/١٢/٤٧	٩٤٧–٩٤٤
٢٠	" " "	١١٦/٣٠٧	١٫٢٥٠	١/٦٦٤٨٦	٣/٩/٤٨	٩٤٨
٢١	أنطون إلياس يوسف شحادة	١٢١/٨٣	١٫٩٨٠	١٨٣٢٦	١٧/٧/٣٩٣	٩٤٨ تاليه
٢٢	موسى أبو عطاالله	٢٦٢/٤٣١	١٫١٨٥	٨٧٥٢٣	٢٢/٦/٥٥	٥٥/٥٤–٩٤٤