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*SARANNO RISPETTATI COME PER IL PASSATO:*  
ITALIAN COLONIAL POLICY TOWARDS LIBYAN RELIGIOUS  
ENDOWMENTS

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## **Abstract**

This paper offers a survey of Italian colonial policy towards Muslim religious endowments (*waqf*, pl. *awqaf*) in Libya from 1911 to 1943. Through an analysis of 41 lawsuits presented to the colonial Court of Appeals and a detailed survey of the laws promulgated to reform the administration of the *awqaf* in Libya, this study reveals the legal mechanisms adopted by Italian jurists to regulate *awqaf* matters in their only North African colony. It demonstrates that, unlike other colonial powers in the region, the Italians did not set out to confiscate real estate that had been immobilized as religious endowments, nor did they seek to delegitimize the principles of Islamic law on which *awqaf* were founded. When confiscation of endowed property did occur, it was to retaliate against those Muslim brotherhoods, such as the Sanusiyya, which had taken up arms against colonial rule. With few exceptions, Italians respected the legal validity of the *awqaf*, and limited themselves to exercising more direct control over their administration by removing them from the jurisdiction of the *qadi* (Islamic judge) and placing them under the judicial oversight of state courts.

## **Keywords**

Italy, Libya, Colonial Law, Islam, North Africa



## Introduction

Despite the extensive literature on Italy's colonization of Libya, Italian scholars have shown little interest in unravelling colonial policy towards Muslim endowments (Arabic *waqf*, pl. *awqāf*).<sup>1</sup> Focused as they have been on reconstructing the political and military history of Italy's only Arab colony, or in highlighting the more repressive aspects of Fascist rule on its *Fourth Shore*, these scholars have paid less attention to colonial social and religious policies, of which the *awqāf* constitute an important chapter.<sup>2</sup> In Libya, as elsewhere in the Islamic world, the revenues of the public endowments (in colonial Tripoli called *awqāf al-jawāmi* 'endowments of the mosques, but generally referred to as *awqāf khayriyya*,) supported a wide range of public and municipal services such as education, religious edifices and water wells.<sup>3</sup> Another endowment (*awqāf al-sūr*, endowment of the walls) was specifically aimed at the upkeep of Tripoli's defence walls. Aside from these two types of endowments, the third and perhaps most popular kind of *waqf* in Tripolitania were the so-called family endowments (*awqāf ahliyya*). Unlike the *awqāf al-jawāmi* ' and *awqāf al-sūr*, which were actual and irrevocable donations, through which the constituent devolved the full ownership and usufruct of an item to a religious cause or charity, a *family waqf* was an endowment whose constituent relinquished the ownership of the property for an ultimate charitable purpose but left its usufruct to a line of beneficiaries, usually from among the constituent's family. Only when all the beneficiaries died out would this *waqf* become a public endowment and its revenues used solely for charitable purposes.

When scholars do mention religious endowments in the Arab provinces under Italian rule,<sup>4</sup> this is primarily in relation to the expropriation of property that belonged to *awqāf* of the Sanusiyya, a religious brotherhood that spearheaded an anti-Italian revolt until its defeat in 1930. Angelo Del Boca, one of the most prolific writers on colonial Libya, for example, points to the expropriation of thousands of hectares belonging to 14 Sanusi *zāwiya* (lodges) as the culmination of the brutal policy perpetuated against the population of Cyrenaica.<sup>5</sup> In a similar fashion, Anna Maria Medici also

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<sup>1</sup> A complete analysis of the historiography on the Italian colonial enterprise in Libya is beyond the scope of this paper. For an overview of the existing literature by Italian, foreign and Libyan scholars refer to N. LABANCA, P. VENUTA, *Bibliografia della Libia coloniale 1911-2000*, Firenze, 2004.

<sup>2</sup> Some studies on the *awqāf* appeared in the early years of colonial rule and represent the government's attempt to come to terms with this institution that had no equivalent in the Italian legal system. See C. BASSO, *Il contratto di doppia locazione (igiaraten) dei beni auqaf nel diritto ottomano*, Tripoli, 1913; M. CARTECHINI, *Per il riscatto dei beni auqaf igiaraten* in «Tripolitania Agricola», 1927; A. BERTOLA, *Sull'efficacia del diritto romano in Libia in materia di auqaf igiaraten* in «Il Foro Italiano», 1919, 1, p. 829; S. CALIFANO, *Il regime dei beni auqaf*, Tripoli, 1913; E. DE LEONE, *Il vacf nel diritto coloniale italiano* in «Oltremare», Agosto 1930; G. DA RE, *L'istituto del beni vacuf, con Speciale riguardo alle Sue condizioni nelle colonie dell'Africa settentrionale*, Roma, 1914; S. GADDI, *I beni auqaf e la giurisprudenza coloniale italiana*, in «Alere flammam», no. 6, 1925; A. FANTONI, *I problemi giuridici connessi al possesso della terra: l'opera dell'Ufficio Fondiario*, in «Cirenaica Illustrata», 1932, pp. 30-34.

<sup>3</sup> At the time of the occupation there were 44 major public endowments in Tripoli. These were the *waqf* of *ahmad pasha*, *sidi darghut*, *muhammad pasha*, *al-kharruba*, *al-naqa*, *al-ruba'a*, *'uthman pasha*, *sidi salim*, *al-duruj*, *mahmud*, *sidi hammuda*, *al-shan shan*, *makka al-musharrafa*, *madrasa al-katib*, *al-siklani*, *ben sabr*, *al-nakhli*, *'azzi*, *ben sulayman*, *al-hattab*, *al-'asawus*, *'abd al-wahhab*, *al-miladi*, *sidi 'attiya*, *ben tabib*, *al-dubbagh*, *sidi ya'qub*, *al-shaykha radiya*, *ben suwwab*, *ben latayyif*, *al-saraya*, *al-mufti*, *ben nur*, *al-kerari*, *medina al-munawwara*, *ben maqil*, *ben tabuna qara baghli*, *mulay mohammad*, *al-tujbiyin*, *al-sayd*, *al-majdiyya*, *al-shaykh al-maraghni*, *mustafa al-ahmar*. G. CALIFANO, *Il regime dei beni awqaf*, op. cit., p. 123.

<sup>4</sup> Tripolitania and Cyrenaica were separate administrative units until 1934 when they were officially brought together with Fezzan to form what is now referred to as *Libya*. In this essay we shall use the word *Libya* in reference to both provinces, also prior to their official union in 1934.

<sup>5</sup> A. DEL BOCA, *Gli Italiani in Libia*, vol. 2, Roma, 1988, pp. 174-178. On the expropriation of Sanusi property, see also E.E. EVANS-PRITCHARD, *Italy and the Sanusiya order in Cyrenaica* in «Bulletin of the School of Oriental and African Studies», University of London, 1946, vol. 11, no. 4, p. 846.

portrays the confiscation of Sanusi real estate in Cyrenaica as a colonial attempt to free arable land for settlers, a move which she interprets as an attack upon religious endowments.<sup>6</sup>

What has been overlooked however is that the expropriation of Sanusi *waqf* property was an exception rather than the rule. The 1930 royal decree of expropriation has to be understood as directed against those who had taken arms against Italian colonization, and not against religious endowments *per se*.<sup>7</sup> As a matter of fact, this *ordine di confisca*, and another decree issued soon after confiscating Sanusi property in Tripolitania, called for the expropriation of *waqf* as well as the private property of individuals, families or tribes linked to the Sanusiyya.<sup>8</sup> This episode alone therefore cannot be considered as representative of Italy's policy towards religious endowments. Rather, it should be framed as part of a Fascist military strategy, which did not solely use expropriation, but also population resettlement, concentration camps and deportation to quell an anti-colonial revolt that had lasted almost ten years. The persistence of the revolt in Cyrenaica also meant that this province remained under a military administration much longer than Tripoli, which was placed under civilian rule soon after the occupation. The divide between regions under military and civilian authority is yet another reason why we cannot consider the *awqāf* policy in Cyrenaica as an embodiment of the overall Italian policy towards endowments.

Italians expropriated vast amounts of real estate in their Libyan colony.<sup>9</sup> However, with the exception of the Sanusi case examined above, they rarely touched any other *awqāf* property. A few timid attempts to use *waqf* property in the Tripoli medina were undertaken in the first few years of rule, as demonstrated by the expansion of the Customs (*Dogana*) to buildings owned by local *awqāf*. However, that first case of *waqf* expropriation became so riddled with legal negotiations and lengthy judicial debates that similar actions appear to have been rarely pursued afterwards.<sup>10</sup> Unlike the French colonial officers in Algeria, Italian officials in Libya rarely used the property or the revenue of public or family endowments for their own government purposes.<sup>11</sup>

This study reveals that throughout their 30-year rule in Libya, Italians upheld the validity of the *awqāf* and generally adhered to principles of Islamic law and to Ottoman legislation that regulated

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<sup>6</sup> A.M. MEDICI, «Politiche dell'appartenenza in Africa del Nord. Colonialismo e welfare islamico in Cirenaica», in P. VALSECCHI (ed.), *Africa tra Stato e società. Scritti in omaggio a Giampaolo Calchi Novati*, Milano, 2008. This study, which gives a thorough and detailed analysis of the governmental decisions that eventually led to the confiscation decree, is the first scholarly attempt to unravel Italian policy towards religious endowments. The author, however, only focuses on Cyrenaica and fails to capture Italian policy as a whole, although at one point she does admit that the Italians never questioned the existence of the *waqf* as an institution.

<sup>7</sup> *Confisca dei beni senussiti in Cirenaica*, Royal Decree (hereafter RD) 22 Dec. 1930, no. 1944, in *Bollettino Ufficiale della Cirenaica* 1931; *Confisca dei beni appartenuti ai Senussi in Tripolitania*, RD 21 March 1931, ACP 3496, in *Bollettino Ufficiale della Tripolitania* 1931.

<sup>8</sup> Art. 2 of the RD *Confisca dei beni senussiti in Cirenaica*, cited above, confirms the expropriation of all property «in any way acquired by the Sanusi brotherhood, or given to it through *sadaga* or constituted in *waqf* or *habs*, or in any other way assigned to individual members, families, *biut*, *aile*, cabile, to the *tariqah* of Sidi Mohammed Ben Ali Es-Senusi and his successors, or even inheritances, for the benefit of the brotherhood, left to their *chalifa*, *mokaddem*, *sceh zauia*, *achuan*; similarly the income or rents that the Brotherhood receives from its real estate property».

<sup>9</sup> Francois Dumasy has shown that the extensive recourse to expropriation of former Ottoman property and of Libyan private property, on the basis of the RD 2 Sett. 1912, no. 1099, became one of the main means through which Italian municipal officers were able to reconstruct the new urban landscape of colonial Tripoli. See F. DUMASY, *Ordonner et Batir. Construction de l'espace urbain et ordre colonial a Tripoli pendant la colonisation italienne, 1911-1940*, unpublished PhD thesis, Université de Provence Aix-Marseille 1, 2006, pp. 538-561.

<sup>10</sup> Italian attempts to expropriate these buildings located in the Bab al-Bahr area of the Tripoli medina started in 1913, but it took them three years to finally get their hands on the edifices that belonged to the *awqāf al-jawami'* and the *waqf* of the al-Mizran mosque. Details on this episode are provided in F. DUMASY, *Ordonner et Batir*, cit., pp. 346-350. The exact extent to which colonial officers expropriated urban *awqāf* properties will be possible only following a full study of the *Registri degli Espropri* available in the *Libyan centre for national archives and historical studies*.

<sup>11</sup> In order to make space for their rural settlement policy, French colonial officers in Algeria busied themselves to find legal expedients in order to revert extensive stretches of *awqāf* property into private property, which could then be assigned to French settlers. See D. POWERS, *Orientalism, Colonialism and Legal History: The attack on Muslim Family Endowments in Algerian and India*, in «Comparative Studies in Society and History», 1989, vol. 31, pp. 535-571.

*awqāf* prior to the Italian occupation. Despite the transformations imposed on the juridical status and on the administration of the Libyan *awqāf*, colonial officers never sought to debunk this institution, nor did they attempt to «nationalize» these endowments.<sup>12</sup> On the eve of the peace treaty with the Turks, the Italians declared that Libyan *awqāf* «shall be respected as in the past». As we shall see, this statement was largely adhered to throughout the thirty years of Italian rule in Libya.<sup>13</sup>

In order to support this contention, this essay provides an overview of the legal status of the *awqāf* at the time of the Italian conquest and traces the juridical transformations they underwent up to 1939, when the last colonial law for the administration of the *awqāf* was issued. For this purpose we shall examine the *Decreti Reali* published in the *Bollettino Ufficiale del Governo*,<sup>14</sup> as well as a selection of court cases on *awqāf* matters heard by Tripoli's Court of Appeals.<sup>15</sup>

It is important to note from the outset that when attempting to study the Libyan *awqāf* during the colonial period one faces the problem of scarcity of available sources. Although the 775 registers of the Islamic courts (*sijillāt al-mahkama al-shar'īyya*) of Tripoli contain hundreds of examples of *waqfiyya* (the original constituting act of a *waqf*, written by a notary) and *sharī'a* court hearings over *waqf* matters from the pre-colonial period, only a handful of such cases appear to exist in the *sijillāt* of the colonial period.<sup>16</sup> Most of these cases concern a special type of rent contract known as *ijāratayn* (double rent)<sup>17</sup> and the appointment of administrators or imams. As we shall see in greater detail below, the reason why so few *waqf*-related cases made it to the Islamic court, following the occupation in 1911, appears to be tied to the colonial creation of the Court of First Instance (also known as *Tribunale Ordinario* and occasionally referred to as *Tribunale per gli Indigeni*), which took over most of the duties of the *qādī* court on *awqāf* matters. It is also possible that after the re-organization of the

<sup>12</sup> A Libyan scholar has recently claimed that Italians «nationalized» Libya's *awqāf*. See M. ABOSSOWA, *The law of waqf in Tripoli under Italian colonization (1911-1921)*, unpublished paper presented at the *Law of Waqf II* conference held at the Islamic Legal Studies Program, Harvard Law School, May 16-18, 2008, unpublished conference proceedings. Aboossawa claims that the Italians took over the *mīrī awqāf*, but does not provide any evidence that these properties he refers to, which were indeed *mīrī* (owned by the Ottoman state), were also *awqāf* property.

<sup>13</sup> RD 17 Feb. 1912, n. 1088, in MINISTERO DELLE COLONIE, *Ordinamenti della Libia*, Roma, 1914, p. 11.

<sup>14</sup> The *Regi Decreti* (Royal Decrees), as well as *Decreti del Governatore* (Governor's Decrees, hereafter DG) and *Decreti Ministeriali*, had immediate legal value when they were published in these legal compendiums. Decrees issued prior to 1914 were published in MINISTERO DELLE COLONIE, *Ordinamenti della Libia*, cit.; those from 1915 to 1933 were published in the *Bollettino Ufficiale del Governo della Tripolitania* or/and *Bollettino Ufficiale del Governo della Cirenaica* depending on the geographical scope of the law; after 1934, when the administration of Tripolitania and Cyrenaica were united, laws were published in the *Bollettino Ufficiale del Governo della Libia*.

<sup>15</sup> The Court of Appeals of Tripoli was the second instance collegial court for both civil and penal matters. Established in 1915, it was colonial Libya's only forum for appeals and it adjudicated contested sentences valued above 2,000 Lira emitted by the first instance tribunals in the areas of Tripolitania, Cyrenaica and Fezzan, which had been placed under Italian civilian rule. This court was also called upon when it was unclear which court of first instance had jurisdiction over a lawsuit. After 1921, the Court of Appeals also examined lawsuits on disputed land titles. Its sentences are available in three separate publications, which are: W. CAFFAREL, *Giurisprudenza coloniale della Corte d'appello per la Libia, 1915-1919*, Tripoli: Tipo-litografia del Governo della Tripolitania, 1920; G. MARTINA, F. VALENZI, *Giurisprudenza della Corte d'Appello della Libia 1920-1925*, Tripoli, 1926; F. VALENZI ET AL, *Giurisprudenza della Corte d'appello della Libia, 1926-1932* Tripoli: 1933. Henceforth we shall refer to these volumes as *Giurisprudenza I*, *Giurisprudenza II* and *Giurisprudenza III* respectively. Individual lawsuits will be referred to citing the abridged title of the volume and page number.

<sup>16</sup> See the handwritten catalogue of the *sijillāt al-mahkama al-shar'īyya* (hereafter SMS) now kept in the new *Libyan center for national archives and historical studies*. Archivists of the *Dār al-Mahfuzāt al-Tārīkhīyya*, the Libyan archive where these registers were housed until 2008, duly recorded all the *waqf* cases contained in *sijillāt*.

<sup>17</sup> SMS 396, n. 51 (1915), concerns the sale of the *ijāratayn* contract to lease three properties in *shara' mizrān* belonging to the *waqf* of *al-kabaknī* mosque; SMS 396, n. 150 (1916), on the use in *ijāratayn* of two mills belonging to the *waqf* of the *al-'arabī* mosque; SMS 396, n. 149 (1916) concerns the registration of an *ijāratayn* agreement between the *awqāf al-jawāma'* and the new leaser of a shop in *mahallat baladiyya*; SMS 399, n. 103 (1914) concerns the sale of an *ijāratayn* contract of *waqf* property in the *sūq al-mushir* area; SMS 399, n. 15 (1914) is a sale of an *ijāratayn* contract of property of the *waqf* of *al-kharruba* mosque; SMS 418, n. 29 (1914) is the sale of *ijāratayn* contract of property of the *waqf* of the *durghut pasha* mosque.

central administration of Tripoli's *awqāf* in 1915 all *waqf* contracts were recorded in separate (unlabelled) registers and not in the *sijillāt* of the Muslim court.

Given the scarcity of *waqf* records in the *sijillāt* and in the absence of registers of the first instance court of Tripoli or of the special tribunals set up to verify real estate ownership, it has been necessary to turn to the published sentences of the Court of Appeals in order to shed light on Italy's *waqf* policy in Libya. The significance of this court lies in the fact that its rulings constituted a body of jurisprudence that had binding legal value whenever there was silence of the law.<sup>18</sup> In this regard, colonial officers had established that the *giurisprudenza* (jurisprudence) that stemmed out of the deliberations of the Court of Appeals became automatically a source of law in Libya.<sup>19</sup> The underlying idea behind this was that, given the lengthy procedure to emanate new legislation, the sentences of Libya's Court of Appeals would be the most immediate way to start sketching a new legal framework that would take into account local realities that found no correspondence in the Italian legal codes.

The idea that a court ruling could become a legal norm is not without problems, since, unlike common law, the Italian positive law rejected the formal use of court verdicts as a legal precedent. The recourse, however, to such a system attests to the large degree of improvisation in which the colonial courts of Tripoli operated, in order to make up for the absence of appropriate laws necessary to rule on matters that the Italian legislators were confronting for the first time. The way the colonial judges resolved disputes on the *awqāf*, a widely spread pious institution in Muslim countries but entirely absent from the Italian legal world, illustrates how colonial authorities bended and adapted their law to adjust to local circumstances.<sup>20</sup>

Over the thirty years of Italian rule in Libya, Muslim religious endowments underwent various transformations. They went from being controlled by an administrative body (*idāra awqāf al-jawāmi'*), created by the Ottomans and headed by a Turkish officer, to an autonomous local institution managed by Libyan notables appointed by the colonial government. They also went from being under the complete jurisdiction of the Islamic judge to being an institution under mixed judicial oversight, with the colonial courts competent for some matters and the Islamic court for others.

Given that Italian policy on the *awqāf* did not follow a linear progression in any precise direction, it is difficult to divide this gradual transition of the status and functioning of the *awqāf* into distinct periods. The problem is also linked to the fact that some *awqāf* issues, as in the case of the land registry, continued over a period of time and cannot be compartmentalized into specific and convenient dates. However, despite these caveats and for the benefit of clarity, it is useful to think of the history of the *awqāf* in colonial Libya as being characterized by the following phases: the first, from 1911 to 1915, was characterized by the status quo and the emergence of the first problems; the second, from 1915 to 1917, featured administrative reforms and the creation of the «beni aukaf» administration in Tripoli; the third phase, from 1918 to 1934, saw the creation of the Land Registry and the consequent problems to prove a *waqf*'s legal validity; in the fourth phase, which embraces the years from 1934 to 1939, the administration of the «beni aukaf» was extended to the whole of Libya.

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<sup>18</sup> Jurisprudence was considered one of the sources of Italian colonial law. Art. 1 of the supplementary norms of the *Ordinamento Giudiziario* of Tripolitania and Cyrenaica, approved with RD 15 April 1917, n. 938, established that «in adapting the laws to local conditions, the judge must, with his decisions, fix the norms that can best regulate controversial issues, thus introducing those changes to the laws, which he would have promulgated had he been a legislator» in E. CUCINOTTA, *Diritto Coloniale Italiano*, Roma, 1933, p. 57. Even before the *Ordinamento* of 1917, the Italians adhered to the principle according to which, when there is silence of the law, the Appeals Court must consider itself invested with jurisdiction by the Governor, in conformity with art. 12 of the RD 20 March 1913, n. 289, in MINISTERO DELLE COLONIE, *Ordinamenti della Libia*, cit., p. 251.

<sup>19</sup> According to the RD 15 April 1917, no. 938, in applying judicial regulations, the magistrates and civil servants ought to be sure that people adhere to «the spirit that animates the dispositions, according to which the administration of justice must take place in the quickest and most simple way, in so far as it can be compatible with the defence of public and private interests». In CUCINOTTA, *Diritto Coloniale*, cit., p. 57.

<sup>20</sup> After its publication, Italian judges increasingly referred to David Santillana's translation into Italian of the work of Maliki jurist Khalīl b. Ishāq al-Jundī. See I. GUIDI, D. SANTILLANA, *Il «Muhtasar»: o sommario del diritto malechita di Khalil ibn Ishaq*, Milano, Hoepli, 1919; and D. SANTILLANA, *Istituzioni di diritto musulmano malichita con riguardo anche al sistema sciafita*, Roma, Istituto per l'Oriente, 1925.

A detailed analysis of these four moments will reveal that, despite the confiscation of Sanusi property, Italian authorities never attempted to discredit this Muslim institution and the founding principles on which it was based.

### The status quo and the first problems (1911-1915)

Since the beginning of the colonial enterprise, Italian authorities had adopted the general idea that, in relation to the local population, Italy would respect their belief and religious practices within the limits imposed by colonial public order and in so far as they «did not run against the spirit of Italian law and civilization».<sup>21</sup> In the wake of this professed adherence to local customs and the pre-existing order, the Italian military commanders ordered the immediate reconstitution of the offices that had previously administered Muslim endowments. They nominated Muhammad al-Būsayrī, brother of and assistant to the *qādī* of Tripoli, as the head of the *awqāf al-jawāmi'*, replacing the previous Ottoman officer Shafīq Effendi.<sup>22</sup> They also appointed another Tripoli notable with links to the *qādī* court, Muhammad al-Na'ib, as the administrator of the *awqāf al-sūr*.<sup>23</sup> Likewise for Cyrenaica, the military commander there also reinstated the administrative office of the *awqāf* in Benghazi.<sup>24</sup> A year after the occupation, on the eve of the peace treaty with the Turks, the Italians declared that «the rights of the pious foundations (*vakufs*) will be respected as in the past» and this soon became the main tenet of the Italian policy towards the Libyan *awqāf*.<sup>25</sup>

This professed respect towards Muslim endowments can be explained within the context of Italy's so-called «politica islamica», which became a cornerstone of Italian policy from the early years of the colonial adventures and was further reinforced during the Fascist period, when Mussolini himself was crowned the *spada dell'Islam* (sword of Islam).<sup>26</sup> Aimed both at distancing Italy from neighbouring colonial powers as well as at co-opting the local establishment, the proclaimed physical defence of endowments became an integral part of Italy's Islamic policy.

The decrees on the *awqāf* promulgated in the first two years of colonial rule were admittedly vague. The commanders of the expeditionary forces in both Cyrenaica and Tripolitania authorized the re-establishment of the administrative bodies that managed the *awqāf* in Tripoli, Benghazi and Homs, and professed that the *awqāf* would be respected as in the past, but they neglected to address other issues related to the legal status of the *awqāf*. In addition to failing to set up verification procedures necessary to determine which properties were *awqāf*, in this first phase of their occupation, the Italians did not clarify who had juridical oversight over Muslim endowments, nor how these bodies should be administered.

With regard to the first issue – how the Italians determined what was *waqf* property - we know that in the immediate aftermath of the military occupation, the former Italian consul to Tripoli, Cavaliere Galli, and his translator Ahmida Smirli, with the help of the city's major Hassuna Pasha and Muhammad al-Būsayrī, got hold of the registers of the public *awqāf* of Tripoli and transported them to the Castle of Tripoli in order to safeguard them from possible destruction during the siege of the city.<sup>27</sup> These registers offered the colonial officers details on all the properties belonging to the *awqāf al-*

<sup>21</sup> CUCINOTTA, cit., p. 28.

<sup>22</sup> Declaration of Gen. Caneva, 6 November 1911, in MINISTERO DELLE COLONIE, *Ordinamenti della Libia* cit., p. 190.

<sup>23</sup> Declaration of Gen. Caneva, 14 December 1911, in MINISTERO DELLE COLONIE, *Ordinamenti della Libia* cit., p. 190.

<sup>24</sup> Declaration of Gen. Briccola, 30 November 1911, in MINISTERO DELLE COLONIE, *Ordinamenti della Libia* cit., p. 189.

<sup>25</sup> RD 17 Feb. 1912, no. 1088, in MINISTERO DELLE COLONIE, *Ordinamenti della Libia* cit., p. 11.

<sup>26</sup> On Italy's «politica islamica» see A. MALVEZZI, *L'Italia e l'Islam in Libia*, Milano, 1913; N.A., *La politica islamica dell'Italia: Orientamenti e note ad uso dei giornalisti*, in occasione del «Viaggio del Duce in Libia per l'inaugurazione della Litoranea anno XV», Roma, 1937; R. CANTALUPO, *L'Italia Musulmana*, Roma, 1928; G. CERBELLA, *Fascismo e Islamismo*, Tripoli, 1938; R. DE FELICE, *Il Fascismo e l'Oriente. Arabi, ebrei e indiani nella politica di Mussolini*, Bologna 1988; E. GALOPPINI, *Il Fascismo e l'Islam*, Parma, 2001.

<sup>27</sup> CALIFANO, op. cit., p. 116. I did not find these registers in the Libyan National Archives inside Tripoli's Castle, so it is possible that they were transferred either to the *Ufficio Fondiario* or to the «*beni aukaf*» offices when these offices were created.

*jawāmi'* and *awqāf al-sūr*. They were not however inventories of all the *awqāf* property in the colony, as at the time there appears to have been no registry of the so-called family endowments, whose usufruct was still in the hands of individual beneficiaries and had not yet passed to the *awqāf al-jawāmi'*, the central authority administering public endowments. The inventories of Tripoli's family *awqāf*, together with most documents and registers of property ownership, appear to have gone missing, probably burnt, during the Italian siege of Tripoli's castle in 1911.<sup>28</sup>

Colonial authorities required such registers in order to distinguish property that had been immobilized in *waqf* deeds, which they wished to uphold, from Ottoman state (*mīrī*) property that the Italians had taken over unilaterally.<sup>29</sup> Similarly, they needed to differentiate *waqf* property from private property that the government and the settler population could purchase or rent with no restrictions. Unlike private property, *awqāf* land or buildings could not be purchased and their rent, as we shall see later, had temporal restrictions.

Until 1913 the absence of property registries identifying all endowed real estate had not aroused particular concern, given that colonial authorities had imposed a total ban on the sale of real estate in order to pre-empt the possible speculation and unlawful appropriation of land, including *waqf* property.<sup>30</sup> However, when in early 1913 the first colonial land law in Libya lifted the freeze on real estate transactions, the ability to trace the exact status of real estate ownership gained in urgency.<sup>31</sup> In order to confront this problem, this land law called for the provisional registration of real-estate belonging to both family and public endowments in a special list of *awqāf* property; colonial officials also ordered the completion of three separate lists for three different categories of property, labelled respectively state property (*proprietà demaniale*), property of collective use (*beni di godimento collettivo*), and free property (*proprietà libera*), which most probably correspond to the Ottoman terms *mīrī*, *matrūka* e *mawt*.<sup>32</sup> These provisional lists of land ownership were to be publicly displayed in the land registry offices, in ordinary courts and in *sharī'a* courts for 30 consecutive days, and were to be published in the *Bollettino Ufficiale*. If, within two years of their publication, nobody raised any objection to the inclusion of a piece of land or an urban dwelling in the *waqf* register, only then did its *waqf* status become definite and binding.<sup>33</sup> On the other hand, if objections were raised, the Land Registry was then obliged to examine the case and determine the property's correct legal status.<sup>34</sup>

With regard to the second issue - the jurisdiction over *waqf* cases - Italian lawmakers had established the general principal that a *qādī* had competence over all matters related to «personal

<sup>28</sup> See for example the prologue to the first law on property rights, RD 26 Jan. 1913 n. 48, in MINISTERO DELLE COLONIE, *Ordinamenti della Libia* cit., p. 327.

<sup>29</sup> In the proceedings of Tripoli's court of Appeals the judges make repeated mention of the fact that most registers of Tripoli's property were destroyed or went missing during the siege of the Soraya Castle, where the office of the Ottoman governor was located. The lack of a comprehensive cadastral survey in rural northern Tripolitania and technical failures in administering the Ottoman system of land registration became major obstacles in establishing the validity of claims of property ownership. The legality of using Libyan land for Italian settlement, however, was the fundamental issue. Colonial authorities argued that the solution to this problem rested upon the assumption that the Italian state, which had become the new sovereign in Tripolitania, had dominion right to the same property as the Ottoman state. The Italians believed that they were entitled to those lands that under the Ottomans were defined as *mīrī* (state land), *matrūka* (land for public use or «collective» land) and *mawt* (uncultivated land), but not *awqāf* property. See G. FOWLER, *Italian Colonization of Tripolitania* in «Annals for the Association of American Geographers», vol. 62 no. 4 (Dec. 1972), p. 633.

<sup>30</sup> RD 20 Nov. 1911, no. 1248 in MINISTERO DELLE COLONIE, *Ordinamenti della Libia* cit., p. 360.

<sup>31</sup> RD 26 Jan. 1913, n. 48 in MINISTERO DELLE COLONIE, *Ordinamenti della Libia* cit., p. 327.

<sup>32</sup> It is probable that the three terms found in the Italian register (*proprietà demaniale*, *beni di godimento collettivo*, and *proprietà libera*) refer to the Ottoman terms (used elsewhere but not in the Italian text of the law) *miri*, *matruka*, and *mawt*. On this land law see also FOWLER, *Italian Colonization*, cit., p. 634.

<sup>33</sup> At some point following the promulgation of the 1913 land law, the deadline to submit appeals, originally set at two years, was decreased to three months from the date of publication of the Land Registry.

<sup>34</sup> The exact publication date of these lists remains unclear, as no such list was found in the *Bollettino Ufficiale* in the years following the 1913 law. However, as we shall see later in this paper, the Court of Appeals started to hear numerous disputes over *waqf* property after 1917, so presumably the publication of these lists occurred that year.

status, family relations, marriages and inheritances». <sup>35</sup> In the pre-colonial period religious endowments fell under the jurisdiction of the Muslim judge; but by limiting the jurisdiction of the *qādī* to the four above-mentioned matters, and by failing to provide explicit mention of *awqāf* cases, it became unclear whether religious endowments could be considered part of the *qādī*'s duties. The uncertainty was linked to the question of whether or not *awqāf* could be considered a special type of Islamic inheritance. On the one hand, given that *awqāf* did somehow involve the devolution of property in favour of a benefactor's heirs, some jurists considered it a special type of inheritance. On the other hand, given that the heirs of a *waqf*'s beneficiary only received the usufruct of a property and not its full ownership, other lawmakers argued that the transmission of *awqāf* property transcended the Islamic law of succession and therefore could not be considered as belonging to «inheritance» matters.

The Court of Appeals voiced its opinion on this matter, on which Italian law had remained silent. In one of the court's first sessions, at the beginning of 1915, it established that the *qādī* court was competent in *waqf* matters only in strictly juridical-religious issues, but «it could not by analogy extend [its jurisdiction] to issues related to contracts and property rights». <sup>36</sup> This implied that all contractual matters related to any type of endowed property had to be presented to a colonial civil court (*Tribunale Ordinario*) and then be validated by the colonial authorities. As later sentences would clarify, a *qādī*'s authority over an endowment would be limited to establishing the quotas of succession <sup>37</sup> and overseeing the foundation of a new *waqf*. <sup>38</sup> Instead, the ordinary court was responsible for rent contracts of *awqāf* property, <sup>39</sup> and reserved for itself the right to declare a *waqf* null <sup>40</sup> and to oversee a *waqf*'s administration. <sup>41</sup>

The conflict between the colonial court and the *qādī* court is well reflected in the case concerning the contested appointment of a woman as administrator of the al-Mizran *waqf* in Tripoli. <sup>42</sup> The dispute was not whether a woman could act as a *waqf*'s administrator, which in itself is a matter of contention, but rather on whether one of the women, Zahra Mabruka, represented in court by her husband Muhamad, was mentally able to act as administrator. <sup>43</sup> It was unclear which court had jurisdiction over this matter. The plaintiff had first presented her case to the Court of First Instance, but the Italian judges there told her to obtain the legal opinion of the *qādī*, who traditionally oversaw the appointment of a *nādhir* (administrator). The *qādī* examined the case and gave his ruling, which was transcribed in the registers of the Islamic court. <sup>44</sup> However, in the mean time, and in relation to another case on appeal, the Court of Appeals had established that the *qādī* had no jurisdiction in matters of *waqf* administration, because this belonged to the ordinary court. Amid these contradictory orders, the Mabruk vs Mizran case reached the Court of Appeals, which was then forced to clarify that matters of *awqāf* administration «fall either under the jurisdiction of the *qādī* or of ordinary justice, depending on the specific object of the controversy». <sup>45</sup> Given that this particular matter required a specific judgment on the mental capacity of a person to act as administrator, the court eventually ruled that the case fell under the jurisdiction of the *qādī* and sent the case back to the *sharī'a* court. It is important to underscore – as the Italian judges also did - that in this case the colonial authorities called upon the Muslim judge solely because it was his prerogative to evaluate the mental capacity of people

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<sup>35</sup> CUCINOTTA, *Diritto Coloniale*, cit., p. 50.

<sup>36</sup> *Giurisprudenza* I, p. 13.

<sup>37</sup> *Giurisprudenza* I, p. 148 and *Giurisprudenza* III, p. 28.

<sup>38</sup> *Giurisprudenza* I, p. 147.

<sup>39</sup> *Giurisprudenza* I, p. 37.

<sup>40</sup> *Giurisprudenza* I, p. 148.

<sup>41</sup> *Giurisprudenza* III, p. 37.

<sup>42</sup> *Giurisprudenza* I, p. 157.

<sup>43</sup> *Ibidem*.

<sup>44</sup> SMS 450, p. 273 (1917).

<sup>45</sup> *Giurisprudenza* I, p. 157.

invested with public duties such as legal guardians, tutors and administrators.<sup>46</sup> In most other *waqf* matters that the court was competent for, the *qādī* would be called in as a sort of expert witness.

Although the problems emerging from the ambiguous competing authority of the *qādī* and the colonial courts were broadly resolved in the first few hearings of the colonial court, the more specific details of this two-sided jurisdiction remained a re-occurring problem that the judges of the Court of Appeals continued to confront over the years. As late as 1918 and 1920 other cases, which questioned the jurisdiction of the various courts, forced Italian judges to clarify, and once again reaffirm, that «the prevailing doctrine, the most recent jurisprudence of the colonies of North Africa, in spite of a series of contrasts and disagreements, tends to consider a *waqf* as an institution of property right (*diritto reale*) – this is the thesis followed by this court».<sup>47</sup>

In relation to the third issue – how to administer the *awqāf* – during the first phase of the Italian colonization of Libya, colonial authorities made only a few timid attempts to restructure the administration of the endowments. The first such attempt to reform the administration of the *awqāf* took place in the summer of 1914, when the Italian-appointed administrator of the public *awqāf*, Muhammad al-Būsayrī, was replaced by another Tripoli notable, Hassuna Gurgi, flanked by a committee of four other local Muslims.<sup>48</sup> Apparently the reason for this change was that the Tripoli notables had not welcomed the fact that the Būsayrī family dominated both the local court (Muhammad al-Būsayrī's brother was *qādī* of Tripoli) as well as the *awqāf*. A directorate, composed of a group of notables instead of a single appointed director, was assumed to be a better alternative and would avoid the concentration of power in the hands of one family. This experimental system appears not to have been fully satisfactory, however, as the other consultative members, who were not paid for their supervisory role, repeatedly failed to show up at the meeting of this newly created administrative body.<sup>49</sup>

Another attempt to reform the administration of the *awqāf* came in the summer of 1915, when the government passed a decree in which it once again reaffirmed Italy's total respect for Islamic institutions in general, and the *waqf* foundations in particular. This new law officially abrogated a similar declaration made in 1912; however, it did not change in any substantial way the status of the *awqāf* or their administration.

It can therefore be said that in this first period of colonial rule in Libya, the *awqāf* did not undergo any major transformation and the status quo was generally maintained. The Italian military commanders issued vague statements with regard to Muslim endowments, how they should be administered and how the government should go about certifying land ownership. The impact of these decisions was not immediate, but became apparent only in the long run. As we pointed out, the main significant and immediate innovation from this initial period was the Court of Appeal's rulings, which established that in most matters the *awqāf* fell under the jurisdiction of the ordinary courts rather than the *qādī*.

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<sup>46</sup> It remains unclear to what extent the colonial courts kept for themselves the right to oversee the administration of a *waqf*, given that in *Giurisprudenza* II, p. 375 the judges ruled that matters related to the nomination of an administrator are the competence of the *qādī*. It is possible that the *Tribunale Ordinario* was competent on all financial and contract disputes (which could involve or not the administrator of a *waqf*), whereas the *qādī* retained the right to judge the capacity of a proposed administrator. This detail could not be verified because, with the exception of the above-mentioned Mabrūka vs Mizran case, the registers from the colonial period do not contain other cases of this sort.

<sup>47</sup> *Giurisprudenza* I, p. 149. By defining a *waqf* as an institution of *diritto reale*, the court was effectively establishing that it constituted a proper dispensation of the law of succession and therefore had to be placed under the jurisdiction of the ordinary courts, also referred to as *Tribunali per gli Indigeni*. For this reason, «a case that needs to establish who is the definite recipient of a *waqf*, pertains to the *Tribunale per Indigeni* and not to the *sharī'a* court, which is assigned cases of inheritance; this is because the definite recipient takes over his rights *ope legis*, in the light of his own rights that are derived directly from the *waqfiyya* and not from hereditary succession». (*Giurisprudenza* II, p. 40).

<sup>48</sup> RD 6 July 1914, cited in GOVERNO DELLA TRIPOLITANIA *Progetto di Ordinamento dell'amministrazione dei beni awqaf della Tripolitania*, Tripoli, 1916, p. 4.

<sup>49</sup> GOVERNO DELLA TRIPOLITANIA, *Progetto di Ordinamento* cit., p. 4.

### Administrative reforms and the creation of the «beni aukaf» in Tripoli (1915-1917)

The first major colonial attempt to transform the administrative system of Tripoli's religious endowments was the *Progetto di ordinamento dell'amministrazione dei beni aukaf della Tripolitania*, which began in late 1915.<sup>50</sup> The government appointed a mixed commission of eight local Arab notables and five colonial officers, who met 23 times over a period of five months in order to come up with recommendations for the government on the future of this institution.<sup>51</sup> They discussed matters concerning the creation of a general inventory of the public and private *awqāf*, the procedure to verify family *awqāf*, administrative regulations and how to improve the revenues generated by public *waqf* property. Most of the final recommendations made by this commission were ratified in late 1917 in two separate laws, respectively on the administration of the *awqāf al-jawāmi'* and the *awqāf al-sūr* respectively.<sup>52</sup>

The main point agreed upon was that a council composed exclusively of Muslim members (one president, one administrator, and five advisors) would administer the public endowments (*awqāf khayrīyya*), which would be known as «beni aukaf». Although the council was to be an autonomous Muslim entity, it could not be totally independent from the Italian state, which had the right to approve of its members and oversee this institution. In this respect, the law of 1917 reaffirmed that the «*Consiglio dei Beni Aukaf*» – as the Italians called it – «is subject to the oversight of the government, that can in any moment send one of its delegates to verify the acts, the documents, the minutes, the registers, and in general anything that refers to the administration of the *awqāf*».<sup>53</sup> The Governor, furthermore, could annul decisions and contracts made by the council. Despite the formal rights the Government awarded to itself, it appears that the Libyan members of the commission never opposed Italy's request to be involved in the administration of the *awqāf*.<sup>54</sup> The written minutes of the meeting reveal that, although they objected to an Italian officer being a permanent fixture of the *awqāf* council, they did welcome the contribution of the Italian advisors in helping structure the *awqāf* administration and in checking its finances.

The other issue addressed by this law was the composition of the council. Seeing that in the past there had been problems with the appointed advisors (accused of pursuing their own advantage or never showing up to the meetings), this law of 1917 explicitly stated that these men could not have any direct or indirect private or public interest in *awqāf* properties. In order to secure their attendance at the bi-monthly meeting of this new *awqāf* council, it was also established that the five advisors would receive a symbolic token every time they attended. If they failed to attend two consecutive meetings the *qādī* would personally reproach them and they could then be replaced.

Unlike the advisors, the president and the administrator were full-time public employees who received a regular salary. The President, who throughout most of the colonial years appears to have been the Tripoli notable Hassuna Gurgi,<sup>55</sup> had a more legal and representative role, signing contracts or documents of the *awqāf* and meeting with representatives of the Italian government. On the other hand, the duty of the administrator was to sell the agricultural products grown on endowed land, to maintain *waqf* real estate, rent it out and control *waqf* finances. Contacts or expenses below 100 lira

<sup>50</sup> This commission was formed with the DG 4 November 1915, serie B, n. 26, in *Bollettino Ufficiale della Tripolitania* 1915.

<sup>51</sup> The members of this commission were the head of Libya's Appeals Court Antonio Marongiu, the head of the Land Office Giuseppe La Rocca, the First Secretary of the General Secretariat Luigi Del Giudice, a consultant of the government in matters of Islamic Law Alexis Lavison, Giacomo Tedesco, the Mayor of Tripoli Hassuna Pasha, the *qādī* of Tripoli Abdurrahman al-Būsayrī, Mohammad Farhat Bey, Ahmad Zia al-Din Muntasser, il Mufti di Tripoli 'Umar b. Mohammad al-Msellati, another *qādī* of the Nuwahi al-Arba area Najm al-Din al-'Alam, the administrator of the *awqāf al-jawāmi'* Hassuna Gurgi, and the administrator of the *awqāf al-sūr* Mohammad Sami Bey al-Na'ib.

<sup>52</sup> *Destinazione delle rendite dei beni awqāf al-sūr di Tripoli* RD 16 July 1917, n. 1283; *Istituzione di un consiglio speciale per l'amministrazione e sorveglianza dei beni awqaf*, RD 2 Oct. 1917, n. 1656, both in *Bollettino Ufficiale della Tripolitania* 1917.

<sup>53</sup> RD 2 Oct. 1917, n. 1656.

<sup>54</sup> GOVERNO DELLA TRIPOLITANIA, *Il Progetto di Ordinamento* cit.

<sup>55</sup> As late as 1936, official documents list Hassuna Gurgi as the *Beni Aukaf* President. See DG 9 Jan. 1936, SA 1913, in *Bollettino Ufficiale della Libia*, p. 30.

could be underwritten by the administrator directly, but expenses above that sum had to be approved by all members of the council.

This council had direct administrative authority over Tripoli's *awqāf mazbūta*, («complete», meaning those endowments which no longer had independently appointed or designated administrators or beneficiaries, also referred to as public *awqāf* or *awqāf khayrīyya*). It could also administer the property of other types of *waqf* as well as endowments from outside the Tripoli area, granted there was the explicit request of the current beneficiaries and the approval of the *qādī* to do so. With regard to other types of *waqf*, including the family endowments, it was established that the council only had the right to «control» them, but the law did not specify what type of control this implied.

As the 1913 land law had already anticipated, the 1917 law on *awqāf* administration reaffirmed the need to compile a general inventory of all types of *waqf* property, be they public endowments or family ones, involving rural or urban property, mobile or real-estate. There were no endowed mobile goods in Tripolitania (in other Muslim countries these could be cash, books, carpets, gems), so no registers of this type were ever compiled.<sup>56</sup> As for the registers of endowed real-estate, these had to be assembled by three separate authorities.<sup>57</sup> Firstly, the administrator of the *awqāf* council had to compile a list of Tripoli's *awqāf mazbūta*, of which it already possessed the original Ottoman registers. In addition to this, the *imams* of every single mosque in Tripoli were asked to put together a list of all the *awqāf* for which that mosque had already become the actual beneficiary, or had been appointed as the ultimate beneficiary. Thirdly, for *waqf* property outside Tripoli, local commissions made up of four Muslims were created; the *mukhtar* (head of the village) and the imams from the given area were entrusted with surveying all the *waqf* buildings and land there. All these different registers, even those from outside the area of direct authority of the newly appointed *awqāf* council, had to then be reviewed by the council.

The other issue that the *progetto di ordinamento dell'amministrazione dei beni aukaf* of Tripolitania sought to settle was that of the *awqāf al-sūr*. This *waqf* had been created in the Ottoman period in order to support the upkeep of Tripoli's defence walls. Given that these walls had been destroyed during the occupation and Italy was now entrusted with the defence of the city, colonial officers argued that this *waqf* was no longer needed, at least not with its original purpose. The commission therefore suggested a more metaphoric reading of the constituting principle of the *waqf*, which was the defence of the city, and came up with the idea that, under present circumstances, the best «defence» that could be offered to the population of Tripoli was education and not a wall. The commission argued that «in conformity with the traditions and Islamic customs», if the original purpose of a *waqf* could no longer be upheld because of a change in circumstances, then it was admissible to use its revenues for similar purposes of general public utility. Consequently, the commission decided that the revenues of this endowment should go towards the upkeep of a school of Islamic culture modelled on Egypt's al-Azhar, of which Tripoli had no example. This Islamic school was not built immediately, but only twenty years after this law on the *awqāf al-sūr* was passed. As long as the school did not exist, the funds generated from the rented properties of this *waqf* accrued to the central administration of the «beni aukaf».<sup>58</sup> Contrary to what is commonly believed, this special endowment for the «defence» of the city was not abolished, nor were its properties expropriated by the state; the funds it generated, as the revenues of other public endowments of Tripoli, simply accrued to the «beni aukaf».

What is important to note about this second «reforming» phase of the history of the *waqf* in Libya is that the Italian authorities adhered to their initial commitment to leave these endowments in Muslim hands as in the past. Admittedly they retained some indirect control over the *awqāf*, as it was the governor who had the right to appoint the members of the *awqāf* council, and he also had the right to veto any decision that might harm Italian interests. But retaining the oversight of this institution

<sup>56</sup> *Relazione della sotto-commissione per l'inventario generale e per la ricognizione degli Aukaf di famiglia*, in appendix to the proceedings of the 18 Dec. 1915 meeting, in GOVERNO DELLA TRIPOLITANIA, *Progetto di Ordinamento*, cit. p. 75.

<sup>57</sup> Capo V, in the RD 2 Oct. 1917, n. 1656.

<sup>58</sup> RD 16 July 1917, n. 1283, cit.

does not appear to have been perceived as a direct interference. Local notables also welcomed Italian efforts to restructure the *awqāf al-sūr*, and it was actually following the suggestion of the Muslim members of the advisory committee that the proposal of using the funds of this *waqf* for an Islamic university emerged.

Similarly, the local notables never questioned the idea of the collaboration between local imams and village *shaykhs* in gathering information concerning all the existing *waqfs* spread inside Tripoli or elsewhere. In this respect, the Libyans on the council never, at any moment, expressed concern or fear that the information collected might be used to undermine these institutions rather than safeguard them. Nor does the Italian documentation at our disposal suggest in any way that colonial officials considered the use of the *awqāf* registry to expropriate or nationalize the properties listed in them. The ultimate aim of these reforms appears to have been to bolster the finances of this institution, not to appropriate them.

The two laws of 1917, which set up an administrative council for the «beni aukaf» and reformed the *awqaf al-sūr*, remained in force during the following two decades. It was only in 1939 that a new law on the administration of the *awqāf*, expanding the administrative role of the «beni aukaf» to the whole of Libya, was passed.<sup>59</sup> Throughout the intervening twenty years, the only other legislation to be issued, related to the *awqāf*, was one authorizing lawyers to represent the «beni aukaf» in court, rather than the council's president, who usually acted as its legal representative.<sup>60</sup> It is not a coincidence that this was the only *awqāf*-related law that was ratified in this period. As we shall see, from 1917 onwards an increasing number of legal disputes over endowments reached the colonial courts. It was within this legal forum that a professional lawyer was more qualified than the council's President, who had no training in Italian legal procedure, to speak on behalf of the *awqāf*. So the fact that in the following years we rarely find official laws on the *awqāf* in the *Bollettino Ufficiale* should not lead us to think that new regulations were never passed. They were passed, but not through Royal or Governor's Decrees, which regulated most issues in the colony; *waqf* matters were generally settled through the rulings of the Court of Appeals, which had binding legal value.

### Land Registry and the problems of verifying a valid waqf (1918-1934)

In this third phase, one of the main problems that judges of the Court of Appeals found themselves having to rule on was what constituted a valid endowment and what documentation was required to prove a *waqf*'s existence. The rulings that judges of the Court of Appeals gave on these matters had important implications, especially in the case of family *waqfs*, for which no compiled register existed.<sup>61</sup> By adopting what we shall reveal was a generally accommodating stance over what constituted a valid *waqf* and what evidence was needed to prove it, colonial authorities *de facto* upheld their support of these institutions and recognized endowed land and urban property as immobilized in perpetuity.

One of the first issues linked to a *waqf*'s validity that the judges had to resolve was whether Libyan *waqf* had to follow the Maliki or Hanafi school of law (*madhhab*). As mentioned earlier, Italian rulers had established as a general principle that local customs should regulate community matters. Given that the majority of the Libyan population followed the Maliki *madhhab*, Italians considered this the legal school applicable inside Libya.<sup>62</sup> Under Ottoman rule however, the Hanafi school prevailed and many *waqfiyya* that predated the Italian occupation were written in accordance with Hanafi *madhhab*, not Maliki law, as most of the Muslim judges that Ottoman authorities sent to

<sup>59</sup> RD 9 Jan. 1939, n. 1295 in *Bollettino Ufficiale della Libia* 1939.

<sup>60</sup> DG 28 July 1918, n. 1175, in *Bollettino Ufficiale della Tripolitania* 1918.

<sup>61</sup> Their rulings appear not to have had an impact upon the public (*khayrī*) endowments, as pre-colonial registers of these types of *waqf* were apparently available and therefore their existence could not be disputed. Furthermore, legal disputes over the validity of a *waqf khayrī* appear to have been rare. In fact, it was mainly members of a family whose predecessors had created a family *waqf* who contested its existence in order to free the immobilized property and thus obtain a greater share of the inheritance. For this reason, most of the court cases of this period pertain to family endowments, not *khayrī* ones.

<sup>62</sup> CUCINOTTA, *Diritto Coloniale*, cit, p. 44.

Tripoli belonged to the Hanafi school. Yet the contrary was also possible, so that at times the Italian judges were called upon to deliberate over the validity of a pre-1911 *waqfiyya* explicitly based on Maliki doctrines, or of a contemporary *waqfiyya* claimed to be based on Hanafi *madhhab*. How were the colonial authorities supposed to determine which school of law to uphold and when?

The judges attempted to solve the matter by establishing an overriding principle according to which, when a school of law was explicitly referred to in a *waqfiyya*, then that was what was to be followed, regardless of when the *waqfiyya* was written.<sup>63</sup> If a written act was available but it did not explicitly state the school, then the courts assumed that it would be Hanafi if the *waqfiyya* had been stipulated prior to 1911, and Maliki after that date.<sup>64</sup> Things started to become more complicated in the absence of a written act, because the judges had to first verify the validity of the *waqf's* existence through trustworthy witnesses or through other means, the details of which will be analyzed later. If the existence of a *waqf* was confirmed, then the date (whether pre or post-1911) of the alleged foundation of a pious endowment was once again taken into consideration. In this respect, the court stated:

When there is conflict among the different rites, the court decides to follow the Hanafi one, which was used under the former Ottoman legislation, given that at that time it regulated both the form and the essence of the act and it influenced local customs.<sup>65</sup>

For the purpose of clarity, let us briefly recall the differences between the two schools insofar as they are pertinent to the cases of family *waqf* discussed in the Tripoli court.<sup>66</sup> According to Hanafi law, the founder of a *waqf* can also be its first beneficiary; for the Maliki school on the other hand, the constituent must relinquish the usufruct of the devolved property for the *waqf* to be considered legitimate. A further difference rested in the Maliki prohibition to exclude female descendants from the entitlement, whereas the Hanafi school allowed the explicit exclusion of women from the line of beneficiaries. A third point of contention, which shall be examined more at length, was whether a written *waqfiyya* was necessary for a *waqf* to be valid and whether a *qādī* had to verify and approve it.

Referring to one school rather than the other had significant implications when deliberating over *awqāf* matters. A defect in the form of the *waqfiyya* could cause its annulment, which in turn could invalidate a family *waqf*, and revert the property that had been immobilized into free private property. On many occasions, heirs who had been left out of the line of beneficiaries of endowed properties attempted to turn to the local *qādī* to request a *waqf's* annulment on the basis of some alleged incompatibility with either the Maliki or Hanafi law. However, as we explained earlier, after 1915 the *qādī* no longer had jurisdiction over such matters and instead he sent the plaintiffs to the Court of First Instance, which was competent in matters of property rights. Given that those who composed this state court were bureaucrats who did not have a thorough knowledge of Islamic law and procedure, they would often call on the *qādī* (if he was deemed competent) for his expert opinion to verify the plaintiff's claims. If the verdict of the Court of First Instance was contested, then the dispute would ultimately reach the Court of Appeals, which, in almost all cases, recognized the contested *waqf* as valid.

The Italian judges appear to have understood the legal differences between the two schools. The verdicts they emitted over contested appeals, insofar as can be seen, reflect considerable appreciation of the schools' normative differences.

In relation to the Hanafi school's acceptance of the exclusion of female descendants from the line of beneficiaries, the Italian judges never seem to have been troubled by this tacit form of discrimination, which other European jurists as well as Maliki legal scholars had previously opposed.

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<sup>63</sup> *Giurisprudenza* II, p. 32.

<sup>64</sup> *Giurisprudenza* II, p. 330.

<sup>65</sup> *Giurisprudenza* I, p. 177.

<sup>66</sup> For a detailed treatment of the differences between the Maliki and Hanafi schools in *awqāf* matters, see A. LAYISH, *The Maliki Family Waqf according to Wills and Waqfiyyat* in «Bulletin of the School of Oriental and African Studies», University of London, 1983, vol. 46, no. 1, p. 1-32.

On the contrary, the Italians explained it as the manifestation of the constituent's right to nominate whoever pleases him, on the basis that a *waqf* was not a form of succession but rather a donation.<sup>67</sup>

In order to illustrate the position of the Italian judges with regard to this point, let us recall the case of Mne' bint Muhamad al-Sherif who protested her husband's decision to create a *waqf* whose beneficiaries were solely the male heirs.<sup>68</sup> Mne' asked the court to annul her husband's endowment on the basis of the following objections: it had been created according to Hanafi law; the constituent had kept usufruct for himself; and, thirdly, the *waqfiyya*, which had not been ratified by a *sharī'a* court, excluded female descendants from the line of beneficiaries of the *waqf*. The court ruled against the first two claims on the basis of the legal arguments we already analyzed above. With regard to her last objection, on the illegality of female exclusion, the court objected to it claiming that a *waqf* is not a legacy but rather a donation *sui generis*, so the devolution can be in favour of all heirs or in favour of some heirs, excluding others. Therefore a «*waqfiyya* done in favour of male descendants *ex filio*, excluding female descendants *ex filio*, is not null (*batil*)».<sup>69</sup>

With regard to the question of whether the constituent of a family *waqf* was allowed to retain the usufruct of an endowed property during his lifetime, the Italians ruled: «Life-long usufruct that the constituent reserved for himself is null according to the Maliki and the Shafi'i, but it is allowed by the Hanafi imams».<sup>70</sup> However, they also added that a *waqf*'s validity was subordinate to the dispossession of the property in favour of the first beneficiary, thereby implying that devolved property would effectively become *waqf* only after the death of the constituent.<sup>71</sup>

The question of what the Italian jurists accepted as the valid founding act of a Muslim endowment embraces three separate issues. The first is whether the foundation of an endowment required a *waqfiyya*. The second issue is whether this document had to be validated by a *qādī* before a *waqf* could be considered legally established. The third, and most significant, is whether physical proof of a written *waqfiyya* was necessary, without which a *waqf* was considered invalid, or whether oral witnesses could adequately prove its existence. As we shall see, the answer to some of these questions varied according to whether a *waqf* was created under Hanafi or Maliki law.

With regard to the first and second issue, the Italians established that for endowments created according to Hanafi law, not only was a written *waqfiyya* necessary, but it also had to bear the Hanafi judge's written approval, usually represented by placing the *qādī*'s seal on the document. «According to Hanafi rite, in order for a *waqf* to be valid and irrevocable, not only must there be a written founding act, but it must also have been redacted in front of the *qādī* with the *qādī*'s special wording, which validates the constitution of the *waqf* and obliges its constituent to respect it [the validity of the waqf]».<sup>72</sup>

That was not the case for endowments created under Maliki law. In fact, the Court of Appeals often ruled that in such cases, it was sufficient that the constituent express clearly in front of witnesses his intention to immobilize his property for a pious aim.<sup>73</sup> This could be done orally and without the *qādī*'s ratification. According to the Italian jurists, both Maliki and Shafi'i rites «do not require the

<sup>67</sup> *Giurisprudenza* II, p. 32. Other similar cases are *Giurisprudenza* I, p.148 and *Giurisprudenza* II, p. 86.

<sup>68</sup> *Giurisprudenza* II, p. 32.

<sup>69</sup> *Ibidem*.

<sup>70</sup> *Giurisprudenza* II, p. 32.

<sup>71</sup> *Giurisprudenza* II, p. 86 and 375.

<sup>72</sup> *Giurisprudenza* II, p. 214. On this issue see also *Giurisprudenza* I, p. 177 and *Giurisprudenza* II, p. 78. Italian authorities required the *qādī*'s ratification of the founding act of a *waqf* created by the *ibādī* religious community, to which most berbers in the country belonged. In a long and complicated dispute over the inalienability of some land known as Gisir Abar in the Nefusa mountain, the Italian authorities underscored the *ibādī* school's total «disapproval» of family *waqfs* (*Giurisprudenza* III, p. 231). They explained the occasional transformation of *ibādī* land into religious endowments as the «result of the obvious influence of Hanafi laws of the ancient Ottoman dominators and of the Maliki ones of the surrounding population». Because of their alleged disapproval of *awqāf*, the Italian judge ruled that *ibādīs* do not recognize a *waqf* unless there is a written approval of a *qādī*, whose function is that of a notary, or a formal ruling of the *qādī*, who could declare whether the procedure followed to declare a *waqf* void was correct or wrong.

<sup>73</sup> *Giurisprudenza* II, p. 86 and 375.

*qadi*'s formal signed authentication of a newly created *waqf*, given that they allow the verbal constitution of a *waqf* in front of proper witnesses, who can authenticate the validity of the *waqf*'s creation». <sup>74</sup> It is also significant to note that, if an endowment created under Maliki law was well-known and publicly recognized, the Italian authorities considered it as a valid *waqf*, even in absence of any written document. «According to the norms of the Maliki rite used in Libya, the establishment of a *waqf* prior to our occupation can be proved by public notoriety and can therefore be attested to through witnesses». <sup>75</sup> The same court reaffirmed the notion that «neither in Muslim doctrine, especially in the Maliki rite, nor in the Libyan land law is a written act indispensable for the validity of a *waqf*». <sup>76</sup>

This leads us to the third matter – whether, oral witnesses (*shahāda*) could prove the existence of a *waqf* previously created either according to Maliki or Hanafī procedures, regardless of whether its foundation required a *waqfiyya* or not. On this issue, the Italian colonial judges appear to have blurred the distinction between Maliki and Hanafī procedures. In fact, for both schools, the court ruled that if the *waqfiyya* was lost or destroyed, oral testimony could be used to prove a *waqf*'s existence. <sup>77</sup>

A landmark case that set the standard for the colonial authorities' acceptance of oral testimony to prove that property had been immobilized for an endowment, for which no written proof was available, is the Schendrani vs Ezghelghi case of 1917. <sup>78</sup> On that occasion, the judges acknowledged that some Muslim commentators, as well as colonial authorities in other Arab countries, required a written act to prove a *waqf*'s existence. The Italians however, stated that they refrained from adopting such a policy in light of Libya's own circumstances and for «supreme reasons of justice». The ruling states:

Issues related to the form (*sighah*) of the *waqfiyya* were invariably solved by the first imams of the legal schools, by later Muslim legal commentators (cfr. Abu Jusef with Mohamed) [Abu Yusuf], by writers on Islamic law (Zeys, Mercier, Clavel), as well as by the jurisprudence of the Tribunals in Egypt, Algeria, Tunisia and India. In absence of a law, the Court establishes that in Libya, if a case requires the application of the Maliki school, the judge should not consider a written act as an essential and necessary element to declare a *waqf* valid. [...] In the light of supreme reasons of justice, the judge has the right to accept oral testimony to establish the validity of a *waqfiyya* that was originally constituted through a written act (*hodgia*) [hujja] that was lost or destroyed. <sup>79</sup>

It is clear that, as a general principle, the Italians never sought to undermine the existence of Libya's *awqāf*. They could have followed the line of policy adopted by France, by ruling that the written act was essential for the legal validity of a *waqf*, or found legal expedients to challenge the principles of Islamic law on which Muslim endowments were based, but they did not. <sup>80</sup>

In order to understand why the Italians did not follow French policy requiring a written *waqfiyya*, it is important to bear in mind two factors. The first is that the colonial authorities were not pressured to invalidate pious endowments in order to free immobilized property for their settlement policy. The land survey, which began soon after the occupation of Tripoli, had revealed that rural property in Tripolitania was by and large not immobilized by *awqāf* deeds. <sup>81</sup> Furthermore, even if that had been the case, there was no real urgency to make room for Italian settlers in the cultivable areas outside Tripoli because the government did not begin to actively promote a settlement policy until the

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<sup>74</sup> *Giurisprudenza* II, p. 40.

<sup>75</sup> *Giurisprudenza* III, p. 24.

<sup>76</sup> *Ibidem*. For further reference to this idea that a written act is not required to prove the existence of a Maliki *waqf*, see art. 30 n. 5 and art. 32 of the *Ordinamento Fondiario* of 1921, published as RD 3 July 1921, n. 1207.

<sup>77</sup> *Giurisprudenza* I, p. 177, *Giurisprudenza* II, p. 68 and 375.

<sup>78</sup> *Giurisprudenza* I, p. 96.

<sup>79</sup> *Ibidem*.

<sup>80</sup> POWERS, *Orientalism, Colonialism and Legal History* cit.

<sup>81</sup> See FOWLER, *Italian Colonization*, cit., p. 633.

end of 1920.<sup>82</sup> So, unlike the French, Italians did not need to push for a forcible large-scale annulment of endowed property.

By establishing that a written founding act was not required in order to recognize a *waqf* as legally valid, the Italians opened the door for many Tripolitanians to contest the land registration that had taken place following the Land Law of 1913. As mentioned earlier, the probate system that colonial officers had set up in 1913 proved to be problematic. On many occasions Libyans sued the Land Registry to protest the registration of alleged private property as *waqf* or, vice versa, of *waqf* property as private.<sup>83</sup> Other problems were linked to the fact that many Libyans had also failed to file a complaint prior to the imposed deadline, or believed that the mere inclusion of property in these displayed lists was legally binding *per se*.

The promulgation of another land law in 1921 gave rise to even further confusion.<sup>84</sup> Unlike the 1913 royal decree, which had established that registration of a *waqf* in the Land registry was binding only if nobody contested it within three months of the official publication of the lists, this new land law established that registration in the *awqāf* registers had immediate legal effects.<sup>85</sup> Given the large number of contested cases, a *Tribunale Speciale* was set up to re-examine the decisions of the Land Registry,<sup>86</sup> and in turn, appeals filed against this special land tribunal were examined by the Court of Appeals. As far as we can tell from the published records of Libya's Court of Appeals, these judges did not invalidate a *waqf* even when it might have had the legal grounds to do so and the government's interest in mind, and continued to examine these appeals even long after the official deadline for such re-examinations had passed.

A case that illustrates the long-lasting problems and disorder caused by these land laws was the Issaui vs Issaui case of 1925.<sup>87</sup> Even if the exact legal details of the case do not come across in the published summary at our disposal, the significance of this case lies in the fact that the Italian judges were called on to examine the validity of a *waqf* linked to a *zāwiya* belonging to the Sanusi brotherhood, which spearheaded an anti-Italian resistance in Cyrenaica. In light of the growing animosity between Italian officials and the Sanusi leadership, and considering the escalation of the anti-Sanusi military engagement of the late 1920s and the expropriation of Sanusi *awqāf* property in 1930, it is noteworthy that the Italian judges did not attempt to grasp this lawsuit in order to invalidate a Sanusi *waqf*. On the contrary, the judge recognized the immediate and binding effect of the registration of the *waqf* property in the land registers (on the basis of the 1921 Land Law), even in the absence of a written *waqfiyya*, and confirmed the validity of the *waqf* associated to the Sanusi lodge.

Apart from Italy's recognition of public notoriety as a means to demonstrate the existence of a Muslim endowment, the way colonial officers dealt with two other issues, the so-called *ijāratayn* contracts and the three-year limit to *waqf* rent contracts, further reinforces the picture of Italy's *awqāf* policy as being characterized by continued respect towards this Muslim institution and towards the laws that governed it prior to the Italian occupation.

The first issue is the colonial recognition of *ijāratayn* contracts, a type of contract on the basis of which the *awqāf* administration transferred the rights over a property for an indeterminate amount of time to a third party who could use the property himself or rent it out to others. The word *ijāratayn* literally means two rents: the first is the anticipated rent, paid when the leaser takes possession of the

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<sup>82</sup> C. SEGRE, *Fourth Shore: The Italian colonization of Libya* (Chicago, London: University of Chicago Press, 1974).

<sup>83</sup> *Giurisprudenza* II, p. 320 and 20 and *Giurisprudenza* III, p. 198.

<sup>84</sup> RD 3 July 1921, n. 1207.

<sup>85</sup> I did not find any published list of family *waqfs* in any of the volumes of the *Bollettino Ufficiale della Tripolitania*, so it remains unclear what was considered the «official» date of publication of these lists. I did, however, find the complete inventory of public *awqāf* of both urban and rural property bound by *waqf* deeds and placed under the direct administration of the *Amministrazione dei Beni Awqaf*. See R. *Ufficio Fondiario di Tripoli - Elenco, in testo bilingue, dei beni demaniali e dei beni awqaf pubblici (Moschee, Zavie, Marabutti, Cimiteri musulmani), parte Urbana di Tripoli, parte Rustica di Tripoli (Sahel), parte Rustica di Tripoli (Menscia) e parte Urbana di Tripoli (Sahel)* in *Bollettino Ufficiale della Tripolitania*, supplement n. 29, 1923.

<sup>86</sup> *Giurisprudenza* III, p. 198.

<sup>87</sup> *Giurisprudenza* II, p. 375.

property; the second, referred to as delayed rent, is the yearly rent that the new possessor must pay to the central administration of the public *awqāf*.<sup>88</sup> This delayed rent was very cheap and over time it became just a nominal payment that did not contribute much to the coffers of the central administration of the Tripoli *awqāf*.

Although the income provided was relatively small, the advantage of the *ijāratayn*, a type of contract that is not rooted in classical Islamic law, appears to be linked to its administrative advantages. With this type of contract the responsibility of the property's upkeep fell on the person renting the property and no longer on the administration of the public *awqāf*. Although the Italian local government, which was keen to increase the revenues generated by *waqf* properties, had legal room to manoeuvre in order to invalidate, or at least limit the unlimited duration of these contracts, the colonial court ruled differently. As a matter of fact, it reaffirmed the principles on which the Ottoman *ijāratayn* law of 1287H was based, and did so in apparent conflict with the manifested aims of the municipal authorities who had wanted to increase the revenues of the «beni aukaf».<sup>89</sup>

The legal recognition of the *ijāratayn* contracts, as well as that of the simple rent contracts to be examined below, depended on Italy's implicit recognition of the Ottoman law, which was in use prior to the Italian occupation of Libya. In order to justify its adoption of such Ottoman laws Italian colonial judges used a roundabout explanation. Colonial officers in Libya had often reaffirmed that Islamic Law (*sharī'a*) and customary law (*ādāt*) would continue to be respected but they made no mention of Ottoman state law (which in theory had been automatically replaced by Italian positive law). So in order to be able to apply some specific Ottoman laws related to *awqāf* property and land tenure, Italian judges simply argued that Ottoman *qanun* (law) should be considered the source of local customary law, in the same way as tribal customs were.

By equating Ottoman land laws to a type of local custom Italian judges were thus able to apply an Ottoman law that imposed a three-year limit on rented *waqf* property stipulated through a normal, single (not *ijāratayn*) contract.<sup>90</sup> On several occasions the *Corte di Appello* had to remind plaintiffs who had rented *awqāf* property, that the Ottoman law of 1299H was still valid, even after the Italian occupation.<sup>91</sup> According to this law, *awqāf* property could not be rented for more than 3 years (except, of course, property leased under *ijāratayn* contracts).<sup>92</sup> The informing principle of this prohibition was

to limit the authority of the beneficiary *pro-tempore*, so that he cannot bind future beneficiaries, who will succeed him to the useful dominion of the «uaqf», to an agreement he made; [this is ] foremost in order not to go against the reported will of the constituent, who gave clear rules on the order of devolution and modality of possession.<sup>93</sup>

People in Tripoli, as elsewhere, had found ways of circumventing the Ottoman law by issuing a number of successive three-year contracts paid for in advance. The undesired consequence of this practice was that, when a new beneficiary took over the usufruct of the property upon the death of the previous beneficiary, he was deprived of the property's revenue, which had been paid as a lump sum to

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<sup>88</sup> For further information on the *ijāratayn*, see BASSO, *Il contratto di doppia locazione* cit.

<sup>89</sup> See, for example, *Giurisprudenza* I, p. 37 and *Giurisprudenza* II, p. 102, 151, 415.

<sup>90</sup> *Giurisprudenza* I, p. 147b.

<sup>91</sup> *Giurisprudenza* I, p. 53.

<sup>92</sup> Some Muslim jurists had established a one-year rent limit for urban *waqf* property and extended it to three years for rural property in order to allow the productive cycle to bear its fruits. However, as far as we can tell from the case details available in the printed records of the *Corte di Appello*, the Italian jurists did not differentiate between rural and urban property and considered both limited to a three-year rent. Whether this is entirely due to the Ottoman law or whether it was somehow a result of customary practice in Tripoli could not be fully evinced.

<sup>93</sup> *Giurisprudenza*, I, p. 40.

the now deceased beneficiary. As a result, the new beneficiary, who could not renegotiate the terms of the contract, did not receive any revenue from the rented property.<sup>94</sup>

In order to prevent this customary practice of multiple rent contracts paid for in advance, the Italians re-enforced the Ottoman law and limited the validity of the contracts to the one covering the three years in which the previous beneficiary died.<sup>95</sup> In order to further protect the rights of possible future beneficiaries, the judges also ruled that the rent of all three years could not be paid to the beneficiaries in advance, but had to be transferred on a yearly basis. The beneficiary of a *waqf* was compared to a person with usufruct rights, who enjoys the fruits of a property day after day. As they stated, «the fruits of an *awqaf* can be taken only when they have ripened and expired; if it were differently, one might deprive the surviving beneficiaries of their shares since a *waqf* is created for the benefit of certain people, as in this case».<sup>96</sup>

To summarize, the years between 1918 and 1934 brought the Court of Appeals to the forefront of Italy's *awqāf* policy. It was this court that ruled on the fundamentals of what constituted a valid *waqf* and on what terms the contracts governed the lease of *waqf* property. The court rulings analyzed in this section reveal that Italian colonial authorities never attempted legal manoeuvres to expropriate or undermine the validity of this institution. On the contrary, they upheld those same Ottoman and customary laws that had governed this institution in the past.

### **Extending the «beni aukaf» to the whole of Libya (1934-1939)**

In the early 1930s Italian authorities managed to quell the anti-colonial rebellion that had had lasted over ten years in Cyrenaica. They crushed the last bastion of resistance in Kufra, arrested and killed the Sanusi leader 'Umar al-Mukhtar and confiscated all the brotherhood's property, including the *waqfs* of their religious lodges. After having brought under its direct control all of Tripolitania, and now also Cyrenaica and Fezzan, colonial authorities carried out the administrative union of these provinces, which had until then been administrated separately, in 1934.

In terms of *awqāf* policy, this push for an administrative centralization meant that the years leading up to the Second World War were characterized by an increasing need to expand the administration of the *awqāf* throughout the colony. Until then, «beni aukaf» councils existed in the cities of Tripoli, Benghazi and Derna, but after the promulgation in 1939 of the new *Ordinamento per l'amministrazione dei Beni Awqāf della Libia*, the main city of every administrative province, including Fezzan, had to have its own *awqāf* council.<sup>97</sup> The main innovation of this law was the introduction of such councils in many provincial cities. A slight restructuring of the administrative council also took place, but it was relatively marginal and in most matters this *Ordinamento* of 1939 upheld what had already been established by the law that had set up Tripoli's «beni aukaf» in 1917. The administrative council had a President and an administrator, both of whom received government salaries, and Muslim advisors who had to have a «great influence on people of their same religion».<sup>98</sup> The number of these advisors was brought down to three, instead of five, and they received a token payment for every meeting they attended. The individual duties of these different members of the council remained largely the same as those outlined in 1917, and together they approved the budget, discussed new contracts, updated the *awqāf* registry, administered the *awqāf mazbūta* and controlled all the other types of *awqāf* from around the country. In a similar fashion, the Italian Governor of Libya retained his right to oversee the decisions of the council, appoint its members and check its account books. This law also confirmed the decisions previously taken by the judges of the *Corte di Appello* with regard to the partial competence of the *sharī'a* court in *awqāf* matters. The law reaffirmed that the main function of the *qādī* court was to oversee the administration of individual family *waqfs*, but left all other matters in the hand of the *Tribunale Ordinario*.

<sup>94</sup> *Giurisprudenza* III, p. 45.

<sup>95</sup> *Giurisprudenza* I, p. 40, 53, 147b, and *Giurisprudenza* II, p. 291.

<sup>96</sup> *Giurisprudenza* III, p. 45.

<sup>97</sup> RD 9 Jan. 1939, n. 1295 in *Bollettino Ufficiale della Libia* 1939, p. 1855.

<sup>98</sup> Art. 10 of the RD 9 Jan. 1939, n. 1295, cit.

The overall effect of this law therefore, was simply to institutionalize the «beni aukaf» throughout the colony. It did not change in any significant way the manner in which religious endowments were administered, nor did it change the balance of power between government authorities and local Muslim notables. As we pointed out when evaluating the 1917 law, these administrative reforms did not undermine the legality of Muslim endowments nor were they aimed at a gradual governmental expropriation of *awqāf* property. Italian authorities simply brought the «beni aukaf» under the direct oversight of the Governor, but left all daily administrative duties in the hands of local Muslim notables. The structure and the functions of the *awqāf* council, as the Italians had set it up, remained intact even after Italy lost its Arab colony in 1943. Under the reign of King Idris, the 1939 *awqāf* law was renewed and appears to have been in force largely unchanged (with the exception of Libyan state officials replacing the supervisory role previously held by colonial officers) throughout the monarchical period.<sup>99</sup>

## Conclusion

The rulings of the Court of Appeals of Tripoli and the colonial laws on the *awqāf* that have been examined in this paper indicate that Italian authorities never sought to invalidate this Muslim institution nor confiscate its property on ideological grounds. The few transformations that the Italians introduced were aimed at bringing Muslim pious endowments under the financial and judicial oversight of the colonial administration, not at destroying them.

By classifying a *waqf* as an institution of *diritto reale* (governed by property law), Italian colonial authorities effectively established that it constituted a proper dispensation of the law of succession, thus removing the *awqāf* from the duties of the *sharī'a* court. After placing most *waqf* matters under the jurisdiction of the ordinary courts, Italian magistrates introduced principles and methods of Islamic law into their own legal rulings and often applied a rather meticulous and strict reading of the norms formulated by some Muslim jurists. But they did not do so in order to undermine the *awqāf*, but quite on the contrary, they adhered to Maliki and Hanafi principles in order to defend the legality of these endowments.

By establishing clear rules on whether Maliki or Hanafi *madhhabs* governed an endowment, the judges managed to avoid conceding to the numerous appeals made by unhappy family members who had been excluded from the line of beneficiaries of the endowment. Such requests, based on the alleged incompatibility with the principles of one school or the other, were for the most part rejected by the court, which upheld the legitimacy of this institution. A similar defence of endowments and their related property is also manifest in the decision to accept oral testimony and public notoriety as a valid means to prove the existence of a *waqf* whose founding act had been lost. This practice points to a particularly accommodating stance taken by the colonial authorities, who could have easily adopted a more rigid legal position by invalidating endowments that did not have the appropriate written documents to prove their establishment. As noted however, the court never pushed such an interpretation and was particularly lenient in establishing the rules for a valid endowment.

The Italians introduced the Land Registry as another means to establish property rights over all categories of land, including property bound by *awqāf* deeds. Although the system was confusing and resulted in a number of wrong classifications of *awqāf* property, the court sought to rectify these mistakes that had been erroneously recorded in the registers of the *Ufficio Fondiario* and ruled on the matter well after the deadline that had been set for such appeals.

With regard to the rent contracts of *awqāf* property, Italy recognized the legality of double rent contracts (*ijāratayn*), although it was against the financial interest of the colonial administration to do so. In the case of family endowments bound by single rent contracts, the Italians applied previous Ottoman legislation limiting rent contracts to three years.

The administrative reform introduced in 1917 and confirmed in 1939 left the *awqāf* in the hands of Tripoli's Muslim notables, but allowed the colonial governor the ultimate right to oversee the

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<sup>99</sup> See G.C. KOZLOWSKI, R. PETERS, D.S. POWERS, A. LAYISH, A.K.S. LAMBTON, R. DEGUILHEM, R.D. MCCHESENEY, M.B. HOOKER, J.O. HUNWICK, *Wakf (a.)* in *Encyclopedia of Islam* (eds.) P. PEARMAN, TH. BIANQUI, E.E. BOSWORTH, E. VAN DONZEL, W.P. HEINRICHS. Brill, 2008. Brill Online. Oxford University Libraries, 19 April 2008.

decisions of the council. This supervisory role that the Italian authorities held on to however, should not be interpreted as an intrusive colonial attempt to take over the institution or the properties it managed. Furthermore the fact that, after the country's independence, the central administration of the «beni aukaf» council was not radically challenged, attests to a certain degree of popular acceptance of the way this council had been functioning during the colonial period.

This is not to say that the Italians never expropriated *awqāf* property. They did so, particularly in Cyrenaica, but this policy was not part of an overall strategy to curtail the validity of Libyan *awqāf*. It was not a measure dictated by jurisprudence or endorsed by the Italian judges. On the contrary, it was dictated by political and military strategy and was enforced by the Italian security forces. It was never grounded in legal principles. David Santillana, Italy's most prominent scholar of Islamic Law in the colonial period, critiqued any government's attempt to expropriate Sanusi property on mere legal grounds.<sup>100</sup> The expropriation of Sanusi lodges and their property was aimed at destroying the economic foundations of the Order, which the Italians saw as the last bastion of anti-Italian resistance. As we mentioned at the outset of this essay, the confiscation of Sanusi *waqfs* did not specifically target endowed property. Rather, it was directed against all those who had taken arms against colonial forces and sought to punish them for resisting colonial rule.

Although some Italian authors have pointed to this expropriation as a sign of Italy's continued attempt to undermine the legality of local institutions such as the *awqāf*, this episode alone stands at odds with the overall Italian policy towards Libyan religious endowments. In fact, a closer examination at the colonial documentation that has so far been unearthed, indicates that throughout their thirty-year rule in Libya, the Italian authorities kept their initial promise that the Libyan religious endowments would be «respected as in the past».

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<sup>100</sup> D. SANTILLANA, *La questione delle proprietà senussite* in A. BALDINETTI (ed.), *D. Santillana: l'uomo e il giurista. Scritti inediti*, Roma, 1995.



