

LAND PRIVATIZATION IN ISLAMIC LAW?¹ THE CASE OF *IRŞĀD* IN EGYPT, 1850-1950

Adam Mestyan

Durham, North Carolina

In this article, I explore the uses of the term *irşād* in nineteenth- and twentieth-century legal opinions (*fatwa*, pl. *fatāwā*) issued by Egyptian muftis. This term can be rendered into English as ‘the public trust’ or, more precisely, ‘the designated endowment’. Kenneth Cuno argues that this was not a judicial category in applied law but that muftis used this term in Ottoman Egypt and Syria to justify the position of Muslim rentiers in an ideology of local notables between the sixteenth and nineteenth centuries. Building on this argument, I suggest that this term belongs to the larger conceptual domain of administrative privatization of public land. I explore the relationship between the administrative uses of this term and its Islamic legal understanding in nineteenth-century Egypt. Finally, I consider how after the dissolution of the Ottoman Empire Muslim jurists in interwar Egypt still identified some endowments as *irşād* to provide flexibility for the new royal government.

Wa-law waqafa al-sultān min bayt mālinā / li-maṣlahat ‘ammat yağūz wa-yu ‘ğğar
If the ruler endows [land] from our fisc / for the common good let it be permissible and rentable

Ibn Wahbān (d. 1367) quoted in Ibn ‘Ābidīn, *Radd al-muḥtār*, III, 393 and al-‘Idwī, *Tabṣirat*, 86

Today, when historians and jurists speak of a Muslim trust, they usually have in mind what is conveyed by the Arabic term *waqf* (in Turkish *vakıf*): an endowment of a property by a private person for a specific stated purpose. However, the conceptual domain of the Muslim endowment is much larger. We find a number of Arabic terms identifying various acts and types of endowment in Muslim polities in world history. In this article, I explore the category of *irşād* which, as a special legal

¹ The names of Ottoman elite individuals in Egypt are written in contemporary Turkish orthography. More on what can be called “the doctrine of the Muslim fisc” is in Mestyan-Nori (*under review*). I thank Ghislaine Alleaume, Mercedes Volait, and Nicolas Michel for comments on a previous version of this paper, and two anonymous reviewers for their helpful suggestions.

term, denotes an act of assigning assets or their income for some public purpose by the imam, the leader of the community. These special assets – usually agricultural land – belonged jointly to the Muslim community represented in the Muslim fisc, the virtual treasury (*bayt al-māl*). In this paper, I use the term “fisc land” to denote the legal status of such lands.

Kenneth Cuno argues that muftis in Ottoman Egypt and Syria used this term in treatises, speeches, and legal opinions to justify the position of Muslim rentiers – who received stipends, tax-farms, and so on, from the local government - between the sixteenth and nineteenth centuries. This term, in his eyes, was part of an “ideology” of local notables which the muftis mobilized on occasion against fiscal reform and which was forgotten by the twentieth century (Cuno 1999: 141-142).

Building on Cuno’s argument, in the present article I suggest that this term belongs to the ambiguous conceptual domain of the administrative privatization of public land. I explore the relationship between the administrative uses of this term and its Islamic legal understanding in nineteenth-century Egypt. Finally, adding more nuance to Cuno’s argument I consider how, after the dissolution of the Ottoman Empire, Muslim jurists in interwar Egypt still identified some endowments as *irṣād* to provide flexibility for the new royal government.

1. What is *irṣād*?

Historians (Tabataba’i 1983, Johansen 1988, Imber 1997, Ġānim 1998, Cuno 1999, Ito 2017, Michel 2018, Ayoub 2020) have already clarified the development of the term *irṣād* and the theory behind it. Before we proceed further, let us briefly draw on these earlier scholars’ work to offer an overview of this term.

Muslim rulers often assigned the income from land that in theory belonged to the Muslim fisc to pious purposes (jobs at mosques, in schools, salaries of soldiers, the maintenance of mosques, the “poor” in Mecca and Medina, and so on). Twelfth-century Šāfi’ī jurists – the most prominent legal tradition in Ayyubid and Mamluk Egypt and Syria – accepted this practice with the argument that the imam (in legal terms, the administrative authority) can create an endowment from fisc land for the benefit of the community and for those whose maintenance is among the legitimate expenses of the Muslim fisc (*min maṣārīf bayt al-māl*). The Šāfi’ī jurists called such a trust simply a *waqf* although there remained disagreements about its validity.

However, there was a terminological change sometime in the fifteenth century. In the second half of that century, the Egyptian scholar as-Suyūfī described the endowment of fisc land by the imam as an ‘act of earmarking’ or ‘an act of designation’ (*irṣād*) and ‘setting apart’ (*ifrāz*). He clearly distinguished this earmarking and its result, the ‘designated trust’ (*waqf irṣādī* or simply *irṣād*; later jurists even used the plural *irṣādāt*) from an ‘act of endowing’ (*waqf*) which resulted in what he called the ‘true trust’ (*waqf haqīqī*) (Cuno 1999:144; Ito 2017:51, 54).

A few decades later, now under Ottoman rule in the middle of the sixteenth century, Egyptian jurists used the term *irṣād* routinely in discussions about land tax.

They emphasized that Sultan Selim, the conqueror of Egypt, and Sultan Suleiman maintained the earlier *irşādāt* and created new ones. This time Ḥanafī jurists, whom the Ottomans partnered as the empire's official juristic tradition (Burak 2015), took over the originally Šāfi'ī argument and they also started to evoke a retroactive story of emirs and Mamluk sultans creating *irşād* in pre-Ottoman times (Johansen 1988: 81, 92; Cuno 1999). By the seventeenth century, we find the term regularly in the writings of Ḥanafī muftis. Central imperial jurists writing in Ottoman Turkish called such trusts *evkaf-ı salatin*, although there are examples of the term *vakıf-i irsadi*, indicating that some central jurists were familiar with the Arab muftis' terminology.

To repeat and summarize, in Šāfi'ī and Ottoman Ḥanafī legal theory the basic differences between *waqf* and *irşād* inhered 1) in the legal status of the asset to be endowed (private vs. community); 2) in the status of the endower (private individual vs. imam); 3) and in the identity of the beneficiaries (anything pious vs. legitimate expenses of the fisc). *Waqf* is a private thing, even if it serves community purposes, while *irşād* is always related to the leader of the community. The most important consequence of the differences is that muftis agree that *irşād*, unlike *waqf*, is not under the judge's jurisdiction: only the imam (and subsequent rulers after him) can appoint its administrators and he alone can change them and the terms of endowment – but even he cannot abolish it. We soon shall see the importance of this rule.

The term *irşād* was a way for Ottoman jurists to make sense of administrative forms of 'assigning' fisc land in terms of Islamic law. They used a number of Arabic synonyms to denote the act of earmarking as giving something for a specific purpose: *irşād*, *iqṭā'*, *ifrāz*, *i'tā'*, *ta'yīn*.² We can summarize their challenge as the problem of privatization in Islamic law. In short, the problem was how to express in legal terms administrative acts whereby assets or their income belonging to the Muslim community may become the private property of individuals.

This question was not a small matter. The Ottomans (and before them many rulers) granted land, or the income of land, to military men in return for their service. The jurists had to find a constitutional basis to answer questions about those grants, especially in cases of rents and inheritance. Hence acts of granting land required that jurists engage also with the temporal dimension of law. The problem of 'earmarking' and 'granting' resulted in a Muslim legal theory of Ottoman fiscal government which was best expressed in the eighteenth century. This theory and its vocabulary, as Cuno argues, were then also used to protect the interests of provincial groups – and later, as I shall explore here, to facilitate government oversight.

None of the scholars referred above have noted any instances where a ruler's legal act is explicitly identified as an *irşād* in a judge's written certificate. This absence suggests that it was not a term used in applied law in the court. Nicolas Michel helps to explain this absence when he observes that the earliest examples of *rizqa*

² A contemporary historian, Ghānim has used *iqṭā'* in this sense as a synonym for *irşād* – in my opinion correctly (Ghānim 1998:64).

iḥbāsiyya, a special class of small-scale endowment originating in Ayyubid Egypt, are recorded in tax registers as being ‘designated’ (*mursada*) although the later ones are recorded with a different wording (Michel 2018:134-135). If the chroniclers and as-Suyūfī were right, and rulers indeed ordered, literally ‘earmarked’, the income from a fisc asset for various purposes, then we should look for the origins of the term *irṣād* not in judges’ registers but rather in the Mamluk chancellery records – that is to say, within the administration itself. As it is well known, there is no legal requirement for a notarized written certificate for an endowment to be a valid legal act. Jurists insist that the will of the endower creates an endowment, and not the judge’s notarization. The order of a ruler is an expression of his will, and it is thus likely that jurists interpreted sultanic administrative orders, such as an Ottoman *mülk-name* (see below), as giving legal substance to acts of earmarking. If this was indeed the case, and the origin of *irṣād* was administrative (*siyāsa*) and not jurisprudential (*fiqh*), this is an important example of how jurists incorporated administrative innovations into Muslim legal theory (for criminal matters see Rapaport 2012).

2. A theory of *irṣād*

The theory behind the idea of *irṣād* is based on the principle, best summarized by the learned mufti Ibn ‘Ābidīn in early nineteenth-century Damascus, that the leader of the community has no ownership over the assets belonging to the Muslim community in the virtual fisc, the *bayt al-māl* (Ibn ‘Ābidīn, *Radd al-muḥtār* III, 265-266, 392-393, 413). Neither does the fisc have ownership over every type of assets under its care.³ It only has an original ownership title (*raqaba*) to those assets which are not dedicated to a specific purpose already in the Koran and prophetic texts (*fay*).⁴ In classic Šāfi‘ī and Ḥanafī legal theory, the imam has a right only to *distribute* these fisc-properties, and the income from said fisc-properties, for the interests of those Muslims such as the poor, widows, soldiers, scholars, and so on,

³ Muftis often argue that the *bayt al-māl* is the owner of the non-dedicated type of common properties, while it is only the guardian of the compulsory charity and other, dedicated types of income (Tabataba‘ī 1983:15; Michel 2018:241).

⁴ There has been some confusion over what *raqaba* is exactly and how to translate it to English. Imber calls *raqaba* “the ownership of substance” of land, and “real substance” in Imber 1997:120, 123 (and he appears to suggest, mistakenly, that this right belongs to the ruler); A. Cohen in EI2 (art. “*mīrī*”) calls it “absolute ownership,” a right belonging to the treasury; and Mustafa al-Shihabi in EI2 (art. “*filāḥa*”) calls it “original title” belonging to the treasury. In my opinion, al-Shihabi’s solution is the best. *Raqaba* (lit. the neck) is also used to describe the ownership title in slaves. See examples in al-‘Abbāsī al-Mahdī, *al-Fatāwā*, II (Kitāb al-‘itq and Kitāb al-waqf). For *fay*’ see for example, Abū Yūsuf, *Kitāb al-ḥarāğ*, 176, 189; Johansen 1988: 8-9.

who already have a right to income from the fisc. After the imam's earmarking of an asset for a purpose the original ownership title of that asset remains with the fisc. In other words, the decision of the imam does not change the legal status of the asset. And the fisc's remaining *raqaba* is the reason why the imam's act does not result in a real endowment. The imam is an individual private person. Like any other person, he can establish a *waqf* only from things in his personal, private ownership (*milk*). The imam is not an owner of fisc-assets (his relationship to these assets is not *milkiyya*), and thus his will concerning such an asset, his act of designation, cannot constitute a *waqf*. A logical consequence is that neither does his earmarking allow the beneficiary to create a *waqf* of the earmarked asset because, to repeat, the imam's will does not change the original legal status of the asset in this classic theory (although the beneficiary may create a *waqf* of the asset's revenue if that is their personal property).

But in the seventeenth century there emerged a new line of thought. In the Ottoman Empire the problem of privatization appeared at a large scale because of sultanic practices. Cuno highlights a *fatwa* by the chief mufti Šihāb ad-Dīn al-Ḥamawī. According to this mufti, individual property rights (*tamlīk*) may follow from the imam's earmarking of fiscal land for certain Muslim groups (Cuno 1999: 156). al-Ḥamawī's norms were reflective of the Ottoman administrative practice. Seventeenth-century sultans granted agricultural fisc land ("villages") with individual property rights (in Turkish orthography *temlik*) through a special decree (*temlik-name* and *mülk-name*) (Gerber 1988: 154-155; examples in Özcan 2013: 135-146). It appears that the Ottomans, at one point, developed a three-tier understanding of the legal dimensions of an agricultural asset: the original ownership title (*raqaba*), the individual ownership title (*milk*, "the right of possession"), and the title to the taxes (*rusūmāt*), which all could be granted separately (Barnes 1987:45). This fiscal-legal practice needs more research, but the vocabulary of the *mülk-name* appears close to the language used in describing *waqf* endowments. The imperial Ottoman ways of administrative privatization was perhaps unclear or confusing even to the most sophisticated muftis in the Arab provinces, especially since if the *raqaba* remained with the fisc the act of giving individual property right was still an act of *irşād*.

The obscurity of the term *irşād*, between administrative acts and legal theory, is an example of what Thomas Bauer called *Ambiguitätstoleranz* in pre-industrial Muslim polities (Bauer 2011:18). Ambiguity in this case was useful for avoiding direct conflict between Muslim rulers and Muslim jurists. We shall see the nineteenth-century ambivalent application of this logic below.

The final theoretical issue is the muftis' insistence on the ban of abolition. Why was it not legal for the next imam to withdraw a designated common asset from serving a pious purpose? We can only explain this ban by the fact that in legal theory *irşād* is nothing other than the formalization of an already existing right to the *bayt al-māl* assets enjoyed by the poor, widows, and other afore-mentioned constituencies

of Muslims. This right is protected by the Koran and the Prophet's example and those sources are higher than the imam's authority. In this view, the imam merely executed what these authorities had already decided. Hence muftis could argue that it was illegal to abolish public trusts.

3. *Irṣād* in the nineteenth century

By the eighteenth century, Egyptian muftis interpreted regularized payments to locals from the provincial government's fiscal office in Cairo as falling within the category of *irṣād*. A history of the stipend- and tax-farm systems within Ottoman Egypt is yet to be written and the evaluation of its exact scope and economic significance should be the subject of detailed studies (scholars should build on 'Afīfī 1991, Cuno 1992 and 1999, Michel 1999). There were stipends (*murattabāt*) to the staff in mosques, stipends of religious scholars, stipends of soldiers, widows, and orphans. Ḥanafī jurists considered the legal status of these stipends in the same way as the legal status of tax-farming, *iltizām* (which was the assignment from the fiscal office of a right to collect the tax in a rural location in return of regular payments). They referred to all these fiscal rights together as *irṣādāt* and *murattabāt*, both of these following the same logic, namely that the ruler or his representative assigned these incomes from fisc land at one point in time to Muslim groups – especially soldiers – who had legitimate rights in the fisc. In Egypt, the source of all these payments was one single bureau. The provincial government's fiscal office paid all these sums to the beneficiaries and was in charge with distributing the rights to *iltizām*. The jurists argued that the amounts may be decreased or increased but the ruler and subsequent rulers cannot abolish them. They also agreed that the stipends are heritable allocations; that they can be divided (for instance, someone had the right to the 'sixth' of the payments for all positions in a rural mosque, 'Afīfī 1991:122); that the right to them may be even sold among the people (as the original title to the source of income anyway remained with the fisc); and that a stipend may be endowed as a *waqf*. This government-based virtual market economy of mostly urban rentiers in Egypt persisted well into the nineteenth century.

The last jurists who made extensive use of the category of *irṣād* in theoretical works to defend this virtual mini-market in Egypt were Ḥasan al-'Idwī al-Ḥamzāwī (1806-1885), an Azharī professor and early printing entrepreneur of Arabic books, supporter of khedives Saīd and Ismail and an important figure in the 1882 uprising (Cuno 1992:195; Cuno 1999; Schwartz 2017); and Muḥammad al-'Abbāsī al-Mahdī (1827–1897), the chief Ḥanafī mufti (later "Grand Mufti" of Egypt) between 1848 and 1897 (Peters 1994). In the 1850s, both sheikhs wrote treatises about Muslim laws of property and taxation as a reaction to Saīd Pasha's enquiry about property law and the subsequent remaking of the fiscal system, finalized in the 1858 Land Code (Cuno 1992; Mestyan 2020). Both of them relied on the work of Ibn 'Ābidīn, whose majestic commentary *Radd al-muḥtār* was just published in 1855 in the Būlāq

press. The defense of the old rentier economy, however, also contained important concepts to legalize a new wave of privatizing fisc land in late Ottoman Egypt.

Ḥasan al-ʿIdwī’s long treatise about Islamic fiscal laws in Egypt contains important sections on *irşād*. He writes that the land in Egypt comprises three kinds of legal status: private property (*mamlūk*), barren land (*mawwāt*), and fisc land (*al-arḍ allatī li-bayt al-māl*). According to law, the ruler cannot sell or endow lands that fall into this latter category. He can only earmark it, says al-ʿIdwī, for the legitimate expenses of the fisc. The earmarked asset is “like a *waqf* in the meaning of an *irşād*, that is, the conditions of the real *waqf* do not apply to it, which also means that he and those after him can increase or reduce the revenue but [...] [they] cannot abolish it” (al-ʿIdwī, *Tabṣirat*, 84). And the sheikh devotes many pages to explain, with reference to many previous muftis, especially Ibn ʿĀbidīn, what *irşād* is and why rulers cannot abolish it. After the theoretical arguments, al-ʿIdwī also evokes the story of *irşād* from Ayyubid times to justify its existence in khedivial Egypt (al-ʿIdwī, *Tabṣirat*, 91-94). As to the 1850s contemporary practice, he clearly identifies the administrative use of this term and subtly warns the pasha that the theory of *irşād* is also the constitutional basis on which his own family members can possess their large lands (al-ʿIdwī, *Tabṣirat*, 90):

The reality in this time is that *irşādāt* are made when the administrative authority (*walī al-amr*) issues an order about them – after submitting the allocated [quantity of fisc land] – to his followers in order to endow and earmark (*bi-īqāfihā wa-irşādihā*) these for his descendants and similar others, and for the general interest, sometimes immediately sometimes as a consequence, and for the performance of pious acts and offerings. He issues an exalted order to execute this. It is not legitimate to abolish the terms of such noble orders which were issued as mercy for the subjects and which provide subsistence (*maʿāš*) for those who have legitimate rights to it among the subjects.

Unlike al-ʿIdwī’s work, which was published in 1859, al-ʿAbbāsī al-Mahdī’s short treatise did not go into print until decades later, only as part of the mufti’s selected *fatāwā* in the mid-1880s. In this treatise (*Risālat aṣ-ṣafwa al-mahdiyya fī arşād al-arādī al-miṣriyya*), the mufti focuses solely on the ruler’s endowments (*irşādāt*). He enumerates previous legal opinions and describes the familiar history of *irşādāt* from the twelfth century. And, of course, he also argues that the abolition of these trusts, whether embodied in rights to land or to cash, is against the interests of Muslims. In an unusually straightforward manner, al-ʿAbbāsī al-Mahdī declares that resistance of the people is legal in such cases. Importantly, the mufti also notes that fisc land can be endowed by those for whom the administrative authority has assigned (*aqṭa ʿa*) these lands and with the permission of that authority. That is, one can create a *waqf* from an *irşād* as if it were individual property if the imam specified that the act of ‘assigning’ was an act of assigning individual property rights (exactly like the seventeenth-century Ottoman practice above). The Egyptian mufti indeed

evokes, following Ibn ‘Ābidīn, the distinction between individual property right (*milk*) and original title (*raqaba*). He repeats that the imam’s assignment (*iqṭā‘*) can create an individual property right to fisc land, but notes that this creation does not abolish the *raqaba* of the *bayt al-māl*. Subsequent imams cannot abolish, but instead only modify, the terms of *irṣād* because the specific beneficiaries – soldiers, scholars, workers, widows, and the poor – are beneficiaries of the *bayt al-māl* itself. (al-‘Abbāsī al-Mahdī, *al-Fatāwā*, 2: 645–50).

This is a quite abstract Muslim legal theory about property in the 1850s, at a global moment of industrial transformation of empires. We can even understand Cuno’s 1999 article as a deep commentary on the treatises of al-‘Idwī and al-‘Abbāsī al-Mahdī because he analyzes many of the pre-nineteenth-century legal opinions on *irṣād* cited by the two sheikhs in the 1850s, as well as others besides. In a similar vein, my present paper in turn offers a commentary on Cuno’s study of this complicated issue. I shall further investigate the consequences of this 1850s Muslim theory for the history of capital in Egypt at another place.

Although Cuno implies that *irṣād* was a purely ideological term, we know that it in fact appears in administrative use in the 1850s in cases of semi-privatization. For instance, a note by Said Pasha sent to the finance department on 10 Dū al-Qa‘da 1270 (4 August 1854) orders the ‘demarcation’ (*taḥdīd*) and ‘setting apart’ (*farz*) of 100 feddans agricultural land in a village for the lady Kalfadan, a female Circassian slave of the pasha, and her descendants. The land in question belonged to a particular fiscal category of untaxed land (*rizqa bilā māl*) whose earlier title deed for Said as a private person had been issued in 1839. In 1854 August, as freshly appointed governor, Said specified in his order that if Kalfadan’s family died out two third of the land should serve the expenses of his mother’s grave and one third the expenses of the mosque of al-Ustād Bū Sīrī as ‘*waqf* and *irṣād*’. The registry office then issued the new title certificate on 22 Rabī‘ al-Awwal (13 December 1854) to the lady Kalfadan. The certificate referred to the pasha’s act as a ‘grant’ (*īḥāb*) and continued to describe the fiscal status of the land as *rizqa bi-lā māl* (quoted in ‘Abduh, *Fatāwā*, 1: 262). I will return to this document below.

Said’s order shows the Arabic terminological ambiguity in the administrative domain of creating landed property in the mid-1850s. The khedives did assume sultanic legal authority in giving property titles to land in Egypt (Mestyan 2020) but they often compressed legally separate acts into one single administrative order, continuing in the meanwhile to use the vocabulary of endowment. In this example, Said sets apart a piece of land for Kalfadan and her family but only for as long as the family continues to exist. Within the same order, the text outlines the future fate of said piece of land in an ambiguous fashion, referring both to *waqf* and to *irṣād*. This ambiguity was due to the fact that the pasha was both a private individual and the representative of the imam; and it appears that the scribes were unsure how he could create an endowment out of his private property through the issuance of an order as the governor of Egypt.

We can also find arguments about *irşād* in practical judicial processes. Consider this case. Said Pasha's office sent a long letter and documents to the chief mufti on 17 Šawwāl 1276 (3 May 1860). The case was a question about a *waqf* of agricultural land and two gardens in Qalyubiyya, endowed in the late eighteenth century, now under the trusteeship of a certain Muḥammad Sālim Lāz, possibly a high Ottoman official. This Lāz rented the lands to a certain Sa'd Manša and gave permission for its cultivation and the erection of buildings. However, Manša complained to Said Pasha because the 'ulamā' of the (High) Judicial Council (*Mağlis al-Aḥkām*) wanted to abolish this *waqf* and therefore to nullify his contract with the argument that the *waqf* was not legally valid. The council argued that the endowed assets were government (*amīrī*) land (that is, fisc land) and that the original eighteenth-century endower had thus had no right to create a *waqf*. The office of the pasha initiated a huge correspondence with all kinds of government bureaus and judges to locate the original documents and to decide about the case. Next, they asked the mufti al-'Abbāsī al-Mahdī whether the endowment was an *irşād*, and if so, what the implications were, and whether it was permissible to abolish the endowment. After studying the documents carefully, the mufti issued his opinion in which he quoted again the authorities he had already quoted in the earlier essay, and declared that since sultanic permission had been granted in the eighteenth century to create an endowment (!) from these fisc lands which had been assigned as *iltizām*, Lāz's endowment was indeed an *irşād* and it was not possible to abolish it. The mufti underlined that the 'ulama' of the Legislative Council were thus wrong in demanding abolition (al-'Abbāsī al-Mahdī, *al-Fatāwā* II, 657–661; *fatwā* dated 17 Dū l-Qa'da 1276). We do not presently know what happened at this juncture – to follow the case further, we would need to consult the archive of the (High) Judicial Council to see whether they considered the mufti's legal opinion and whether they adjudicated accordingly. If they did, that would mean that the confirmation of someone's income as *irşād* conferred protection that it would not enjoy if his land were instead labelled as an illegal *waqf*.

Even more importantly, al-'Abbāsī al-Mahdī, while defending the earlier market regime of stipends, regularly reminded the khedivial administration of a legal possibility through which they could alienate fisc land to specific Muslim groups by the act of the pasha's assignment. How exactly the evolving government bureaucracy used this type of privatization needs proper research. I assume that we can see the ambivalent logic of *irşād* behind the often mentioned but rarely analyzed important act when hundreds of Egyptian soldiers received land instead of cash sums upon retirement in the late 1850s and the early 1860s.

4. *Irṣād* in the Twentieth Century

Cuno notes that *irṣād* “is mentioned only in passing” among Egyptian jurists in the twentieth century (Cuno 1999:143). This is only partially correct.

The theory of *irṣād* is a good indicator of the problems associated with the transition from a Muslim imperial context to the age of the League of Nations in the 1920s. After 1924, the end of the Ottoman caliphate created an entirely new situation for which Muslim jurists had to develop new juristic solutions. In the case of post-Ottoman Egypt specifically, two problems with *irṣādāt* were 1) that some of these endowments supposed an imperial context (for instance, the income from Egyptian and Syrian villages for Mecca and Medina) but now there were distinct governments in separate local polities and 2) that the *irṣādāt* created by the khedives (as representatives of the sultan) during the nineteenth century required the identification of the imam, or at least the highest administrative authority (*walī al-amr*), in order to decide who has the right over appointments and over the terms of the endowment under changing political circumstances. Thus, through the problem of *irṣād* we can also explore whether the jurists identified the new Egyptian king as *walī al-amr*, and the local Egyptian government as his government in this regard.

First it appears that the theory and ideology of *irṣād* was indeed forgotten after the 1870s when a new property regime started in Egypt, and particularly after the 1882 establishment of the British occupation. Let us consider the following example. The afore-mentioned 1854 order of Said Pasha about the land of the lady Kalfadan is quoted in a question addressed to the Grand Mufti Muḥammad ‘Abduh on 14 Ğumādā al-Ākhar 1318 (8 September 1900). Muṣṭafā Bey al-Bāğūrī from Tanta asked the question because in the meanwhile the lady Kalfadan and her daughter had died, but her son was still alive, and her daughter’s legal heirs asked for their share of the estate. In short, the bey asked whether the pasha’s order and the certificate created individual property (*milk*) and if so, whether that meant the cancellation of the second half of the order about the legal status of endowment after the extinction of the family. This was an important question for the heirs because if they inherited private property they could simply sell their share.

The answer of Muḥammad ‘Abduh was that the ‘goal was to create a *waqf* and that ‘the endower used the expression of allocating (*lafẓ al-i-‘tā*) in the meaning of an endowment act’. So ‘Abduh decided the asset’s legal status was *waqf* after the order. The mufti emphasized that in this case the income from the endowed land must be given equally to the female and the male descendants. ‘Abduh was not concerned with identifying the original legal status of the land to decide whether the order created a *waqf* or an *irṣād*. Perhaps ‘Abduh, who was not a practicing jurist until the 1890s, did not know or understand the difference. (Another possible explanation of this negligence is that he was hereby continuing an old practice, namely the legal acceptance of endowing *rizqa* land into a *waqf* as if *rizqa* land fell within the legal status of individual property.) (‘Abduh, *Fatāwā*, 1: 262-263; Mestyan 2020).

Early twentieth-century professors of law did not forget *irṣād*, however. ‘Abd al-Ġalīl ‘Abd al-Raḥmān ‘Aṣūb was a judge in the Cairo Ṣarī‘a Court of Appeal, and a professor in the Law Faculty in the Egyptian (later Fuad I, today’s Cairo) University. He published a book about endowment law in 1915 specifically for his students. In the second edition (1935), he updated the text with what he considered important in his decades-long practice as a judge, too (the book has been republished several times and is used in al-Azhar even today).

‘Aṣūb states that the judge must have proof about ‘definitive individual ownership’ (*milk batt*) to create a *waqf* but that the source of ownership — even if it is legally not correct, such as an act of sale when the money is not yet paid — does not matter. ‘Aṣūb highlights the special case of lands that belong to the fisc, which are earmarked for the benefit of Muslim scholars. As one might expect, he emphasizes that the original title (*raqaba*) remains with the fisc and thus their users cannot endow these lands. But he also declares that these earmarked lands can be made into *waqf* if the sultan gives the *raqaba* over to ‘those who have a right to [to the fisc]’ (*li-man lahu istiḥqāq fīhi*). His main source is, again, the Syrian jurist Ibn ‘Ābidīn. ‘Aṣūb also emphasizes that *irṣād* is a separate institution: *irṣād* is not *waqf* although ‘it is in its form and image’ (*‘alā hay‘atihi wa-sūratihī*). He emphasizes that a judge cannot cancel an *irṣād* and return the land to the fisc or issue an order to give it to someone else or channel its income for another purpose. Only the imam can decide because the original public ownership right of the fisc was never transferred (‘Aṣūb, *Kitāb al-waqf*, 24-25).

It is important to be reminded of the practical difference between *waqf* and *irṣād* in terms of the differing jurisdictional authority over the two types of endowments in this historical period. The Egyptian muftis maintained that after 1914, when Egypt became a local polity under British protectorate, *ṣarī‘a* courts – as opposed to the king, the government, or the local (*ahlī*) courts – had total jurisdiction over *waqf*. For instance, a very direct question about jurisdictional competence arrived from the Egyptian Border Authority (*Maṣlahat Aqsām al-Ḥudūd*) to the Grand Mufti Muḥammad Baḥīt al-Muṭī‘ī in January 1918. Under what conditions, the query asked, could the rightful trustees of a *waqf* be deposed and the trusteeship given to other persons or to the government, ‘with or without the agreement of the original trustees?’ If this was not possible, would the death of the trustees or their deportation (*naḥy*) be enough cause for such a decision? And, if the proceeds from the endowment could not be paid to the rightful parties, should this be established in front of a *ṣarī‘a* court? The Border Authority posed the same questions to the Ministry of Pious Endowments. The Grand Mufti’s opinion was that a trustee could be deposed only in case of false management (*ḥiyāna*), and this must be established by an authorized legal ruling. Furthermore, only a *ṣarī‘a* judge’s decision could authorize a new trustee, and that decision must be based on the original stipulations of the endowment. The judge could not appoint anyone else to the trusteeship for as long as there were relatives of the endower alive, even if they were not beneficiaries.

If the trustee died, and there was no stipulation about succession in trusteeship in the endowment certificate, only the judge could appoint a new trustee. In case of absence (for instance, deportation), the trustee should have a representative, and if there was no representative, the judge should appoint a temporary trustee. And, of course, any issue about payment to beneficiaries must be submitted to a *šarī'a* court (al-Muṭī'ī, *al-Fatāwā*, 200-202 [*fatwa* n. 114]). The Grand Mufti thus upheld the total power of the judge over *waqf*; and, indirectly, denied that the new government or the sultan of Egypt had legal authority in this regard.

The identification of an endowment as an *irṣād*, however, had a very different consequence. As we know by now, only the imam or his representative could decide about *irṣādāt*. Furthermore, we have also seen that the orders by which a ruler assigned a piece of fisc land for a purpose were often worded ambiguously.

In 1873, Khedive Ismail, as the representative of the imam (the Ottoman sultan) in the Egyptian province, donated lands and buildings for the benefit of new local schools (*al-makātib al-ahliyya*). It is worth quoting the order (11 Šawwāl 1290 / 2 December 1873) in full:

We have decided that all properties, real estates, and agricultural lands, which have remained until now as government (*amīrī*) property from the sale of Abdülhalim Pasha[’s properties] (except what is contained in the Šubra department and what entered the Railways, so all the rest that have remained in government possession until now), we have given and donated (*wahabnā*) for the Civil Schools, in a kind of endowment (*bi-naw' al-īqāf*), in order to pay their gains and proceedings to the mentioned schools. The execution [of this order] is entrusted to the Endowments Department of the Schools, including the copy of the related *waqf*-certificates that were mentioned in the correspondence, and the agreement with the Director of Education about these principles. Whenever there are new additions henceforth, and anything should pass to the government from the sale of [the properties of] Abdülhalim Pasha, by way of estates and inheritances according to *šarī'a* rules, first that [property] should be presented to us in order that we can issue an order about it to the Finance Department.

Ismail Pasha added an explanatory note, too: the Director of Endowments and Schools may select some of the properties to be sold or exchanged for the benefit of these schools before the final, proper endowment act (both quoted in *MS*, 124).

Abdülhalim was the uncle of Ismail, the most senior male member of the khedivial family in the 1870s, and lifelong challenger to his rule. In 1870, he signed a contract by the terms of which he disavowed all claims in Egypt in return for a stipend of yearly 60,000 British pounds. After this he lived mostly in Istanbul. The contract included that he gave the ownership of his properties in Egypt to the local government.

For decades there were no problems with Ismail’s arrangement. The properties in question were quite extensive, financing most government-civil schools in Egypt.

But in 1908, the Ministry wanted to sell some properties. It turned out that no court ever issued a *waqf* certificate about Ismail's assignment. The legal status of the properties was unclear. The Ministries of Justice and Finance together asked the Grand Mufti al-Şidfī whether Ismail Pasha's order in fact constituted a valid *waqf*. Al-Şidfī answered that the original order constituted an *irşād*, because the assets belonged to the Muslim fisc (the local government) and not to Khedive Ismail as a private person. This endowment was thus not a *waqf*. But the assignment was a valid act because the representative of the imam (the khedive as representative of the Ottoman sultan) was authorized to designate income from fisc land. And, following an argument with which we are now familiar, he added that it was not possible to abolish the designation itself. Al-Şidfī used the analogy of a *waqf* to argue that an *irşād* is legally valid:

As the mentioned lands and properties in the afore-mentioned order were precisely specified and Ismail Pasha sent them and registered them (*waqqa 'a-hā*) for the mentioned schools to teach the Koran, and this was done by way of endowment (or: like the endowment, *min qabīl al-waqf*) for mosques and forts, the teaching of the Koran, and [the benefit] of jurists, and all kinds of similar things which are meant to last forever, so it is legally valid.

In sum, the mufti's argument was that Ismail's administrative order constituted an *irşād* and should be adjudicated accordingly. The upshot was that the khedivial government was not allowed to abolish the *irşād* by selling the designated properties (*al-Fatāwā al-islāmiyya*, 1540-1542).

Twenty years later, the now sovereign local Egyptian government under British occupation tried once again to secure authorization to sell the properties (possibly all of them), this time with more success. In June 1929, the Department of State Properties (*Maşlahat al-Amlāk al-Amīriyya*) asked the Grand Mufti again, this time 'Abd al-Mağīd Salīm, to look at the order of Ismail and decide whether the mentioned lands constituted a *waqf* or not. Salīm's opinion was that 1) such an endowment would indeed be an *irşād* since the lands had not been inserted into the personal ownership of the khedive and remained with the fisc, but that 2) the order itself did not make the assets *irşād* or *waqf*. Rather, Salīm opined, the order was nothing more than a 'permission' (*tarhīṣ*) for an endowment, which concerns a future point in time when the assets would have been sorted out and designated properly. Salīm's opinion was that such a permission does not constitute either *waqf* or *irşād*. He used the word 'permission' because in this way he could avoid the consideration of intention. This was important because, in this way, the permission of Ismail about the sale of assets (before the endowment became established) was legally valid since there was not yet an endowment. And as there was no evidence for a proper endowment intention and act the mentioned properties were neither designated nor endowed. The implication was that the government could not only sell the assets, but do as they wished (*MS*, 123-125).

In other examples from the post-Ottoman period, we find that *irṣād* cases forced muftis to decide and articulate who was the legal authority in Islamic law after the Ottoman caliphate was gone.

For instance, the Interior Ministry wrote to Grand Mufti Salīm in 1928 with a complex question. The governor Abbas Hilmi Pasha (r. 1849-1854) had created an endowment for Medina (possibly for the grave of the Prophet) and stipulated that the trusteeship should be a hereditary perquisite for the male descendants of a certain Muḥammad al-Muntaẓar, starting with this latter's son Muḥammad Ḥayr al-Dīn. In 1928, more than seventy years later, a certain Muḥyī al-Dīn Efendi al-Tarabzūnī was the trustee of this endowment. The *ṣarī'a* court of Medina appointed his brother Muḥammad Amīn al-Tarabzūnī as another, joint trustee of the *waqf*. The Interior Ministry asked the Grand Mufti whether they should authorize this joint appointment because the Justice Ministry raised an objection. The Justice Ministry argued that an Egyptian *ṣarī'a* judge, instead of the Medina judge, should have the power to appoint the trustee of this endowment even if the beneficiaries were not under Egyptian authority (*wilāya*). Obviously, the problem was that both the Hijaz and Egypt were in the Ottoman Empire during the 1850s but in 1928 the beneficiaries in Medina were in the new Saudi Kingdom of the Hijaz while the assets were in the new Kingdom of Egypt.

Grand Mufti Salīm, however, decided that this question was not the real issue. He argued that this endowment was an *irṣād*, with the now familiar reasoning that the endowed asset was not in the private ownership (*milkiyya*) of Abbas Hilmi but belonged to the fisc. Thus, the rules of *waqf* did not apply. The acts of the ruler or his representative concerning such an endowment were conditioned by the common interest of Muslims. And if this was the case, the ruler or his representative did not necessarily have to respect the original conditions in the founding document concerning the trusteeship (because this was not a 'real' *waqf*), but rather they were free to find any convenient way to deliver the proceeds of the endowed assets to the beneficiaries. In this case, the Medina judge could not rule about the trusteeship at all because 'the trustee [of an *irṣād*] not really a trustee of a *waqf* but an *employee of the fisc*, and the authority over him belongs to the one who is the executive power (*walī al-amr*) over the fisc' (my emphasis). Moreover, in this case, since the death of a sultan may invalidate the stipulation about the trusteeship's transmission, the death of Abbas Hilmi Pasha invalidated his original stipulation about the transmission to Muḥammad Ḥayr al-Dīn (the son of Muḥammad al-Muntaẓar), and consequently to his descendant, Muḥyī al-Dīn Efendi al-Tarabzūnī. In fact, the Grand Mufti argued that this person had no right to be the trustee. No judge in the Hijaz or Egypt or elsewhere could have appointed anybody because this endowment was not a *waqf*. Only the Egyptian Finance Ministry, as the representative of King Fuad, who was *walī al-amr* over the fisc, could decide about an *irṣād*. The Finance Ministry thus had complete freedom to appoint whomever they wanted as

intermediaries to deliver the proceeds from Egypt to the beneficiaries in Medina (*al-Fatāwā al-islāmiyya*, 4: 1207-1210).

A similar Egyptian-Saudi problem related to the food supply that Egypt sent every year to the Hijaz, based on the old Ottoman stipulations, which were originally *irşādāt*. In 1926, the Grand Mufti Qurā'a issued an answer to a question from the government. Mecca and Medina received every year 20,235 *irdibb* of wheat, which arrived with the Egyptian delegation that also brought the Kaaba's annually replaced ceremonial cover. This practice derived from the old orders given by sultans Selim and Sulayman in the sixteenth century. The firmans given to Mehmed Ali Pasha in the 1840s re-affirmed this Egyptian obligation. In 1926, however, the new king of the Hijaz 'Abd al-'Azīz ("Ibn Saud") wanted to receive this donation not in kind but in cash. The Egyptian Interior Ministry asked the mufti whether such an exchange would be possible since the original stipulation mentioned that the delivery must be in kind. The Ministry added that they had no objection to such an exchange (perhaps thereby inviting a positive reply). The mufti opined that these were *irşādāt* from the *bayt al-māl*, by the two sultans, for the interests of poor Muslims. In this case, only the imam or his representative could change the stipulations. The Finance Ministry, he added, was the king's representative (who was, in turn, the *walī al-amr*). Thus, he concluded, there was no legal objection to changing the stipulation. (*al-Fatāwā al-islāmiyya*, 12: 4097-4099).

'Ašūb's manual and the legal opinions of the grand muftis of the 1920s-1930s reflect the twilight of the theory of *irşād*, which was, at the end, a constitutional theory about the Muslim fisc. The new Egyptian Civil Code in 1949, created by the 'Abd ar-Razzāq as-Sanhūrī, does not mention *irşād* although it regulates *awqāf*. While the muftis in the 1920s acknowledged the new king as *walī al-amr* in Islamic law and acknowledged also that he in turn delegated legal authority to the Egyptian ministries, after 1952 the government did not need Islamic law anymore to justify privatization and assignment of state land for various tasks. Scholars of Islam in Egypt who remained interested in *waqf*, however, time to time evoke the idea of *irşād*, such as Sheikh Muḥammad Abū Zahra (1971:108) in the 1970s and Ibrāhīm al-Bayyūmī Gānim (1998:62-65) in the 1990s (and today *fiqh*-scholars in Kuwait and Saudi Arabia) but without the analysis of the changing historical administrative contexts which prompted the changes in Muslim legal theory throughout the centuries.

5. Conclusion

A history of the term *irşād* in Egyptian (and Syrian) legal opinions demonstrates the shifting trajectory of terms describing privatization of land between administrative terminology and legal theory in Muslim polities. Whether non-Ḥanafī modern scholars discussed *irşād* in Morocco and Algeria, or in Yemen, should be the subject of separate research. The Ottoman practices in the seventeenth century pushed Ḥanafī legal theorists to accommodate the privatization of fisc land but with an

ultimate legal guarantee, namely, that the *raqaba* of such lands remains with the fisc even in the paradoxical case when the act of assignment is an act of changing the legal status of the assigned land into *milk*.

This article demonstrates the inapplicability of Western political theory concepts to the much more sophisticated Muslim legal realm. The binaries of public-private and state-non-state simply do not make sense before the late nineteenth century. The historical reason is not the absence of Muslim concepts of property and marketization but rather that the conceptual relationship between the Muslim fisc and the Muslim community was different from that of the Christian fisc and the Christian community. How the imperial Ottoman administration impacted this relationship, or at least its articulation in Arabic in Ottoman Egypt and Syria, into a veritable fiscality-based concept of community in which the ruler had limited legal power over the Muslims' economy, needs more research.

REFERENCES

Primary sources

- al-‘Abbāsī al-Mahdī, *al-Fatāwā* = Muḥammad al-‘Abbāsī al-Mahdī. *al-Fatāwā al-mahdiyya fī l-waqā‘i‘ al-miṣriyya*. 6 vols. [Cairo]: al-Maṭba‘a al-Azhariyya al-Miṣriyya, 1301.
- ‘Abduh, *Fatāwā* = *Fatāwā al-Imām Muḥammad ‘Abduh*. Edited by Nifin Muḥammad Mūsā. Cairo: Dār al-Kutub wal-Waṭā’iq al-Qawmiyya, 2017.
- Ibn ‘Ābidīn, *Radd al-muḥtār* = Ḥāšiyat Radd al-muḥtār ‘alā al-Durr al-muḥtār ‘alā matn Tanwīr al-absār. Edited by Muḥammad b. ‘Abd al-Raḥmān Qiṭṭa al-‘Idwī. Cairo: Dār aṭ-Ṭibā‘a al-Miṣriyya, 1272 (1856).
- Abū Yūsuf, *Kitāb al-ḥarāğ* = Abū Yūsuf, *Kitāb al-ḥarāğ*. Edited by Muḥammad Ibrāhīm al-Banna. Cairo: Dār al-Iṣlāḥ, 1981.
- ‘Ašūb, *Kitāb al-waqf* = ‘Abd al-Ğalīl ‘Abd al-Raḥmān ‘Ašūb. *Kitāb al-waqf*. Cairo: Dār al-Āfāq al-‘Arabiyya, 1999.
- al-Fatāwā al-Islāmiyya* = *al-Fatāwā al-islāmiyya*, 20 vols. Cairo: Wizārat al-Awqāf, 1980-.
- al-‘Idwī, *Tabṣirat* = Ḥasan al-‘Idwī al-Ḥamzāwī. *Tabṣirat al-quḍāt wal-iḥwān fī waq‘ al-yad wa-mā yašhad lahu min al-Burhān*. Būlāq: Dār aṭ-Ṭibā‘a al-Mīriyya, 1276 [1859].
- MS* = *Al-Muḥāma aš-šar‘iyya*, 1929, 2 vols.
- al-Muṭī‘ī, *Al-Fatāwā* = Muḥammad Baḥīt al-Muṭī‘ī. *Al-Fatāwā*. ‘Akkār: Maktabat Dār al-‘Ulūm, 2012.

Secondary sources

- ‘Afifī Muḥammad. 1991. *al-Awqāf wal-ḥayāt al-iqtisādiyya fī Miṣr fī l-‘aṣr al-‘uṭmānī*. [Cairo]: al-Hay’a al-Miṣriyya al-‘Āmma li-l-Kitāb.
- Ayoub, Samy A. 3030. *Law, Empire, and the Sultan: Ottoman Imperial Authority and Late Ḥanafī Jurisprudence*. New York: Oxford University Press.
- Barnes, John Roberts. 1987. *An Introduction to Religious Foundations in the Ottoman Empire*. Leiden: E.J. Brill.
- Bauer, Thomas. 2011. *Die Kultur der Ambiguität: Eine andere Geschichte des Islams*. Berlin: Verlag der Weltreligionen.
- Burak, Guy. 2015. *The Second Formation of Islamic Law*. Cambridge: Cambridge University Press.
- Cohen, A. 1993. “Mīrī”, in: *Encyclopaedia of Islam*, 2nd ed. Edited by C.E. Bosworth, et al. VII, 125–126. Leiden: Brill.
- Cuno, Kenneth M. 1992. *The Pasha’s Peasants: Land, Society, and Economy in Lower Egypt, 1740-1858*. Cambridge: Cambridge University Press.
- _____. 1999. “Ideology and Juridical Discourse in Ottoman Egypt: The Uses of the Concept of *Irṣād*”. *Islamic Law and Society* 6.2.136-163.
- Ġānim, Ibrāhīm al-Bayyūmī. 1998. *al-Awqāf was-siyāsa fī Miṣr*. Cairo: Dār aš-Šurūq.
- Gerber, Haim Gerber. 1998. *Economy and Society in an Ottoman City: Bursa, 1600–1700*. Jerusalem: The Hebrew University of Jerusalem.
- Imber, Colin. 1997. *Ebu’s-Su’ud: the Islamic Legal Tradition*. Stanford: Stanford University Press.
- Ito, Takao. 2017. “Al-Suyūṭī and Problems of the *Waqf*”. In *Al-Suyūṭī, a Polymath of the Mamlūk Period*, edited by Antonella Ghersetti, 47–63. Leiden: Brill.
- Johansen, Baber. 1988. *The Islamic Law on Land Tax and Rent: the Peasants’ Loss of Property Rights as Interpreted in the Hanafite Legal Literature of the Mamluk and Ottoman Periods*. London: Croom Helm.
- Mestyán, Adam. 2020. “Seeing Like a Khedivate: Taxing Endowed Agricultural Land, Proofs of Ownership, and the Land Administration in Egypt, 1869.” *Journal of the Economic and Social History of the Orient* 63.5-6.743–87.
- Mestyán, Adam & Rezk Nori. “The Probate Regime - The Capital of Orphans, Islamic Law, and Enchanted Bureaucracy in Nineteenth-Century Egypt.” (Under review.)
- Michel, Nicolas. 2018. *L’Égypte des villages autour du seizième siècle*. Louvain: Peeters.
- Özcan, Özgen. 2013. “Pious Endowments and Land in the Seventeenth Century Ottoman Empire: The *Vakf* of Şeyhülislam Feyzullah Efendi”. MA thesis, Bilkent University.
- Peters, Rudolph. 1994. “Muhammad al-‘Abbasi al-Mahdi (d. 1897), Grand Mufti of Egypt, and His al-Fatawa al-Mahdiyya.” *Islamic Law and Society* 1.1.66-82.

- Rapaport, Yossef. 2012. "Royal Justice and Religious Law: Siyasah and Shari'ah under the Mamluks." *Mamluk Studies Review* 16.71-102.
- Al-Shihabi, Mustafa, G. S. Colin, A.K.S. Lambton, Halil İnalçık, and Irfan Habib. 1965. "Filāḥa". In: *Encyclopaedia of Islam*, 2nd ed. Edited B. Lewis et al. II, 899–910. Leiden: Brill.
- Schwartz, Kathryn A. 2017. "The Political Economy of Private Printing in Cairo As Told From a Commissioning Deal Turned Sour, 1871." *International Journal of Middle East Studies* 49.25–47.
- Tabataba'i, Modarressi Hossein. 1983. *Kharāj in Islamic Law*. Tiptree, Essex: Anchor Press.
- Abū Zahra, Muḥammad. *Muḥādarāt al-waqf*. [?] Dār al-Fikr al-'Arabī, [1971].