CHAPTER THREE

ORIGINS AND EARLY DEVELOPMENT
OF THE INSTITUTION

1. Introduction

This study of pious endowments in al-Andalus covers the period between the 9th and 15th centuries, a chronological framework dictated by the fact that most of the available information is from that long period. There are also data from the period of the emirate, that is the 8th–9th centuries, though they are very scant and are mostly found in non-legal sources. In this chapter I will try to analyse those early data on the existence of pious endowments in al-Andalus prior to the caliphate. But first, it seems necessary to set the topic in a more general context and I will resort to two parameters in order to do that. On the one hand, there is the theoretical justification for the existence of this type of property by Islamic ideology through the legal fundaments that sustain it, based on the Qur’ān and, most of all, the prophetic tradition (Sunna). On the other, there is, from a chronological point of view, the highlights in the development of pious endowments during the first three centuries of Islam.

2. Pious endowments during the first centuries of Islam

All the available indicators point to the fact that there is no documentary evidence subject to corroboration to confirm that the waqf was a legally consolidated institution; there is no evidence either that the practice was socially widespread. The same fact, however, leads us to assume that the formative process can be traced back in time. The problem is trying to ascertain how the former took shape during that process until giving rise to the reality we are familiar with from the 9th century onwards, and which factors determined its emergence and development. Obviously, it is a very complex question as it is partly linked to the circumstances affecting the very origins of Islamic society, many aspects of which are poorly known.
Whereas Muslim scholars and textual sources coincide in linking the emergence of the institution to prophetic tradition, with few references to the existence of parallels with similar institutions in other societies, several experts have shown the likely impact foreign influences had on the genesis of the institution. As is usual in these cases, the historiographic debate can be resumed from three main positions: the foreign influence or origin, the inner pre-Islamic Arab roots and, finally, the eclectic position.\footnote{The best and more recent revision of this debate can be found in P.C. Hennigan, \textit{The Birth of a Legal Institution. The Formation of the Waqf in Third-Century A.H. Hanafi Legal Discourse}, Leiden, 2004, pp. 50–70. The more recent study by Y. Lev, \textit{Charity, Endowments and Charitable Institutions in Medieval Islam}, Gainsville (Florida), 2005, has not been available to me.} As for the first ones, it has been suggested that the \textit{waqf} could be the Islamic version of donations \textit{piae causae} from the Roman and Byzantine periods, the Jewish \textit{qodesh} and even Persian \textit{pat rwan}. The foreign hypothesis has been considered, in chronological order, by J. Schacht, N.J. Coulson and, more recently, M. Gil, among others.\footnote{J. Schacht, ‘Early doctrines on \textit{wakf}’, \textit{Koprülü Amagani (Mélanges Koprulu)}, Istanbul, 1953, which I have been unable to consult; N.J. Coulson, \textit{A History of Islamic Law}, Edinburgh, 1964, p. 28; M. Gil, ‘The Earliest \textit{Waqf} foundations’, \textit{Journal of Near Eastern Studies}, 57/2 (1998), 125–140.} In 1961, C. Cahen rejected the foreign theory and suggested there were links between the \textit{waqf} and certain practices of pre-Islamic Arabs, like the institution of the \textit{haram}.\footnote{C. Cahen, ‘Reflexions sur le \textit{wakf} ancien’, \textit{Studia Islamica}, 14 (1961), pp. 37–56; R. Peters, ‘\textit{Wakf}’, \textit{EI}², XI, p. 60, in whose opinion Cahen’s conclusions ‘seriously weakens the argument of Byzantine influence’.}

The third or eclectic position bases its arguments on both foreign and Arab-Islamic elements. Taking as a starting point the existence of two types of \textit{waqf} depending on the aim sought by the donor (private and charitable), S. Denoix has put forward a hypothesis based on a ‘double inheritance’: the family one would derive from the pre-Islamic inheritance characteristic of the Hijāz whereas the charitable or pious would be the result of the influence of Byzantine \textit{piae causae} and the Jewish \textit{qodesh}.\footnote{S. Denoix, ‘Formes juridiques, enjeux sociaux et strategies foncières’, \textit{Revue des Mondes Musulmans et de la Méditerranée}, no 79–80 (1996), pp. 16 and 20.} More recently, P.C. Hennigan argues that the \textit{waqf} ‘is infused with elements of foreign practices’, but it is not, \textit{stricto sensu}, a ‘borrowed institution’. On these premises, he develops the theory of the ‘unconscious borrowing’: by the middle of the 3rd century, when the \textit{Hanafi} treatises of al-Khaṣṣāf and Hilāl...