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Before Banks: Credit, Society, and Law in Sixteenth-Century Palestine and Syria

A dissertation submitted in partial satisfaction of the requirements for the degree Doctor of Philosophy in History

By

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ABSTRACT

Before Banks: Credit, Society, and Law in Sixteenth-Century Palestine and Syria

by

Munther H. Alsabbagh

This dissertation is a social-legal study of credit in the Middle East before the advent of European-style banking institutions in the 1850s. Although scholars have long observed the importance of credit in daily life since ancient times, little attention has been given to the transformation of credit institutions and practices between the late medieval and early modern eras. This study evaluates how credit structures developed in Syria and Palestine during the long sixteenth century through the lens of Islamic law. While the legalization of market interest and the charitable lending institution known as the cash-*waqf* are rightly attributed as major interventions of Ottoman Law, I demonstrate how both were underpinned by the Ottoman state-approved legal stratagem of the *mu ʿāmala*, a credit structure that was widely used in Mamluk Syria and Palestine (1250-1516). In the first two chapters, I argue that rather than being a radical move, the Ottoman contribution was in refining and regularizing the use of the *mu ʿāmala*, as reflected in Ottoman legal literature, jurist manuals, and the state's law courts. The sixteenth century Ottoman legal reforms on credit, I contend,

present a continuity of the credit norms of the fifteenth century and represent a clear evolution from Mamluk antecedents.

Chapters three through six examine historical changes in specific credit structures across the late Mamluk and early Ottoman periods. Chapter three attends to the lending activities of charitable endowments, *waqfs*. While the new Ottoman cash-*waqf* was an institution without a Mamluk parallel, I argue that its use was still predicated on the *mu ʿāmala* form, and similarly allowed for aspects of Mamluk-era legal pluralism to survive into Ottoman Syria and Palestine, such as the widespread practice of registering the loan collateral of debts under Shāfiʿī law. Also, in contrast to the scholarly consensus, I illustrate how cash-*waqfs* in the Levant were integral providers of market credit by the third quarter of the sixteenth century. Chapter four addresses the use of mutual surety ties for communal loans. I argue that Ottoman judges continued to recognize this Mamluk-era practice, which allowed creditors to assert corporate liability on a group of debtors for ensuring tax collection of generally weaker social groups, such as religious minorities and hinterland communities. Chapter five presents the long-held custom of investing the capital of orphan estates into interest-bearing market loans. As with the credit of cash-*waqfs*, such loans were carried out using *mu ʿāmalāt*. Although such credit was supervised by courts, I argue that judicial oversight was loose and different than under the earlier Mamluk era, when a dedicated bureau existed for managing such capital. Chapter six engages in a comparative evaluation of the gender and class dynamics of credit across the Mamluk and Ottoman periods. I compare evidence from sixteenth-century Ottoman court records and fifteenth century Mamluk biographies to show that a remarkable continuity existed in elite women's use of courts to register and adjudicate debts, particularly those related to marriage.

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NOTE ON TERMS AND TRANSLITERATION

The term *ribā*, which appears throughout this dissertation, can variously refer to an unwarranted increase in value (whether in currency or in-kind), a doubling or multiplying, an unfair advantage, or a "purchase of time," to name a few possibilities. In all cases, however, ribā implies an illicit gain. The fiqh literature on ribā, given its social-economic importance, is significant. Works of legal theory, *uṣūl*, as well as substantive law, *furū*ʿ, emphasize identifying the illegal acts that produce ribā and tend to be descriptive in nature. This partly reflects the different classifications of ribā and the occasionally conflicting madhhab doctrinal views on what constitutes it. A determination of ribā is sometimes dependent on jurisprudential reasoning, and not clear-cut definitions or settled doctrine. However, the most prescriptive assessment of ribā is found in fatwā works that reproduce legal cases and their outcomes.

In contrast to ribā, fiqh defined licit gain as ribḥ (lit. "profit"). It is this latter term that the Ottoman state assigned to any legally contracted interest, below 15%, while anything contracted illegally, or above that state's rate would be deemed usurious. Additionally, in both the Mamluk and Ottoman periods, jurists informally used the term *fā'ida*/*fāyda* (lit. "benefit") to imply (as it does today), any financial benefit; depending on context, fā'ida could imply usury or profit. As I illustrate in chapter one, while the terms ribḥ and ribā denote opposites, licit versus illicit gain, fā'ida was used to denote either by Muslim jurists. I will highlight instances where fā'ida is used ambiguously where they occur.

All amounts and percentages related to figures in transactions are presented in numerical form rather than written out. I have adopted the convention of writing out numbers less than one hundred, as well as when numbers express non-transactional information, the

number of years, objects and so forth (e.g., Süleymān's rule lasted forty-six years). All dates are presented in both Hijra year and Gregorian calendar year formats. I have adopted the IJMES transliteration format. For Ottoman Turkish historical figures, I adopt the Ottoman Turkish transliteration convention for titles and names (e.g., Şeyhülislam Ebu's-Su'ud) and the Arabic one for figures coming from the Arab Levant or Egypt (e.g., Shaykh al-Islām al-Ghazzī). For major cities and territories, I spell them according to popular usage (e.g. Rumelia, Damascus).

Due to widely varying pagination conventions between various sijills, the convention I have adopted is the following: the first letter refers to first initial of the sijill's originating city (J = Jerusalem, D = Damascus, A = Aleppo); this is followed by a hyphen and sequential numbers attributing to the sijill its original archival number (Damascus' first sijill is thus D-1); another hyphen separates the sijill number from the page number in question, and then each sijill act corresponds to that act's order in appearance in the page, from top-bottom (e.g. the third act on the third page of the first sijill from Damascus is D-1-3-3).

Introduction

Although many historical studies of the Middle East before 1800 recognize the importance of credit in the region's social-economic history, relatively little is known about the social-economic significance of credit before the introduction of European-style banking institutions in the nineteenth century. The social and legal history of credit, especially, has been thinly studied. Major social-economic historical studies of the Arab Levant (Bilād al-Shām) have focused on the seventeenth and eighteenth centuries, in part due to the abundance of court records.[1] In these studies, credit has tended to play an ancillary economic role to partnerships, which have long been perceived as the drivers of trade. The absence of banks in the premodern period may have encouraged this bias. Understandably, scholars have been less attracted to studying credit outside of the rubric of institutions. Existing credit studies for the premodern era have focused on the original and rise of Ottoman moneylending charitable foundations, known as *awqāf al-nuqūd* (or 'cash-waqfs').[2] Indeed, the rise of

[1] Stanford Jay Shaw, *The Financial and Administrative Organization and Development of Ottoman Egypt, 1517-1798* (Princeton University Press, 1962); André Raymond, *Artisans et commerçants au Caire au 18e siècle*, 2 vols. (Damas, 1973); Peter Gran, *Islamic Roots of Capitalism: Egypt, 1760-1840* (Syracuse University Press, 1979); Bruce Alan Masters, *The Origins of Western Economic Dominance in the Middle East: Mercantilism and the Islamic Economy in Aleppo, 1600-1750* (New York: New York University Press, 1988); Abraham Marcus, *The Middle East on the Eve of Modernity: Aleppo in the Eighteenth Century* (New York: Columbia University Press, 1989); Nelly Hanna, *Making Big Money in 1600 : The Life and Times of Isma'il Abu Taqiyya, Egyptian Merchant*, 1st ed. (Syracuse N.Y.: Syracuse University Press, 1998); Nelly Hanna, *Ottoman Egypt and the Emergence of the Modern World: 1500-1800*, 2014; Halil İnalcık and Donald Quataert, *An Economic and Social History of the Ottoman Empire* (Cambridge; New York: Cambridge University Press, 1997).

[2] Jon E Mandaville, "Usurious Piety: The Cash Waqf Controversy in the Ottoman Empire," *Int. J. Middle East Stud. International Journal of Middle East Studies* 10, no. 03 (1979): 289–308; Murat Çizakça, "Cash Waqfs of Bursa, 1555-1823," *Jeconsocihistori Journal of the Economic and Social History of the Orient* 38, no. 3 (1995): 313–54; Ronald C. Jennings, "Loans and Credit in Early 17th Century Ottoman Judical Records : The Sharia Court of Anatolian Kayseri," *Journal of the Economic and Social History of the Orient* XVI (1973): 168–216; Neş'et Çağatay, "Ribā and Interest Concept and Banking in the Ottoman Empire," *Studia Islamica*, no. 32 (1970): 53–68; Muḥammad al-Arna'aūṭ, "Dalālāt Ẓuhūr Waqf Al-Nuqūd Fī Al-Quds Khilāl Al-Ḥukm Al-'Uthmānī," *Mujalat Awqāf*, no. 9 (November 2005): 33–47; Muḥammad al-Arna'aūṭ, Jon E Mandaville, and

banking institutions in the mid-nineteenth century has attracted recent scholarship on credit that is located at the intersection of imperialism, industrialization, globalization and modern-state formation.[3] This dissertation attends to the study of credit before the rise of banking by examining the social, legal, and cultural structures underpinning institutionalized credit practices, how these were understood, used, and developed through the lens of Islamic law.

Using the framework of law for a historical study of credit is not unprecedented; but its application in the context of identifying specific credit practices as distinct social structures is. Islamic law has been heavily mined by social-economic historians of the medieval Middle East to study wide-ranging aspects of daily life.[4] Economic historians have long been intrigued with the idea of origins, whether of specific financial instruments (such as the commenda), or the broad origins of capitalism, which some scholars have argued has roots in Islamic law, or rather, Muslim substantive law (*fiqh*).[5] Other studies have focused on theoretical evaluations of usury in Muslim legal works of the early and middle Islamicate

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Avdo Sućeska, *دراسات في وقف النقود: مفهوم مغاير للربا في المجتمع العثماني / Dirāsāt fī waqf al-nuqūd : mafhūm mughāyir lil-ribā fī al-mujtama' al-'Uthmānī* (2001, مؤسسة التميمي للبحث العلمي والمعلومات، زغوان:).

[3] Cheta, Omar Youssef, "Rule of Merchants: The Practice of Commerce and Law in Late Ottoman Egypt, 1841-1876" (PhD diss., New York University, 2014); Elena Frangakis-Syrett, *Trade and money: the Ottoman economy in the eighteenth and early nineteenth centuries* (Piscataway, NJ; Istanbul: Gorgias Press ; Isis Press, 2010); Ali Coşkun Tunçer, *Sovereign Debt and International Financial Control: The Middle East and the Balkans, 1870-1914*, 2015.

[4] Udovitch's classical study on the law of partnerships in Islam is perhaps the most famous of these: Abraham L Udovitch, *Partnership and Profit in Medieval Islam* (Princeton, N.J.: Princeton University Press, 1970); The most substantial embodiment of applying Islamic law as a framework for understanding the lived experience of communities in the medieval Near East is arguably Goitein's Mediterranean Society, particularly volume one, Economic Foundations: Shelomo Dov Goitein, *A Mediterranean Society: The Jewish Communities of the Arab World as Portrayed in the Documents of the Arab Geniza* (University of California Press, 1988).

[5] Abraham L Udovitch, "Reflections on the Institutions of Credits and Banking in the Medieval Islamic Near East," *Studia Islamica*, no. 41 (1975): 5–21; Abraham L Udovitch, "Credit as a Means of Investment in Medieval Islamic Trade," *Journal of the American Oriental Society* 87, no. 3 (1967): 260–64; Abraham L Udovitch, *At the Origins of the Western Commenda: Islam, Israel, Byzantium? And Credit as a Means of Investment in Medieval Islamic Trade* (Princeton: Program in Near Eastern Studies, Princeton University, 1969); Pryor, John H, "The Origins of the Commenda Contract," *Speculum* 52, no. 1 (1977): 5–37; Subhi Y. Labib, "Capitalism in Medieval Islam," *The Journal of Economic History* 29, no. 1 (March 1969): 79–96; Maxime Rodinson, *Islam and Capitalism* (Penguin Books, 1977); Gene W Heck, *Charlemagne, Muhammad, and the Arab Roots of Capitalism* (Berlin; New York: De Gruyter, 2006); Jairus Banaji, "Islam, the Mediterranean and the Rise of Capitalism," *Historical Materialism* 15, no. 1 (March 1, 2007): 47–74.

periods (eighth to fifteenth centuries). [6] For a number of influential studies produced in the late 1970s and early 80s, these same decades witnessed an increased interest in the Western study of Islam's relationship to modernity, and invariably viewed through the prism of Islamic law. Questions about the place of Western liberal-democratic values, the rise of "political Islam," the Muslim Brotherhood's suppression, and the success of the Iranian Revolution in the Middle East all brewed during this era.[7] Not surprisingly, this same period also witnessed the rise of the first global Islamic banking institutions that continue to rely on Islamic law.[8] Since 9/11, interest in Islam and capitalism has been revived on the back of the growing influence of Persian Gulf states and the maelstrom of conflicts that are disintegrating the region's fragile polities. The concomitant success of Islamic finance and capitalist Islamist ruling elites in Turkey (and briefly Egypt) has compelled some to argue for a positive correlation between Islamic politics and Islamic finance/capitalism.[9]

For altogether different reasons, scholars of the pre-Ottoman Levant have also regularly turned to classical Islamic law to explain the history of commercial exchange. The tendency to seek answers in legal prescriptive works is partially due to the non-survival of

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[6] Nicholas Dylan Ray, "The Medieval Islamic System of Credit and Banking: Legal and Historical Considerations," *Arab Law Quarterly* 12, no. 1 (1997): 43–90; Fazlur Rahman, "Ribā and Interest," *Islamic Studies* 3, no. 1 (March 1964): 1–43; Muhammad Imran Ismail, "Legal Stratagems (Ḥiyal) and Usury in Islamic Commercial Law" (University of Birmingham, 2010).

[7] Labib, "Capitalism in Medieval Islam"; Rodinson, *Islam and Capitalism*; Gran, *Islamic Roots of Capitalism*.

[8] The three largest Islamic banking conglomerates in the world, Kuwait Finance House, Dallat al-Baraka and Dar al-Maal al-Islami were established in 1977, 1978 and 1981 respectively. See: https://www.kfh.com/en/home/Personal/aboutus/story.html http://www.albaraka.com/default.asp?action=category&id=18 and http://www.nytimes.com/2007/08/09/business/09trust.html.

[9] Benedikt Koehler, *Early Islam and the Birth of Capitalism* (Lexington Books, 2014); Heck, *Charlemagne, Muhammad, and the Arab Roots of Capitalism*; Charles Tripp, *Islam and the Moral Economy: The Challenge of Capitalism* (Cambridge; New York: Cambridge University Press, 2006); Tuğal, Cihan, *Passive Revolution : Absorbing the Islamic Challenge to Capitalism* (Stanford, Calif.: Stanford University Press, 2009); Banaji, "Islam, the Mediterranean and the Rise of Capitalism"; Murat Çizakça, *Islamic Capitalism and Finance: Origins, Evolution and the Future* (Edward Elgar Publishing, 2011); Salah El-Sheikh, "The Moral Economy of Classical Islam: A FiqhiConomic Model.," *Muslim World* 98, no. 1 (2008).

most archival and documentary sources for the Levant before the sixteenth century, and this has complicated the work of social historians, whose work is cushioned between 'legal sources' on the one hand, such as judicial manuals and legal responsa, and so-called 'literary' sources on the other, such as chronicles and biographical dictionaries. However, it has also been heavily informed by the fact that credit arrangements in some of the earliest documentary sources, the geniza letters below, drew heavily on forms found in Islamic law. For the Levant, this source constraint is also complicated by the fact that this "problem of the sources" has reinforced a hard division between the Ottoman and Mamluk eras, mostly drawn along the lines of political history (court records in the Levant begin appearing in the 1530s, a decade or so after the beginning of Ottoman rule), and this has had the unfortunate effect of discouraging scholarship comparing or across periods.[10] The problem of periodization is not limited to this juncture of history, but it does have its own source particulars and constraints that have shaped the research outlook of its historians.[11] Historians

[10] A substantial subset of historians' studies have fallen outside of this pattern, many of whom contributed to a recent volume: Mamluk-Ottoman Transition : Continuity and Change in Egypt and Bilād al-Shām in the Sixteenth Century (Conference), Stephan Conermann, and Gül Şen, eds., *The Mamluk-Ottoman Transition: Continuity and Change in Egypt and Bilād Al-Shām in the Sixteenth Century*, 2017; Also see Michel and Abū ghāzī's work on land tenure: Benjamin Lellouch and Nicolas Michel, *Conquête Ottomane de l'Égypte (1517): Arrière-Plan, Impact, Échos* (Leiden; Boston: Brill, 2013); Michel, Nicolas, "Les Rizaq Iḥbāsiyya, Terres Agricoles En Mainmorte Dans l'Égypte Mamelouke et Ottomane : Étude Sur Les Dafātir Al-Aḥbās Ottomans," *Annales Islamologiques*, Les rizaq iḥbāsiyya, XXX (1996) (1996); 'Imād Badr al-Dīn Abū Ghāzī, *Taṭawwur al-ḥiyāzah al-zirā'īyah fī Miṣr : zaman al-Mamālīk al-Zharākisah : dirāsah fī bay' amlāk Bayt al-Māl* (الهرم [Giza]: 'Ayn lil-Dirāsāt wa-al-Buḥūth al-Insānīyah wa-al-Ijtimā'īyah, 2000); Doris Behrens-Abouseif, *Egypt's Adjustment to Ottoman Rule: Institutions, Waqf and Architecture in Cairo, 16th and 17th Centuries* (Brill, 1994); Legal historians may have faced less barriers than social-economic historians, perhaps because of the strengthening of Ḥanafism between periods, and their dependence on legal literature over court records. See for instance Johansen's landmark study on land-tenure and more recently Burak and al-Azem's studies. Baber Johansen, *The Islamic Law on Land Tax and Rent: The Peasants' Loss of Property Rights As Interpreted in the Hanafite Legal Literature of the Mamluk and Ottoman Periods* (Routledge, 1988); Guy Burak, *The Second Formation of Islamic Law: The Hanafi School in the Early Modern Ottoman Empire*, 2015; Guy Burak, "Between the Ḳānūn of Qāytbāy and Ottoman Yasaq: A Note on the Ottomans' Dynastic Law.," *Journal of Islamic Studies* 26, no. 1 (2015); Talal Al-Azem, *Rule-Formulation and Binding Precedent in the Madhhab-Law Tradition: Ibn Qutlubugha's Commentary on the Compendium of Quduri*, 2017.

[11] Hirschler and Bowen-Savant recently edited a special edition of Der Islam dedicated to this problem for a variety of fields in Islamic historiography: Hirschler, Konrad and Bowen Savant, Sarah, "Introduction – What Is in a Period? Arabic Historiography and Periodization," *Der Islam* 91 (2014): 6–19; See also: Shahzad Bashir,

of Mamluk Levant (1250-1516), have a wealth of 'literary' sources to choose from while those of the Ottoman era (1517-1920) swim in court archives, the traditional source base for social historians. Although this has made the task of producing social history on the Mamluk period more challenging, many notable social historical studies have been produced for that long period.[12]

The study of credit in Islamicate societies before the Ottoman era has centered on the Cairo geniza community that flourished in the eleventh and twelfth centuries. Credit was not only indispensable to the activities of the 'geniza traders,' it was also omnipresent in many aspects of social-economic life in general.[13] Notably, the geniza community's prevailing use of Islamic fiqh contractual norms, as well as the frequent reliance of its members on Muslim notaries and courts, alongside Jewish institutions, informed the geniza scholars' views on exploring Islamic law as a contractual framework for governing the business affairs of this community, which by extension they argued, could be used to understand the history of trade

"On Islamic Time: Rethinking Chronology in the Historiography of Muslim Societies," *History and Theory* 53, no. 4 (December 1, 2014): 519–44; For a review of the field defining aspects of the source boundaries between Mamluk and early Ottoman historiography see: Hirschler, Konrad, "Studying Mamluk Historiography: From Source-Criticism to the Cultural Turn," in *Ubi Sumus? Quo Vademus?: Mamluk Studies - State of the Art*, ed. Conermann, Stephan (Bonn: V&R unipress ; Bonn University Press, 2014), 159–86.

[12] A sample: Amīn, Muḥammad Muḥammad, *Awqāf Wa-Al-Ḥayāh Al-Ijtimā'īyah Fī Miṣr, 648-923 A.H./1250-1517 A.D. : Dirāsah Tārīkhīyah Wathā'iqīyah* (Cairo: Dār al-Nahḍah al-'Arabīyah, n.d.); Nelly Hanna, *An Urban History of Būlāq in the Mamluk and Ottoman Periods* (Le Caire: Institut français d'archéologie orientale, 1983); Huda Lutfi, *Al Quds Al-Mamlûkiyya: A History of Mamlûk Jerusalem Based on the Ḥaram Documents* (Berlin: K. Schwarz, 1985); Adam Abdelhamid Sabra, *Poverty and Charity in Medieval Islam: Mamluk Egypt, 1250-1517* (Cambridge, UK; New York: Cambridge University Press, 2000); Yossef Rapoport, *Marriage, Money and Divorce in Medieval Islamic Society* (Cambridge; New York: Cambridge University Press, 2005); Jonathan Porter Berkey, *The Transmission of Knowledge in Medieval Cairo: A Social History of Islamic Education* (Princeton, N.J.: Princeton University Press, 1992); Tōru Miura, *Dynamism in the Urban Society of Damascus: The Ṣāliḥiyya Quarter from the Twelfth to the Twentieth Centuries*, 2016; Tsugitaka Satō, *Sugar in the Social Life of Medieval Islam*, 2015.

[13] Goitein observed, at the start of his section on credit in his volume on Economic Foundations, that "an unusually large amount of Geniza documents deals with credit." 250. For a review of the numerous characteristics of credit in the community, see 262. Shelomo Dov Goitein, *A Mediterranean Society: Economic Foundations*, vol. 1 (Univ of California Press, 1967), 250–66.

and finance in medieval Islamicate society as a whole.[14] Abraham Udovitch, building on the genius of S.D. Goitein, was the geniza scholar who most fully elaborated the way this community's use of credit fell within the scope of Islamic law; three of his works explored credit along two lines, the question of medieval banking in the Near East, and secondly, its use as an instrument in facilitating trade (long-distance particularly), in association with partnerships.[15] Although banking-like activity abounded in the geniza community, scholars have noted key differences between the Islamicate credit instruments and those of medieval Europe (such as between the *suftaja* and the bill of exchange), and have subsequently suggested that little evidence exists of proto-banking institutions in the Islamicate Near East.[16] In observing some basic differences that precluded the rise of banking, such as the absence of deposit banking on interest among the geniza moneylenders, Udovitch argued that the reason why banking did not rise in the medieval Near East was due to "the social setting of medieval Near Eastern economic life."[17] He contended that "mercantile and banking activities were based on a network of personal and social relations, and these, in themselves,

[14] Goitein, S.D., "The Documents of the Cairo Geniza a Source for Islamic Social History," in *Studies in Islamic History and Institutions* (Leiden: Brill, 2010), 279–95; While Goitein's assertion has dominated the field of Geniza studies, a recent important study by P. Ackerman-Lieberman challenges this notion: Phillip Isaac Ackerman-Lieberman, *The Business of Identity: Jews, Muslims, and Economic Life in Medieval Egypt*, 2014; For an excellent analysis of his argument, see: Miriam Frenkel, review of *Review of The Business of Identity: Jews, Muslims, and Economic Life in Medieval Egypt*, by Phillip I. Ackerman-Lieberman, *Journal of the American Oriental Society* 136, no. 3 (2016): 640–43.

[15] Despite its indispensability, which he readily acknowledged, Udovitch's study of credit was typically framed within the context of its role within partnerships. Udovitch, *Partnership and Profit*, 77–82, 80-86,95-96; Udovitch, "Credit as a Means of Investment in Medieval Islamic Trade"; Udovitch, "Reflections."

[16] Earlier scholarship by Fischel, which relied on literary source evidence, argued for the existence of sophisticated early banking enterprises in early Abbasid Baghdad. Goitein and Udovitch later used the Geniza records to revise Fischel's thesis. Walter Fischel, "The Origin of Banking in Mediaeval Islam: A Contribution to the Economic History of the Jews of Baghdad in the Tenth Century," *Journal of the Royal Asiatic Society* 65, no. 2 (1933): 339–52; Charles C. Torrey, "The Evolution of a Financier in the Ancient Near East," *Journal of Near Eastern Studies* 2, no. 4 (October 1, 1943): 295–301; Ashtor, Eliahu, "Banking Instruments Between the Muslim East and the Christian West," *Journal of European Economic History* 1, no. 3 (1972): 553; S. D. Goitein, "Bankers Accounts from the Eleventh Century A.D.," *Journal of the Economic and Social History of the Orient* 9, no. 1/2 (1966): 28–66; Udovitch, "Reflections."

[17] Udovitch, "Reflections," 7.

were not a firm enough foundation upon which to erect economic institutions which could function independently of this social network."[18] In another influential essay, Udovitch would argue that the creation of institutions, banking or otherwise, was unsupported by the culture of the geniza community, as "informal business cooperation [among the geniza traders] was a constellation of individual relationships whose skeins could tie together a fairly large number of people; but these bonds were never expressed in terms of membership of a group abstractly defined; rather, groups, insofar as they were defined, were defined in terms of individuals."[19] This idea of a dependence on individual ties and information cooperation initiated a still on-going debate about whether contract enforcement and the development of institutions was hindered or enabled by informal communal enforcement mechanisms, and the connection that resulting 'trust' networks would have to the development of proto-capitalistic medieval institutions in the West and Near East.[20]

For the Mamluk period, the combination of a documentary source deficit and the plethora of chronicles and political-administrative manuals has resulted in an exceedingly thin examination of the social-historical aspects of credit. Instead, scholarship has focused on topics of concern to the state such as prices, economic output, labor, industrial production,

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[18] Udovitch, "Reflections," 17.

[19] Udovitch, Abraham, "Formalism and Informalism in the Social and Economic Institutions of the Medieval Islamic World," in *Individualism and Conformity in Classical Islam*, ed. Banani, Amin and Vryonis, Speros (Wiesbaden: Harrassowitz, 1977), 74–75; Udovitch's formulation built on Goitein's view that a kind of "informal cooperation" governed the trading activities of the Geniza traders: Goitein, *A Mediterranean Society*, 1967, 1:165–69.

[20] Avner Greif, "Reputation and Coalitions in Medieval Trade: Evidence on the Maghribi Traders," *The Journal of Economic History* 49, no. 4 (December 1989): 857–82; A. Greif, "Contract Enforceability and Economic Institutions in Early Trade - the Maghribi Traders Coalition," *American Economic Review* 83, no. 3 (1993): 525–48; Jessica L. Goldberg, "Choosing and Enforcing Business Relationships in the Eleventh-Century Mediterranean: Reassessing the 'Maghribī Traders'*," *Past & Present* 216, no. 1 (2012): 3–40; Avner Greif, "The Maghribi Traders: A Reappraisal?," *The Economic History Review* 65, no. 2 (May 1, 2012): 445–69; Jessica Goldberg, *Trade and Institutions in the Medieval Mediterranean: The Geniza Merchants and Their Business World* (Cambridge; New York: Cambridge University Press, 2012), 148–50.

markets, taxation, fiscal administration, and most recently, the function of market inspectors (sing. *muḥtasib*).[21] Scholarly mention of credit during the Mamluk era is usually relayed through anecdotes. For instance, from al-Maqrīzī's rich descriptions, we know of a case of a commercial debt dispute in Cairo from 752/1352-3, when a group of Iranian merchants raised a lawsuit against Egyptian merchants for purchasing merchandise on credit and then defaulting on payment. What is instructive for Mamlukists about this case is that it drew in several chief qāḍīs, amīrs, the chamberlain and the sultan himself, and can be used to exemplify the expansion of the sultan's role in the Mamluk judiciary in the mid-fourteenth century.[22] However, such isolated episodes give a snapshot of mostly politicized moments,

[21] Studies that touch on credit during this period do so in the context of political-economy, taxation and diplomacy related to monopolization of the spice trade especially. See: Labib, Subhi, *Handelsgeschichte Ägyptens Im Spätmittelalter : (1171-1517)* (Wiesbaden: Franz Steiner Verlag, 1965); Eliyahu Ashtor, *Levant Trade in the Middle Ages.* (Place of publication not identified: Princeton University Pres, 2016); Eliyahu Ashtor, *A Social and Economic History of the Near East in the Middle Ages* (Berkeley: University of California Press, 1976); Rabie, Hassanein, *The Financial System of Egypt A.H. 564-741/A.D. 1169-1341*, London Oriental Series 25 (London, New York: Oxford University Press, 1972); And more recently: Meloy, John Lash, *Imperial Power and Maritime Trade : Mecca and Cairo in the Later Middle Ages*, Chicago Series on the Middle East (Chicago, IL: Univ. of Chicago Press, 2010); Christ, Georg, *Trading Conflicts : Venetian Merchants and Mamluk Offficials in Late Medieval Alexandria*, Medieval Mediterranean 93 (Leiden; Boston, MA, 2012); Apellániz Ruiz de Galarreta, Francisco Javier, *Pouvoir et Finance En Méditerranée Pré-Moderne : Le Deuxième État Mamelouk et Le Commerce Des Épices (1382-1517)*, Anuario de Estudios Medievales 66 (Barcelona: CSIC, 2009); Studies on the Karimi merchants by Fischel and Ashtor, were exceptional in bridging sources across both Geniza and Mamluk studies. E Ashtor, "The Kārimī Merchants," *J.R. Asiat. Soc. G.B. Irel. Journal of the Royal Asiatic Society of Great Britain & Ireland* 88, no. 1–2 (1956): 45–56; Walter J. Fischel, "The Spice Trade in Mamluk Egypt: A Contribution to the Economic History of Medieval Islam," *Journal of the Economic and Social History of the Orient* 1, no. 2 (1958): 157–74; Among other studies that touch on credit and depend on chronicle sources: Maya Shatzmiller, *Labour in the Medieval Islamic World* (Leiden [The Netherlands]; New York: E.J. Brill, 1994); For the most recent study on the Muhtasib, see: Allouche, Adel and al-Maqrīzī, Aḥmad ibn ʿAlī, *Mamluk Economics : A Study and Translation of Al-Maqrīzī's Ighāthah* (Salt Lake City: University of Utah Press, 1994); Stilt, Kristen, *Islamic Law in Action : Authority, Discretion, and Everyday Experiences in Mamluk Egypt* (Oxford; New York: Oxford University Press, 2011).

[22] al-Maqrīzī, Aḥmad ibn ʿAlī, *Al-Mawāʿiẓ Wa-Al-Iʿtibār Fī Dhikr Al-Khiṭaṭ Wa-Al-Āthār*, ed. Sayyid, Ayman Fuʾād (London, 2002), Vol. 3, 717-8; Aḥmad ibn ʿAlī al-Maqrīzī, *al-Sulūk li-maʿrifat duwal al-mulūk* (Beirut: Dār al-Kutub al-ʿIlmīyah, 1997), Vol. 2, 863; While this event is related in Rapoport's following article, it also appears in articles by Irwin, Escovitz, and Nielsen: Yossef Rapoport, "Royal Justice and Religious Law: Siyāsah and Shariʿah under the Mamluks," *Mamluk Studies Review* XVI (2012): 83; Robert Irwin, "The Privatization of 'Justice' under the Circassian Mamluks," *Mamluk Studies Review* VI (2002): 63–70; Joseph H Escovitz, "The Establishment of Four Chief Judgeships in the Mamlūk Empire," *Jameroriesoci Journal of the American Oriental Society* 102, no. 3 (1982): 100; Nielsen, Jørgen S, "Maẓālim and Dār Al-ʿAdl under the Early Mamluks," *The Muslim World* 66, no. 2 (1976): 127.

and unlike the geniza letters, do not allow for a study of more routine underlying social-legal structures and processes.

This is not to say that the surviving Mamluk era sources preclude a deeper study of social structures. There are non-chronicle Mamluk narrative sources, such as the rare diary (*ta ʿlīq*) of the Damascene notary/witness (*shāhid*) Aḥmad Ibn Ṭawq (d. 1509), which has been edited in four volumes, and is an invaluable new source for Mamluk social historians.[23] Between the Geniza and Mamluk periods, and outside of surviving waqf documents, the documentary source gap has engendered a historiographical tendency, although this is changing, to somewhat disengage from actively mining surviving documentary sources that afford a "view from below."[24] In addition to studies based on waqf deeds, the Ḥaram al-Sharīf archive presents valuable material for evaluating the social-legal history of credit. Donald Little's catalogue of the Ḥaram's legal documents, for instance, has been very useful

[23] Wollina, Torsten, "Ibn Ṭawq's Taʿlīq. An Ego-Document for Mamlūk Studies," in *Ubi Sumus? Quo Vademus?: Mamluk Studies - State of the Art* (Bonn: V & R unipress, Bonn University Press, n.d.), 337–62; Torsten Wollina and Freie Universität (Berlin), *Zwanzig Jahre Alltag: Lebens-, Welt- und Selbstbild im Journal des Aḥmad Ibn Ṭawq* (Göttingen; [Bonn: V & R unipress ; [Bonn University Press, 2014).

[24] Early on, seasoned Mamlukists such as Carl Petry have recognized the untapped potential of documentary sources for the Mamluk period: Petry, Carl F., "A Geniza for Mamluk Studies? Charitable Trust (Waqf) Documents as a Source for Economic and Social History," *Mamluk Studies Review* II (1998); Werner Diem's numerous editions of Mamluk documents, such as the following, are not referenced as much as one would hope for. Werner Diem, *Arabische Briefe Aus Dem 10.-16. Jahrhundert* (Berlin: De Gruyter, 2011); Werner Diem and Österreichische Nationalbibliothek, *Arabische Privatbriefe des 9. bis 15. Jahrhunderts aus der Österreichischen Nationalbibliothek in Wien* (Wiesbaden: Harrassowitz, 1996); Bauden's groundbreaking work on al-Maqrīzī's reuse of Mamluk administrative documents has opened new possibilities: Bauden, Frederic, "Maqriziana I: Discovery of an Autograph Manuscript of Al-Maqrizi: Towards a Better Understanding of His Working Method: Description: Section 1," *Mamluk Studies Review* VII.2 (2002); Bauden, Frederic, "Maqriziana I: Discovery of an Autograph Manuscript of Al-Maqrizi: Towards a Better Understanding of His Working Method: Description: Section 2," *Mamluk Studies Review* X (2006); Bauden, Frederic, "Maqriziana II: Discovery of an Autograph Manuscript of Al-Maqrizi: Towards a Better Understanding of His Working Method: Analysis," *Mamluk Studies Review* XIL (2008); Hirschler has recently taken up the reuse of documents in late Mamluk Damascus as a project: Konrad Hirschler, "From Archive to Archival Practices: Rethinking the Preservation of Mamluk Administrative Documents.(Essay)," *The Journal of the American Oriental Society* 136, no. 1 (2016) Also see his unpublished paper: "Document Reuse in Medieval Arabic Manuscripts" at: https://www.academia.edu/33667339/Document_Reuse_in_Medieval_Arabic_Manuscripts. Hirschler's paper on this presented at the 2017 meeting of the School of Mamluk Studies in Beirut is viewable for viewing at: https://www.youtube.com/watch?v=22GSfKViSTE; Hirschler, Konrad, in *Documentary Life-Cycles: Reuse of Mamluk Legal Documents* (School of Mamluk Studies, 2017, Beirut, 2016).

to this study, as has Huda Lutfi's work on the Ḥaram archive. However, archival sources present their own challenges. Amy Singer has cautioned that an over-reliance on sharī'a court registers (sing. *sijill*) can easily lead to warped conclusions, since Ottoman court records typically only record the outcomes of cases. "In order to assess … (the state's) power realistically, we need to check the state's ability to enforce the norms and ideological aspirations it defined for itself. Unfortunately, we cannot accomplish this feat, entirely, as even local reports in the sijills do not recount the final resolution of conflicts, but only their adjudication. Nor are they an exhaustive chronicle of the encounters between peasants and local officials."[25]

The credit studies of Ottomanists noted above, drew very little on the Mamluk period, even those that considered credit in former Mamluk territories, such as Abdul-Karim Rafeq's study of market credit in early sixteenth century Hama.[26] Except for Rafeq's and Jon Mandaville's studies (the latter's being on the sixteenth century cash-waqf), most early modern Ottomanists' credit studies deal with the seventeenth and eighteenth centuries, when the Arab territories had been thoroughly 'Ottomanized,' and this perhaps drove them to turn a blind eye to the Mamluk era. Such discontinuity is not apparent in European historiography where profound changes in the political order did not always diminish archival continuity between the late medieval and early modern periods.[27] Indeed, the same archives that Eliyahu Ashtor used for his foundational studies on Venetian-Mamluk trade are being profitably

[25] Amy Singer, *Palestinian Peasants and Ottoman Officials: Rural Administration around Sixteenth-Century Jerusalem*, Cambridge Studies in Islamic Civilization (Cambridge ; New York: Cambridge University Press, 1994), 129.
[26] For instance: Rafeq, Abdul Karim, "Maḍāhir Iqtiṣādiyya Wa Ijtimā'Iyya Min Liwā' Ḥamā 942-943/1535-1536," *Dirāsāt Tārīkhiyya*, no. 31/32 (1989).
[27] See for instance: David Stasavage, *States of Credit: Size, Power, and the Development of European Polities* (Princeton, N.J.: Princeton University Press, 2011); Marc Boone, C. A Davids, and Paul Janssens, eds., *Urban Public Debts: Urban Governments and the Market for Annuities in Western Europe (14th-18th Centuries)* (Turnhout, Belgium: Brepols, 2003).

mined to produce important revisionist accounts of Mamluk-Ottoman history, on the Venetian-Mamluk spice trade and alliance during the Venetian-Ottoman wars in the early sixteenth century.[28] Even though landmark studies on prices, wages and economic productivity have been recently issued for the Ottoman sixteenth and seventeenth centuries, scholarship on the influence of credit on the economy is still in its infancy.[29] However, very recently, there has been an effort by some economic historians to evaluate statistically how credit was transacted, to understand the nature of the market for credit in the early modern era.[30] Other scholarship that has touched on credit has focused on in the intersection of

[28] Francisco Javier Apellániz Ruiz de Galarreta, *News on the Bulaq: A Mamluk-Venetian Memorandum on Asian Trade, AD 1503* (European University Institute, 2016); Pedani, Maria Pia, "Venetians in the Levant in the Age of Selim I," in *Conquête Ottomane de l'Égypte (1517) : Arrière-Plan, Impact, Échos*, ed. Lellouche, Benjamin and Michel, Nicolas (Leiden; Boston, MA: Brill, n.d.); For an inventory of the Venetian archives: Maria Pia Pedani and Alessio Bombaci, *Inventory of the Lettere e Scritture Turchesche in the Venetian State Archive* (Leiden; Boston: Brill, 2010); Pedani and Bombaci; Apellániz Ruiz de Galarreta, Francisco Javier, *Pouvoir et Finance En Méditerranée Pré-Moderne : Le Deuxième État Mamelouk et Le Commerce Des Épices (1382-1517)*; Christ, Georg, *Trading Conflicts : Venetian Merchants and Mamluk Offficials in Late Medieval Alexandria*.

[29] Barkan, Ömer Lutfi, "The Price Revolution of the Sixteenth Century: A Turning Point in the Economic History of the near East," trans. McCarthy, Justin, *International Journal of Middle East Studies* 6, no. 1 (1975): 3–28; Şevket Pamuk, *The Ottoman Economy and Its Institutions* (Farnham, England; Burlington, VT: Ashgate, 2009); İnalcık, Halil, "Capital Formation in the Ottoman Empire," *The Journal of Economic History* 29, no. 1 (1969): 97–140; Pamuk, Şevket, "The Price Revolution of the Ottoman Empire Reconsidered," *International Journal of Middle East Studies* 33, no. 1 (February 2001): 69–89; Tezcan, Baki, "The Ottoman Monetary Crisis of 1585 Revisited," *Journal of the Economic and Social History of the Orient* 52 (2009): 460–504; The large historical surveys of prices and wages conducted by Inalcik and Pamuk are critical sources for any future survey study of credit's political-economic impact: İnalcık, Halil, Pamuk, Şevket, and Devlet İstatistik Enstitüsü (Turkey), eds., *Osmanlı Devleti'nde Bilgi ve Istatistik/Data and Statistics in the Ottoman Empire*, 2396 (Ankara: T.C. Başbakanlık Devlet İstatistik Enstitüsü/State Institute of Statistics Prime Ministry Republic of Turkey, 2000); Pamuk, Şevket and Devlet İstatistik Enstitüsü (Turkey), *İstanbul ve Diğer Kentlerde 500 Yıllık Fiyatlar ve Ücretler, 1469-1998/500 Years of Prices and Wages in Istanbul and Other Cities*, 2397 (Ankara: T.C. Başbakanlık Devlet İstatistik Enstitüsü/State Institute of Statistics Prime Ministry Republic of Turkey, 2000).

[30] In a current article, T. Kuran and J. Rubin analyze the political-economic and ethnic aspects of credit transactions in the courts of Istanbul in the first decades of the seventeenth century, based on a statistical analysis of court records from Istanbul courts. Kuran T and Rubin J, "The Financial Power of the Powerless: Socio-Economic Status and Interest Rates under Partial Rule of Law," *Econ. J. Economic Journal*, 2017; Kuran supervised the editing of ten volumes of selections from various court sijills in Uskudar, Istanbul and Galata courts from the seventeenth century. Volumes nine and ten are dedicated to credit: Timur Kuran, *Kredi piyasaları ve faiz uygulamaları (1602-61) = Credit markets and uses of interest (1602-61)*, vol. 9 (İstanbul: Türkiye İş Bankası Kültür Yayınları, 2013); Timur Kuran, *Kredi piyasaları ve faiz uygulamaları (1661-97) genel dizin = Credit markets and uses of interest (1661-97): general index*, vol. 10 (İstanbul: Türkiye İş Bankası Kültür Yayınları, 2013); Ali Yaycıoğlu produced a review article relating to Kuran's editions Ali Yaycıoğlu, "Timur Kuran, Ed., Social and Economic Life in Seventeenth-Century Istanbul: Glimpses from Court Records, Vol. 1-10 (Istanbul: Türkiye İş Bankası Kültür Yayınları, 2010–2013).," *Int. J. Middle East*

communal identity, geography and finance between the Mediterranean and Indian Oceans.[31] Sebouh Aslanian's study, in particular, has located the continued use of Islamicate commercial forms by the Armenians of Julfa, most notably the commenda, in their global business well into the late eighteenth century when other forms were available to them.

The use of Islamic law as a framework was actively applied by S.D. Goitein, followed by three generations of his students, who have found that the prescriptions of fiqh works widely resonated in the records of Jewish traders from the Cairo geniza community. Much of the emphasis of the geniza scholars has been on partnerships, which were the preferred mode of financing business ventures, especially long-distance trade. However, in doing so, scholars have taken the lead from fiqh works in another way, because fiqh places credit in a supporting role to partnerships.[32] Such studies of credit are colored by how fiqh works presented this topic; for jurists, debt was less complex and intriguing than partnerships. In fact, debt (sing. *dayn*) is not understood as a fully-fledged 'contract' in fiqh, but rather, a unilateral and revocable obligation (usually, but not always, a pecuniary one). Dayn is unlike a variety of bilateral or multilateral contracts that attach rights and responsibilities for the rendering of goods or services, such as those found in sales contracts

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Stud. International Journal of Middle East Studies 47, no. 03 (2015): 625–27; Pamuk has recently published an article that deals with this subject broadly, and his volume on Ottoman economy continues to be an invaluable survey of the main political-economic developments in the early modern period. Sevket Pamuk and Sevket Pamuk, "Political power and institutional change: lessons from the Middle East," *Economic History of Developing Regions* 27, no. sup-1 (2012): 41–56; Pamuk, *The Ottoman Economy and Its Institutions*.

[31] Those of Goldberg, Trivellato and Aslanian stand out in particular. The latter two have relied heavily on Italian archives, Venice included, to assess trade within the Ottoman empire. Goldberg, *Trade and Institutions in the Medieval Mediterranean*; Francesca Trivellato, *The Familiarity of Strangers: The Sephardic Diaspora, Livorno, and Cross-Cultural Trade in the Early Modern Period* (New Haven: Yale University Press, 2009); Sebouh David Aslanian, *From the Indian Ocean to the Mediterranean: The Global Trade Networks of Armenian Merchants from New Julfa* (Berkeley: University of California Press, 2011).

[32] Udovitch, *Partnership and Profit*; Patricia Crone, *Meccan Trade and the Rise of Islam* (Princeton, N.J.: Princeton University Press, 1987); Even Kuran's thesis on decline gives scant attention to credit practices and monetization, despite its importance to his overall argument. On commerce, he focuses on partnerships, the commenda.: Timur Kuran, *The Long Divergence: How Islamic Law Held Back the Middle East* (Princeton; Oxford: Princeton University Press, 2011).

(*ʿuqūd buyuʿ*). Perhaps it is for this reason that the most prevalent documentary evidence of credit in court archives (but also various Egyptian papyri collections) is the debt attestation (sing. *iqrār*).

As a longue durée study of credit structures, this dissertation addresses the long sixteenth century in Bilād al-Shām (Syria and Palestine), from the last quarter of the fifteenth century to the first decade of the seventeenth, and analyzes credit structures across three broadly overlapping areas: legal-administrative change, monetization, and social-legal custom. The first concern tackles the historiographical tendency to faithfully cling to the idea that the Ottoman conquest of the Levant introduced significant legal-administrative norms and institutions of 'Ottoman Law' that largely reshaped those of the late fifteenth and early sixteenth century Mamluk period.[33] While the Ottoman law was more bureaucratized, I illustrate how institutional change was a rather gradual process, that integrated both personages and legal-institutional practices of the Mamluk era over many decades. Second, I argue that adoption of Ottoman judicial credit norms did not introduce new elements, but rather reinforced and institutionalized Mamluk legal precursors, the most salient being the so-called credit structure of *muʿāmalāt* (discussed below). My findings corroborate the view of some scholars on the likely coeval development of similar Mamluk-Ottoman institutions

[33] For examples of this view on the events of 1516-1523, see: Reem Meshal, "Antagonistic Sharīʿas and the Construction of Orthodoxy in Sixteenth-Century Ottoman Cairo," *Journal of Islamic Studies* 21, no. 2 (May 1, 2010): 183–212; Wollina, Torsten, "Sultan Selīm in Damascus: The Ottoman Appropriation of a Mamluk Metropolis (922-924/1516-1518)," in *The Mamluk-Ottoman Transition: Continuity and Change in Egypt and Bilād Al-Shām in the Sixteenth Century*, ed. Conermann, Stephan and Şen, Gül (Bonn: V & R unipress, Bonn University Press, 2016).

or the cross-pollination of certain institutions into Ottoman law decades before the Ottoman conquest of the Levant.[34]

Second, how can we best study credit and its role in a pre-capitalist society, and to what extent can we speak of a "monetized" society in fifteenth and sixteenth century Bilād al-Shām? A little monetized economy, in theory, would have been expected to produce an overreliance on credit and the opposite in the case of high monetization. However, my review of credit dealings over the second half of the century suggests that it is very difficult to identify monetization's effects, beyond general inflation. Many other factors were at play for determining the demand and supply of credit, aside from monetization. For instance, high demographic mobility during the middle of the century and turbulent political strife at its end both produced spikes in credit dealings in both periods. Other factors, as well, such as periodic raids by hinterland Bedouins on villages outside of main towns (common to both Mamluk and Ottoman eras and registered throughout the 1500s) could produce periodic increases in borrowing. Droughts and the plague (particularly during 1523-6) also caused serious economic hardship. At the center of urban economic activity, some waqfs during such periods attempted to convert unpaid taxes into debts owed by villagers who farmed their waqf lands. Hyper monetization, in the last quarter of the century, did however prompt an Ottoman-wide currency devaluation (in 1583-5). Despite all these factors, I illustrate how credit structures could withstand significant stress and continue to be used, even when their continued use resulted in social disharmony. I argue that stresses affected the extent to which credit structures were used, but not their form. Thus, even though increased indebtedness was

[34] For instance, Rapoport hints in attibuting the mufti al-adl of the Mamluk's to the Ottoman Seyulislam at the conclusion of his article on the increased role of siyasa in Mamluk courts in the fourteenth and fifteenth centuries. Rapoport, "Royal Justice."

recorded during the 1560s and the turn of the seventeenth century, the credit instruments and processes used in court remained relatively unchanged. As I show in chapter four, the bankruptcy of Jerusalem's Jewish community at the end of the century from the overuse of mutual surety pledges did not result in the judiciary's barring mutual surety. These and other procedures, like the practice of lending out capital from orphan estates (chapter five), operated outside of short-term financial booms or busts and were very resilient as customary-legal (*ʿurf*) devices.

On the last issue of ʿurf, I study how the assemblage of institutions, codes and practices, collectively known as Ottoman Law integrated Mamluk credit structures. Much early scholarship on the Ottoman sovereign's so-called secular legal statutes, the *ḳānūnnāmes*, treated this unique Ottoman contribution as a secular part of the law, that was determined by the sultan, and set outside of the discretion of the sharia courts. Scholarship from the late 1980s, revised this dated idea to show that the ḳānūnnāmes were, rather, designed to be applied in the *qāḍī* courts, and more recent scholarship still has elevated the political-economic role of jurists in playing a central role in determining the development and implementation of the state's legal code. With respect to Bilād al-Shām, current scholarship suggests that while Syrian jurists (of the sixteenth century especially) bemoaned the Ottoman qānūn, the actual contents of ḳānūnnāmes from Damascus and Aleppo, as well as their dates of introduction, suggest that these codes considered local customary law, and integrated the more equitable versions of Mamluk-era law. Further, numerous Ottoman edicts from the 1550s in Damascus and Jerusalem concern the outlawing of Mamluk-era market

and customs taxes, indicate that one cannot presume the full implementation of 'Ottoman law' before the century's second half, at the earliest.[35]

In studying 'urf, I also present evidence of popular Ottoman judicial manuals in the mid-sixteenth century, such as that of Muḥammad al-Bursawī (d. 937/1530?) below, which reproduced a variety of formularies for mu'āmalāt, reflecting a bureaucratized court environment that was, I suggest, set apart from its Mamluk predecessor. Successive ḳānūnnāmes from the 1520s, and legal opinions (*fatwās*) of Şeyhülislam Ebu's-Su'ud (d. 982/1574) from 1541, criminalized credit arrangements that were formulated outside of the mu'āmala forms described by al-Bursawī's manual, promoting consistency in court. The evidence of the sijills of Jerusalem and Damascus broadly support the application of such norms when it came to the registration of financial statements related to the lending from orphan estates. Change and continuity were observed together, and I argue that the changes were more clearly felt in some areas, such as those concerning the regulation of markets than the regulation of market interest and less so in other areas, such as in the gendered dynamic of debt-taking in marriage (which appears to have remained consistent with the widely recorded Mamluk practice, the subject of chapter six). Substantial portions of chapters three (on waqf credit) and four (communal obligations) concern the role of credit in rural-life and its connection to the urban centers of Damascus and Jerusalem; I argue that credit was not only an inextricable facilitator of exchange between the hinterland ecological-economy that supported urban centers, but also vital to the life of rural peasants generally, as it had been in centuries prior.

[35] Burak, "Between the Ḳānūn of Qāytbāy and Ottoman Yasaq," 9–12.

Chapter outline

The first chapter is a review of the framework of the administration of law between the late Mamluk and early Ottoman periods; was there a swift and lasting change in legal institutions and procedures change between periods? Drawing on chronicles and biographical dictionaries, I argue that the adjudicatory institutions of Mamluk law from the last few years of the Mamluk regime in Damascus remained largely in place and were supported by the continuity of political-family factions (*jamā ʿāt*) into the 1530s, following a short-lived attempt at attempt by Sultan Selim and his legal administration to completely reform the legal institutions of Bilād al-Shām in 1517-1519. The legal training and activities of jurists from Bilād al-Shām remained localized partly because of their broad exclusion from the Ottoman state's educational institutions in Istanbul, the *ilmiye* system, and partly because of their patronage networks and familial-affiliation with regional institutions of learning. These allowed them to maintain the continuity of customary legal and market practices into the middle of the century.

Egyptian and Syrian jurists of the Ḥanafī school of jurisprudence (*madhhab*) from the fifteenth and sixteenth centuries also shared some of the same grievances. I illustrate how Ibn Qutlūbughā's (d. 879/1474) complaints about widespread bribery, the poor legal training of qāḍīs, and the wide discretionary powers given to qāḍīs in the Mamluk legal system resonated with succeeding jurists of the school, especially Ibn Nujaym (d. 968/1563), a key jurist of the first half of the sixteenth century. In reviewing recent scholarship on adjudicatory processes in the region in the first century of Ottoman rule, I find compelling evidence to show that, at least in larger cities of Syria and Egypt, "law" was not exclusively

situated in courts, but distributed across competing sites of justice such as the governor's court, *dīwān*, military tribunals, and the Sublime Porte's own direct intervention on behalf of petitions sent to the sultan, and this not to mention the legal opinions issued by regional jurisconsults (sing. *mufti*) and the şeyhülislam which in and of themselves had the effect of legal rulings. There is a crude parallel to this variegated system in the legal system of the late fifteenth and early sixteenth century Mamluk state; Mamluk sultans took a more active role in the ways that law was defined and adjudicated in qāḍī courts and the sultan's so-called secular courts (*maẓālim* courts), and the participation of the state-appointed jurisconsult (*muftī dār al-ʿadl*). Lastly, I reflect on the incorporation of Muslim scholarly elites (*ʿulamāʾ*) from Bilād al-Shām into the ilmiye system, and contend that this did not take off in a significant way until very late in the sixteenth century; further, while the Ottoman state restricted access to the chief qāḍīship to the Ḥanafī madhhab, Ḥanafī qāḍīs did not altogether displace Shāfiʿī ones, who remained and operated as important local deputy-qāḍīs.

This second chapter introduces the history of the legal stratagems for usurious loans that were euphemistically referred to as *muʿāmalāt sharʿīya* by Sunnī jurists in Bilād al-Shām between the fourteenth through early nineteenth centuries. I begin by reviewing the key legal-historical elements underpinning discourses of illicit gain (*ribā*) and the development of legal stratagems (*ḥiyal*) to circumvent ribā proscriptions. I argue that although the widespread use of muʿāmalāt sharʿīya is attested in Ottoman sources, its legal practice is attested in Mamluk legal manuals and responsa from fourteenth and fifteenth century Cairo. While "muʿāmalāt sharʿīya" referred to a number of stratagems in this earlier period (I draw on Taqī al-Dīn al-Subkī's [d. 756/1355] reports of this activity as being somewhat contentious in his day), by the mid-sixteenth century, the prescriptive literature of

Ottoman-era legal responsa and judicial manuals, as well as the court records show the widespread use of specific types of muʿāmalāt sharʿīya not only became widely accepted, but also incorporated into the qānūn, as noted above.

I contend that the contribution of "Ottoman Law" vis-à-vis muʿāmalāt was not in its popularization but in the bureaucratization of its use as a legal instrument. In doing so, this facilitated the state's own rudimentary attempts to control the rate of market interest, the "ribḥ-ceiling," as I call it. Any loan with interest above this rate was usurious "ribā", while anything obtained below it was legally valid interest and denoted as "ribḥ." Further, although muʿāmalāt sharʿīya sprouted from a transoxanian Ḥanafī discourse on legal stratagems (*ḥīyal*, sing. *ḥīla*), I illustrate how they were widely adopted in court registrations by Shāfiʿī jurists before and after the Ottoman conquest. Shāfiʿī jurists' promotion of these transactions dovetailed with the state's imperatives to promote legally-sanctioned loans, *muʿāmalāt* (sing. *muʿāmala*) and given the much larger demographic profile of Shāfiʿīs in Egypt and Bilād al-Shām during the sixteenth century, I contend that Ottoman chief qāḍīs depended on the active participation of Shāfiʿī deputy qāḍīs to handle the registration of these loans. I argue that this was not a case of Shāfiʿīs simply obeying Ottoman Ḥanafī doctrine imposed from the center; the Shāfiʿīs had adopted the muʿāmalāt sharʿīya stratagems earlier on their own accord in Bilād al-Shām under the Mamluks and were now working in harmony with a state-sponsored Ḥanafī legal system.

Chapter three focuses on the deployment of credit by waqfs. Here, I introduce the history of the cash-waqf (*waqf al-nuqūd*) in the Levant and address its effects. I begin by providing an overview of the historiography relating to the cash-waqf controversy of the 1540s and the legal framework for waqf indebtedness in Islamic law. I then move onto a

review of prominent cash-waqfs incepted in Jerusalem in the 1550s and 60s. Contrary to traditional scholarly views, the cash-waqf's use in the region was not only not limited during this period, it was growing rapidly. I assess the views of the few scholars who have studied the Jerusalem sijills to identify these particular waqfs, M. al-Arna'aūṭ being the principal figure. My analysis of these waqfs differs from his, which argues that Shāfi'ī jurists had an acerbic reaction to this "innovation" of Ottoman Law. As I illustrate in several cases, Shāfi'ī qāḍīs routinely served as administrators (sing. *mutawallī*) of such waqfs in sixteenth century Jerusalem, and in a few cases established cash-waqfs of their own. On the activities of these cash-waqfs, my findings are in line with those of scholars who have worked on these institutions in Istanbul and Bursa; among other things. My findings suggest that these institutions did not operate like banks at all, their lending did not exhibit sophisticated economic decision-making or significant variation in interest rates that would reflect different levels of market risk. The emphasis, it seems, was truly on the charitable missions that these institutions were endowed for. I adopt al-Azem's model of inter-madhhab plurality (described in chapter one) to reflect on the blurred lines between Ḥanafī and Shafī'ī practice in examining the common court custom of registering mortgages for cash-waqf loans in Ḥanafī courts, but according to Shāfi'ī madhhab rules.

With respect to conventional (non-cash) waqfs, I show how credit was very far from being a largely urban phenomenon, and in fact entangled a wide net of hinterland communities in long-term debt cycles where both waqfs and their underlying village communities needed each other. Analyzing the accounts of the Ṭāzīya waqf, a Mamluk-era madrasa in Jerusalem, I show how waqfs had to rely on re-capitalization, a web of indebtedness between waqfs and village communities, and the credit provided by employees,

to maintain solvency. This was always a process mediated by qāḍī courts. I argue that the introduction of the cash-waqf had the effect of loosening the restrictions on waqf lending by conventional waqfs, which is highly regulated under fiqh, and allowed only in extra-ordinary situations. By the last decades of the sixteenth century, not infrequently, one comes across the issuance of market credit by family and other non-cash-waqfs, indicating a normalization of this activity, yet it is difficult to measure the extent of this activity.

The fourth chapter deals with mutual surety, a practice that several Ottoman historians of the early modern period have observed, whereby creditors would secure group pledges of creditors that pooled and cross-collateralized their individual liabilities into a larger group obligation. I examine the practice of mutual surety in Jerusalem across three groups: religious communities (the Jews and Christians of the city), village communities, and guilds. Mutual surety debts were usually imposed by powerful elites on marginalized groups in society who had little or no collateral to guarantee their loans. In addition to their financial responsibility, the debtors of such mutual surety arrangements, also usually attached personal guarantees to creditors, which at times resulted in the imprisonment of a debtor group member for default (e.g., a father being imprisoned for his son's loans, where both had guaranteed each other). While fiqh supports these types of individual guarantees, it does not support corporate personhood. However, I demonstrate that the use of mutual sureties against entire communities, at times, indicates that this is exactly what occurred in practice. The Ottoman legal codes, the ḳānūnnāmes, supported the rights of tax-farmers, often military officers, to prevent the movement of peasants who controlled their land. The imposition of mutual surety debts on villagers who had defaulted on their taxes was one way that tax-

farmers attempted to prevent the mobility of individuals. The high demographic mobility of the middle of the century presented a problem for such creditors.

My study contends that the rulings of qāḍīs on cases of mutual surety defaults in Jerusalem were inconsistent. For non-Muslims in Jerusalem the history of communal debts has long standing and is recorded from the Fatimid to Mamluk periods. Members of the Jewish and Christian communities in the city regularly resorted to mutual-guarantee loans for renovating communal buildings, churches, and synagogues. When defaults occurred, qāḍīs had to mediate commercial as well as intra-communal disputes that flared up in these communities, particularly the city's two Jewish communities. With respect to guilds, my findings suggest that the use of mutual surety occurred between members of different guilds and junior members of the same guild; I have not come across an instance in the Jerusalem sijills of a guild's senior members jointly entering into such arrangements. I suggest this reflects the unwillingness of qāḍīs to allow guild members to take on such expansive liability, given the critical importance of guild members to the provision of key goods and services to the city. It also reflects the entrenched status of guild-heads as extensions of the state's mechanism for taxing groups in society. In several cases, I show how members of the city's butchers and builders guilds were required to attest concerning their guilds' debts to and from the city's Jewish and Christian communities (noting that Jews and Christians were members of both guilds).

The fifth chapter of this dissertation covers the well-attested practice of lending out capital from orphan estates. The religious-social imperative connected to the protection of orphans imposed a quasi-legal mandate on the state for supervising, if not regulating the provision of orphan credit. I review the extent of this practice in Mamluk times, largely on

evidence from the legal responsa of Taqī al-Dīn al-Subkī. I argue that the Mamluk institution dedicated to the management of orphan estates, the *mawdi' al-ḥukm*, fell into disuse during the fifteenth century, yet qāḍīs continued to supervise the investment of orphan capital loans and register them in court. By the time of the Ottomans, I suggest that this practice became a reified social-legal custom that was largely handled outside of court, and indeed the financial accounts (sing. *muḥāsaba*) that were infrequently requested by qāḍīs reflect this. I focus on records relating to orphans of the influential Ḥanafī imam Mūsā al-Dayrī, who came from a long line of Jerusalem 'ulamā', established his own cash-waqf in the early 1560s, and left the executorship of his children's estate to his cousin, Jamāl al-Dīn Bin Rabī', an influential merchant and lender in the city. I use the many records of Bin Rabī''s activities in investing this estate in loans to show that the court demonstrated a loose supervision of this activity in Jerusalem. Further, I argue that the bureaucratization of judicial authority in Ottoman courts led qāḍīs to only interfere in cases where disputes arose, or suspected malfeasance between executors and guardians of orphans' estates. However, this would arise after the fact. With its detached supervisory role, I suggest the court's principal role was the validation of executor activity, rather than its interrogation, which is rare in the sijills.

The sixth and final chapter attends to the relationship between gender, social status and credit. Here, I argue that most women's moneylending activities in court, and the adjudication of debts in general, had social and status constraints that increased their transactional costs relative to men's court registrations. I suggest that while courts did not discriminate against women of lower social-economic status, one rarely sees court cases raised by them. Elite women, on the other hand, had a range of legal forums and personal networks at their disposal to aid them in the management of their financial affairs and they

are regularly appear in court records. Most important of these was the agency (*wakāla*) contracts that were used to manage their assets and allowed them to use courts more for pressing their claims. Courts appear to have been more concerned with the use of written rather than oral evidence for adjudicating debts produced by women, and there is not a discernable difference between elite and non-elite women's cases in this regard, despite elite women's much greater access to services, specialists, and witnesses who could have promoted more favorable outcomes. On punitive measures, I contend that courts did not display a differential treatment for insolvent female debtors; they were imprisoned as were men in Jerusalem's women's jail. I refer to the debt imprisonment case of a Jewish female moneylender, Bīla, to show that, as with the case of debtor imprisonment reflected in the chapter on mu'āmalāt above, her imprisonment was intended to restore the money she owed to her creditors rather than as a punitive measure.

Assessing the Mamluk-Ottoman transition and its impact

This dissertation deals with the period of Mamluk-Ottoman transition and the continuation of Mamluk era social institutions and customs after the Ottoman conquest. While the Ottoman conquest reoriented the region's political center to Istanbul, it would take considerable time to Ottomanize the region's society. For political, economic and legal reasons, the social integration of this region did not appear to be a high priority for the Ottoman state's elites in Istanbul. The Ottomans were still in a rapid expansion mode for three decades after the fall of the Mamluk state. They gained large swathes of Southeastern Anatolia and Iraq, including Baghdad (1534), and after Hungary's complete incorporation as a directly ruled region of the Ottoman state in 1541, the Ottoman state's attitude in its

Eastern provinces began to witness "the beginnings of a significant shift in imperial emphasis from territorial expansion to administrative consolidation, that is, from conquest to colonization."[36] It is likely not a coincidence therefore that the earliest surviving court records from Bilād al-Shām and Egypt begin a decade or so (at the earliest) after the Ottoman conquest. Although the earliest extant qāḍī court sijills are from 1528 (for Cairo) and 1530 (for Jerusalem), their form and structure are not characteristic of Ottoman sijills from a decade later; earlier sijills were often made up of loose copies of Mamluk era sijills from different courts and periods that were not assembled in a uniform way. As I elaborate in my chapter on law, several factors would shift the full incorporation of the region's legal institutions into the bureaucratic-legal norms of the Ottoman center to the mid-1540s. Before this time, I suggest, important continuities remained from Mamluk courts.

The 1540s was also the decade of momentous legal reforms associated with Sultan Süleymān's rule, during which the most famous of the ḳānūnnāmes was issued (in 1541), earning him the sobriquet the "lawgiver" (*al-qānūnī*). 1548 marks the year in which the cash-waqf was legalized by Süleymān and the new ḳānūnnāme was swiftly promulgated across the sultanate. In an apparently coordinated action, in 964/1556 the governors of Aleppo and Damascus established the first two cash-waqfs in the Levant (in Aleppo and Jerusalem respectively).[37] Dozens of new cash-waqfs would follow in later decades in these two cities. With respect to the building of landmark Ottoman public waqfs in Bilād al-Shām, these can

[36] Leslie P Peirce, *Morality Tales: Law and Gender in the Ottoman Court of Aintab* (Berkeley, CA: University of California Press, 2003), 108.
[37] Farrūkh Bayk, the governor of Jerusalem in the early 1550s established the city's firs cash-waqf in the amount of 16,000 dirhams in 964/1556 to support Qur'an reciters in Hebron. al-Arna'aūṭ, "Dalālāt Ẓuhūr Waqf Al-Nuqūd Fī Al-Quds Khilāl Al-Ḥukm Al-'Uthmānī," 40; In the same year, Aleppo's governor created a 30,000 gold dinar waqf in Aleppo. Muḥammad Mūfākū, *Dawr Al-Waqf Fī Al-Mujtama'āt Al-Islāmīyah*, al-Ṭab'ah 1 (Bayrūt: Dār al-Fikr al-Mu'āṣir, 2000), 71, 77.

squarely be traced to the 1540s and early 1550s. The mosque-madrasa complex of Hüsrev Pasha (al-Khusrawīya) in Aleppo was completed in 1546, and Süleymān's mosque complex in Damascus began construction in 1554.[38] In the early 1550s the Jerusalem sijills also bear witness to the acquisition and merger of properties in Jerusalem which created that city's famous "soup-kitchen" by Süleymān's chief consort Hasekī Sultan, a major institution in the city that came to be known as al-'Amāra al-'āmira.[39]

Studies on the widely investigated demographic explosion and decline of the sixteenth century have been enabled by the survival of Ottoman cadastral surveys (*tapu taḥrīr defters*) which were developed for the purposes of measuring taxation; a source base that does not exist for Ottomanists of later periods.[40] In central Anatolia, these records indicate a gradually rising population trend from the fifteenth century and a population surge of over 100% in some places during the mid-sixteenth century, followed by a sudden fall towards the century's end. Many factors have been put forward to explain this mid-century population explosion: economic (urban mercantile growth), political (dislocations from long periods of Ottoman-Safavid warfare), and monetary (the flood of American silver), are but a

[38] Bruce Alan Masters, *The Arabs of the Ottoman Empire, 1516-1918: A Social and Cultural History*, 2013, 111.
[39] Amy Singer, *Constructing Ottoman Beneficence: An Imperial Soup Kitchen in Jerusalem* (Albany: State University of New York Press, 2002), 44–45.
[40] Scholars have attributed the lack of tahrir defters for subsequent centuries (they are limited to the fourteenth and fifteenth centuries) to different causes. Lewis and Cohen attributed the disproportionality to the fact that the sixteenth century witnessed the apex of Ottoman military expansion, which brought with it a highly centralized state bureaucracy; Bernard Lewis and Amnon Cohen, *Population and Revenue in the Towns of Palestine in the Sixteenth Century* (Princeton University Press, 2015). Linda Darling has explained that the lack of defters in later periods should be seen outside of a rise and decline framework. She contends that regular tahrir defters were abandoned because of a change in the relationship between "military forces and the land". By the seventeenth century, the *timar* system, and the cavalry forces it supported, was outdated and the military-technology revolution forced the state to increasingly levy ad-hoc *avariz* taxes, which made the tahrir defter system less relevant; Linda T Darling, *Revenue-Raising and Legitimacy: Tax Collection and Finance Administration in the Ottoman Empire, 1560-1660* (Leiden; New York: E.J. Brill, 1996), 81.

few.[41] Michael Cook advanced one of the leading theories to explain the lead up to the late-century depopulation trend, by arguing that the productive ability of arable lands could not support the "population pressure" higher populations placed on smaller plots of land in this century.[42] Before him, M. Akdag, who had observed similar dynamics, indirectly attributed the turn of the seventeenth century Celalī revolts as being facilitated by the availability of this economically marginalized rural manpower.[43] Of late, other scholars who have revisited the tahrir defters and other sources containing rich demographic data, such as waqfs and jizya registers, have questioned the extent to which the buildup of "pressure" led to a "demographic crisis," and consider a plethora of causal factors, realizing that demographic growth was quite variegated across the large empire.[44]

Population centers in Bilād al-Shām also experienced a demographic rise and decline over the "long" sixteenth century, although not as dramatic as that recorded for some Anatolian urban centers.[45] Barkan estimated that the populations of significant Ottoman cities expanded by 84% on average, comparable to the 96% growth that Braudel suggested for the

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[41] Huri İslamoğlu-İnan, *The Ottoman Empire and the World-Economy* (Cambridge University Press, 1987), 112–18.
[42] M. A. Cook, *Population Pressure in Rural Anatolia, 1450-1600* (Oxford University Press, 1972).
[43] Oktay Özel, "Population Changes in Ottoman Anatolia during the 16th and 17th Centuries: The 'Demographic Crisis,'" *International Journal of Middle East Studies* 36, no. 2 (2004): 84; Mustafa Akdağ, *Celâlî isyanları (1550-1603).* (Ankara: Ankara Üniversitesi Basımevi, 1963); For the Celali revolts see: Karen Barkey, *Bandits and Bureaucrats: The Ottoman Route to State Centralization* (Ithaca, N.Y.: Cornell University Press, 1994).
[44] Özel, "Population Changes," 189–92; Huri İslamoğlu-İnan, *State and Peasant in the Ottoman Empire: Agrarian Power Relations and Regional Economic Development in Ottoman Anatolia during the Sixteenth Century* (Leiden; New York: E.J. Brill, 1994); Suraiya Faroqhi, "Political Activity among Ottoman Taxpayers and the Problem of Sultanic Legitimation (1570-1650)," *Journal of the Economic and Social History of the Orient* 35, no. 1 (1992): 1–39; İnalcık and Quataert, *An Economic and Social History of the Ottoman Empire*, 433–52.
[45] The notable exception to this trend was Aleppo. Barkan's study on demographic change in Ottoman cities shows that Aleppo's population gradually declined over the century from a population of 67k in 1519, to 57k, 45k, and 46k for the periods 1520-1530, 1571-1580 and "after 1580" respectively. Barkan, Ömer Lutfi, "Essai Sur Les Données Statistiques Des Registres De Recensement Dans L'Empire Ottoman Aux XVe et XVIe Siècles," *Journal of the Economic and Social History of the Orient* 1, no. 1 (1957): 27; Lewis and Cohen, *Population and Revenue in the Towns of Palestine in the Sixteenth Century*, 20.

Mediterranean centers.[46] However, Barkan contended there were two exceptions, the total populations of Damascus and Aleppo, he asserted experienced a continuous population decline over the sixteenth century.[47] Barkan's data for this is from the taḥrīr defters, although limited, and he does not explain the reasons for this purported decline. Using the same defters, Bernard Lewis and Amnon Cohen, and Adnan Bakhit, illustrated a different trend for Damascus, their studies covered all populations centers of Bilād al-Shām except for the district of Aleppo. The latter surveys suggest that urban centers in Bilād al-Shām experienced a similar dynamic to those of the Ottoman center, with growth rates of 100% or more recorded in some cities. However, the growth and reduction of Damascus' population itself (the city) was far more muted. The district (of Damascus) grew between 30% to 50% or more between the 1520s and 1540s, with growth slowing over the next decade. From the late 1550s populations began to steadily decline.[48] In their study on population and taxation in sixteenth century Palestine, Lewis and Cohen put it this way, "the general trend in the population of the towns … was upwards in the first half of the century … and downwards during the second half."[49] Their work centered on six tahrir surveys that covered the years: 932/1525-6, 945/1538-9, 955/1548/9, 961/1553-4, 970/1562-3, and 1005/1596-7. It is notable that these surveys were more frequent than those observed by Barkan for cities in Anatolia, indicating that tahrir surveys in Bilād al-Shām were neither limited to periods of political succession or confined to the immediate period following conquest.[50]

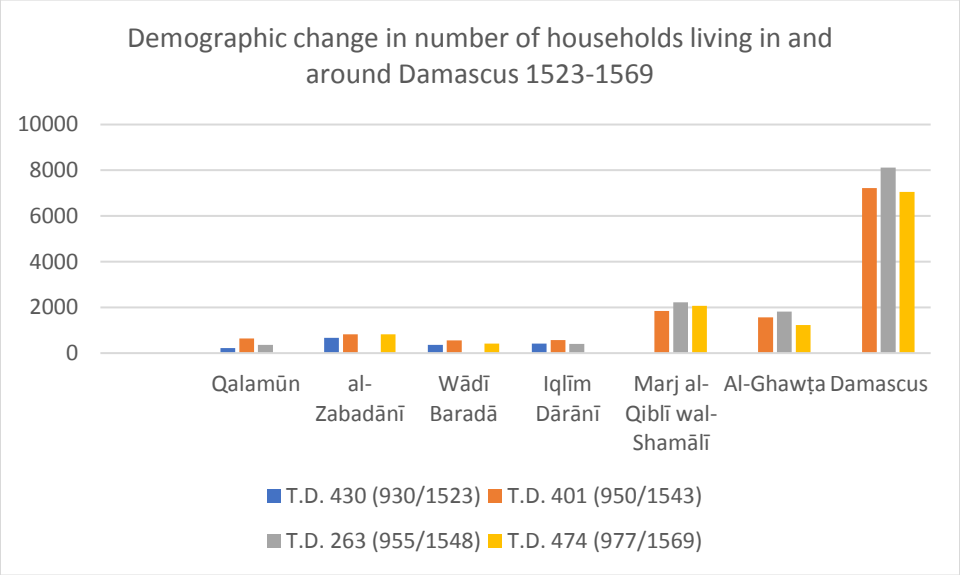
[46] Barkan, Ömer Lutfi, "Research on the Ottoman Fiscal Surveys," in *Studies in the Economic History of the Middle East*, ed. Cook, M.A. (Oxford University Press, 1970), 170–71.
[47] Barkan, Ömer Lutfi, 168–69.
[48] Lewis and Cohen, *Population and Revenue in the Towns of Palestine in the Sixteenth Century*, 18–22.
[49] Lewis and Cohen, *Population and Revenue,* 21.
[50] Lewis and Cohen, *Population and Revenue,* 10.

Bakhit's study of 16th century administration and taxation in Damascus indicates a similar overall trend as that observed later by Lewis and Cohen, however his study reproduced population register data and examined the detailed variations between population increases and decreases of all the thirteen constituent municipalities comprising villages (*sanjaks*/*nāḥiya*), in the district (*liwā'*) of Damascus. He showed how demographic change in the city of Damascus was the largely due to the movement of communities from rural to urban areas; during the highest period of population growth, from the 1520s to 1540s, and hinterland towns also grew. Unfortunately, only three tahrir defters have survived for Damascus, from the years 950/1543, 955/1548, and 977/1569. The first survey carried out immediately after the conquest in 1516 has not survived (although a survey from 930/1523 has survived and records population estimates for Damascus' surrounding towns - below).[51] I have reconstituted some of the data reported by Bakhit in the following table which summarizes the population changes he presented for seven of the nine nāḥiyas surrounding Damascus (those nāḥiyas which had the same villages included in their surveys, with no addition/loss of new ones), and I have also included the data he provides for the city itself:[52]

Nāḥiya	T.D. 430 (930/1523)	T.D. 401 (950/1543)	T.D. 263 (955/1548)	T.D. 474 (977/1569)
Qalamūn	214	638	367	
al-Zabadānī	673	829		817

[51] Muḥammad 'Adnān Bakhīt, *The Ottoman Province of Damascus in the Sixteenth Century* (Beirut: Librairie du Liban, 1982), 36.
[52] This data excludes data for Imams and certain religious notables, and military officers who were tax exempt and excluded from the defters. I have also not included figures for bachelors and simply present the number of households to provide a representative summary of trends. Bakhīt, *The Ottoman Province of Damascus,* 37–49.

Wādī Baradā	359	563		418
Iqlīm Dārānī	413	574	397	
Marj al-Qiblī wal-Shamālī		1838	2229	2072
Al-Ghawṭa		1560	1816	1233
Damascus		7213	8119	7054



The above data indicates that while population increases in some villages were extremely high, sometimes exceeding 100% over the century, the changes around (and including) Damascus were not major in the middle of the century. Despite the non-survival of defters for the 1520s, it would appear though, if one were to extrapolate from the trends of nāḥiyas that do have this data (such as for Qalamūn or Baradā), that populations in outlying areas of Damascus had growth rates of 50% or more in the second quarter of the century. It is tempting to attribute this increase to economic growth or the influx of new populations, and certainly this did occur with the Ottoman demographic expansion. Yet, there are at least three other important factors as well to explain the apparent population surge of Damascus and

Jerusalem in the second quarter of the sixteenth century. First, was the plague recorded in 1523, which at its climax resulted in a reported death toll of 220 deaths per day, and this event likely instigated the cadastral survey of that same year above (T.D. 430).[53] As with other incidences of plague, there would have likely been a natural demographic upsurge in the years following it, both through organic growth and a repopulation of the area from the hinterland through economic pull. Second, as Lewis and Cohen have advanced, the last three decades of Mamluk rule were particularly onerous on the population and characterized by a ratcheting up of confiscations and forced sales (*ṭarḥ*). This instability, they contended, compelled a great number of urban dwellers to seek refuge in hinterland communities, particularly Christians and Jews. Both Lewis and Cohen, for Jerusalem, and Bakhit, for Damascus, recorded population surges of Christians and Jews in the 1540s, attributing this rise to political-economic stability.[54]

Although taxation differed under the Mamluk *iqtā'* and Ottoman *iltizām* systems of land tenure, the political-economic prerogatives of the Ottomans in Jerusalem tended to follow a similar pattern to that which had existed under the Mamluks, at least for the first three decades of Ottoman rule. In Egypt, the iqtā' tax farming system was reformulated as sultan-owned land that was tax-administered directly, and managed by employees of the state (*amīns* and *'āmils*). While stripping the Mamluks of their lands, the Ottoman state did, however, provide lucrative bureaucratic appointments to previous Mamluk elites in the new order and absolved them of certain taxes.[55] A key concern for the Ottomans was that a preservation of the 'iqtā' system, and any military-elites depending on it, could revive the

[53] Bakhīt, *The Ottoman Province of Damascus,* 52.
[54] Lewis and Cohen, *Population and Revenue*, 23–26; Bakhīt, *The Ottoman Province of Damascus*, 40–41, 49–51.
[55] Shaw, *The Financial and Administrative Organization and Development of Ottoman Egypt, 1517-1798*, 28.

factionalism and conflict in Egypt that preceded their reign and threaten Egypt's new role as the empire's preeminent granary.[56] By patronizing the Mamluk elites, but neutralizing their control over land resources, the Ottomans attempted to secure their loyalty and diffuse the potential for revolt. As evidenced in the taḥrīr defter of 1538/9 there was an attempt, to develop a detailed inventory of the population changes that had transpired since the last years of the Mamluk state, and these were not accurately captured by the taḥrīr defter of 932/1525-6; the 945/1538-9 defter provides many more details, such as the names of household (sing. *khane*) heads and counts of bachelors separately – information that was absent from the earlier defter.[57]

In Syria, however, the *timār*, which resembled the Mamluk iqtā' system in form was adopted, although the organization and size of landholdings differed somewhat, as did the demarcation of administrative areas under Ottoman rule.[58] That said, there were customary taxes and market practices, such as ṭarḥ, that were recorded in both Jerusalem's sijills as well as imperial edicts into the 1560s, reflecting a strong continuity of Mamluk-era taxation customs.[59] As in Egypt, the Ottomans perpetuated certain social-economic privileges of the Mamluk elites and their descendants, such as tax privileges that remained throughout the sixteenth century.[60] The stability of social-economic relations continued until the introduction

[56] Shaw, *The Financial and Administrative Organization,* 30.
[57] Lewis and Cohen, *Population and Revenue*, 3–18.
[58] Bakhīt, *The Ottoman Province of Damascus*, 35–36, 91–94.
[59] A typical example of such taxes were the "ghafar"/"khafar" taxes levied on pilgrims traveling through the holy land. Amnon Cohen, *Jewish Life under Islam: Jerusalem in the Sixteenth Century* (Cambridge, Mass.: Harvard University Press, 1984), 102–5. The Ottoman state faced difficulty in controlling such tax which it apparently had no control over, even though they were recorded and farmed out by local judges in Palestine. A Sultanic decree from 1552 calls for the policing of the illegal khafar taxes. Fāḍil Mahdī Bayāt and Halit Eren, *al-Bilād al-'arabīyaï fī al-waṯā'iq al-'uṯmānīyaï* (Istanbul: Istānbūl : IRCICA , Munaẓẓamaï al-Mu'tamar al-islāmī, Markaz al-Abḥāṯ li-al-Tārīḫ wa-al-Funūn wa-al-Ṯaqāfaï al-islāmīyaï, 2010), Vol. 2, 187.
[60] This was more so in Syria than in Egypt. Referring to the Ottoman taḥrīr registers, Lewis and Cohen state, "*awlād-al-nās*… outlived the Mamluk regime, at least in some cities of Palestine. These, already exempt from taxes (in the taḥrīr defters), are described as 'former members of the Jund al-Ḥalqa in the time of the

of arbitrary *avāriz* war-taxes that had the effect of dislodging the power of long-standing elite families and gradually replacing them with a new class of landed military-gentry and janissary elites.[61] In other ways, recent scholarship by J. Fitzgerald on the policing of public markets and taxation has uncovered many reported abuses by former Mamluk elites that continued well into the Ottoman period. He argues that the institutionalization of Ottoman law and order – of the sort that could be comparable to the other large Ottoman cities – only began to take shape in the mid-1540s for Aleppo.[62] For Cairo, Baldwin has argued that policing the rule of law and markets, in contrast to the conventional view of H. Gerber, among others, was a rather decentralized process that was distributed across a variety of actors – most notably, as in the Mamluk era, the Muḥtasib – and not necessarily controlled by the office of the city's chief qāḍī.[63] A. Cohen's study of Jerusalem's court registers for the mid-century has some tentative parallels to Baldwin's assessment, in that numerous courts registered complaints brought against the city's Muḥtasib complaining of extortion; however, this may have been explained by the fact that this position was tax-farmed at considerable expense and sometimes incentivized the skirting of the law to make financial sense.[64] Although the Ottoman muḥtasib was typically a trader or merchant, one should not assume he had the independence of Mamluk-era muḥtasibs. In Ottoman times, the muḥtasib was

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Circassians, now retired.' They resided mainly in the towns. Throughout the sixteenth century they are *still recorded as a separate element* in most of the quarters of Safed as well as in Gaza." (emphasis mine), Lewis and Cohen, *Population and Revenue*, 18. For a review of persistence of Mamluk Jund see idem. 33-34.

[61] For the fracture and collapse of the timar system, see: Colin Imber, *The Ottoman Empire, 1300-1650: The Structure of Power* (Houndmills, Basingstoke, Hampshire; New York: Palgrave Macmillan, 2009), 206–14; For social re-structuring of power relations between military and elite households in connection with the avariz tax system in the seventeenth century Levant, see Dror Ze'evi, *Ottoman Century, An: The District of Jerusalem in the 1600s* (SUNY Press, 2012); Charles L. Wilkins, *Forging Urban Solidarities: Ottoman Aleppo 1640-1700* (BRILL, 2010).

[62] Fitzgerald, Timothy J., "Rituals of Possession, Methods of Control, and the Monopoly of Violence: The Ottoman Conquest of Aleppo in Comparative Perspective," in *The Mamluk-Ottoman Transition: Continuity and Change in Egypt and Bilād Al-Shām in the Sixteenth Century* (Bonn: Bonn University Press, 2016), 249–74.

[63] James E Baldwin, *Islamic Law and Empire in Ottoman Cairo*, 2017, 41–43.

[64] Amnon Cohen, *Economic Life in Ottoman Jerusalem* (Cambridge University Press, 2002), 11–17.

usually a guild member who came under the scrutiny of the judiciary by virtue of this fact, in addition to his appointment by the qāḍī, rather than sultan.[65]

Locating credit and its demographics

A challenge to studying the history of credit in the premodern Middle East is the difficulty in locating bankers or moneylenders as a distinct professional category. It is true that , moneychangers (sing. *ṣarrāf*) were the professional group most associated with market lending historically, and they appeared regularly as creditors in the court records of large cities. Silversmiths (sing. *ṣayyāgh*) are likewise considered to have also fulfilled a banking role. Yet, neither of these groups or their activities were officially identified as centered on lending, as such, and their lending was a byproduct of changing money and trading and manufacture of metalwork, respectively. Moreover, there are a host of other social-professional groups, most notably merchants, who were important providers of market credit. Unlike the late medieval/early modern Italian city-states, banker's guilds did not exist in the Ottoman Levant, to my knowledge and this surely must have created a less structured environment for credit. Although moneylenders were not institutionally organized as such, the footprint of credit was expansive and could be seen in every sector of society. The Mamluk-Ottoman economies of the fifteenth, and sixteenth centuries especially, were highly monetized, so much so that one may even speak of a debt economy. For instance, O. Barkan's study of the estate inventories of elites in Edirne between the sixteenth and

[65] Cohen, 39, 42 Towards the century's end, the autonomy of this figure appears to have been increasingly subsumed by the authority of chief-judges. For instance, in Ramadan 966/August 1588, the chief judge of Jerusalem issued a stern warning to a specific group of named traders and shopkeepers in the city who he suspected of violating (from a tip-off by the muḥtasib) the law and "selling their wares out of their homes and their warehouses, rather than in their shops. The judge warned the traders that they would each be fined 100 sultani for this criminal offense if caught, and that this amount would be donated to the al-Aqsa sanctuary mosque waqf. J-67-389-3. .

seventeenth centuries showed that around 20% of all capital held by wealthy elites was in the form of credit obligations at the time of their deaths. This rate was much higher, exceeding 50%, for moneychangers and jewelers, those whose mainstay was lending.[66]

Market lending was also indispensable to commerce and merchants were the other social group who were engaged as important lenders. From geniza Cairo, hundreds of years earlier, Udovitch observed of "merchant bankers" that "no matter how extensive the banking operations of any single [genizah] merchant, they are invariably encountered together with a correspondingly thriving trade in commodities … even more so than in the medieval West … their [merchant] banking activities were closely related to their private trading commercial activities."[67] To move seamlessly from geniza to early modern economic life would be anachronistic, if not essentialist, yet some key features of moneylending persisted. In spite of the rise of the bureaucratization of loans, under the framework of mu'āmalāt shar'īya discussed below and the development and popularization of cash-waqfs, the absence of deposit-banking continued through the early modern period until the middle of the nineteenth century.

Another aspect of moneylending in the early modern Ottoman period, and one that is founded on a later stereotype, is that it was an activity dominated by non-Muslims, mostly Armenians, Greeks, and Jews. This view is premised on the social-economic effects of economic charters (or 'capitulations'), '*ahdnāmes*, awarded to European states in the seventeenth and eighteenth centuries that increasingly gave the upper hand, so to speak, to non-Muslim Ottoman merchants and lenders affiliated with European powers. Such charters

[66] İnalcık, Halil, "Capital Formation in the Ottoman Empire," 124–25.
[67] Udovitch, "Reflections," 15.

allowed these groups to engage in trading and market activity on preferential basis with respect to taxation and market monopolies. This shift however began well far after the sixteenth and early seventeenth centuries and the court records of Bilād al-Shām show a rather diffused picture of moneylending. Moneylenders came from a wide variety of professional, social, and confessional backgrounds; and Muslims in rough proportion to their demographic majority in society were the dominant moneylenders. For Kayseri, Ronald Jennings posited that 82% of loans in the seventeenth century were issued by Muslims.[68] However, a salient feature of sixteenth century credit was the market dominance of *sipāhī* (cavalry-corps) and janissary officers during the century's second half. Their increasing involvement as moneylenders (and borrowers) tracked the fiscal-crises, monetary inflation, and restructuring of the Ottoman military tax system.

Timur Kuran has recently analyzed court sijill extracts from the courts of Galata and Istanbul during the first half of the seventeenth century and presents findings that paint a somewhat revisionist picture concerning the relationship between religious confession and credit. Volume nine of his series of partially edited sijill extracts reviews 1246 debt cases and registrations. He observes that while non-Muslims were not overrepresented, relative to their demographic presence, the interest rates paid by Christian and Jewish debtors to Muslim creditors was lower than that paid by Muslims debtors to their coreligionists.[69] Further, women in Kuran's pool also paid a lower rate of interest, on average for their debt, than men.[70] In addition, he estimates that intra-Muslim lending represented 57.7% of all lending in

[68] Ronald C. Jennings, "Women in Early 17th Century Ottoman Judicial Records: The Sharia Court of Anatolian Kayseri," *Journal of the Etasiconomic and Social History of the Orient* 18, no. 1 (1975): 182.
[69] He calculates that nominal rates for Muslim borrowers were 13.4% and non-Muslim borrowers were 11.9%. Kuran, *Kredi piyasaları ve faiz uygulamaları (1602-61) = Credit markets and uses of interest (1602-61)*, 9:27.
[70] women = 11.8% to men =13.5%. Kuran, 9:27.

courts, a rate that was much higher than what would be assumed given the demographic share of Muslims.[71] More significantly, his findings suggest that for lending between religious communities, lending mostly occurred in one direction: from Muslims to non-Muslims, rather than the other way around. Kuran argues that this was due to the "pro-Muslim procedural biases" of Islamic courts. Christians and Jews would have benefited from lower rates of interest than Muslim debtors because they would have been less likely to default on their loans given their legal deficiencies (as witnesses).[72] He uses also applies this rationale to explain why Jews and Christians would prefer not to use Islamic courts, because in cases when non-Muslims defaulted on debts in qāḍī courts, Muslim qāḍīs "would side with the borrower. Because of their minority status and limited presence among state officials, non-Muslims may also have been at a disadvantage in using political connections to secure the enforcement of their loans."[73]

While Kuran's evaluation is notable for opening the statistical study of credit, it is far too small a sample to allow for blanket statements about the dynamics of credit across confessional lines. Even if we were to restrict ourselves to Istanbul, this city had an enormous and much larger non-Muslim population relative to many other Ottoman cities at the time. This alone poses the question of whether we can assume a study from Istanbul's sijills on this topic would be indicative of a pattern in the wider Ottoman context. The social-economic and political backgrounds of the parties to these credit transactions are also not addressed in his brief description of the sample and the selection criteria and procedure used

[71] Kuran calculates that random probability would result in 34.6%. Kuran, 9:23.
[72] For an elaboration of his use of pro-Muslim "procedural biases" see: Kuran, T. and Lustig, S., "Judicial Biases in Ottoman Istanbul: Islamic Justice and Its Compatibility with Modern Economic Life," *Journal of Law and Economics* 55, no. 3 (2012): 631–66.
[73] Kuran, *Kredi piyasaları ve faiz uygulamaları (1602-61) = Credit markets and uses of interest (1602-61)*, 9:24.

to create this specific data sample out of tens, perhaps hundreds, of thousands of records is unclear. Its use as a representative sample thus requires further research.[74]

Review of the primary sources

This dissertation relies on a diverse set of primary 'legal' sources, that is, those produced by courts or people attached to them. I draw heavily on the qāḍī court archives of Jerusalem and Damascus, as well as fatwā collections, treatises on judicial procedure, and manuals of legal formularies (so-called *shurūṭ* works that fall under the broad "*adab al-qāḍī*" genre). The latter were produced to guide court notaries and other officials to produce the appropriate legal entries for court registers. I have also used biographical dictionaries and chronicles, principally in chapter one, to sketch aspects of change and continuity in legal culture and institutions.

Qāḍī Court Archives

The sharia court registers, sijills (sing. sijill) I have drawn on for this study are mostly the sharia courts of Damascus and Jerusalem; In a few cases I use material from the sharia courts of Aleppo for comparison. Except for published legal deeds from the Haram al-Sharīf collection (discussed below) that relate to the sharia court of Jerusalem in the late fourteenth century, all the sharia court sijills for Jerusalem used in this study are for the Ottoman period. With the exception of several edited founding waqf deeds from the late Mamluk and early Ottoman era, that have been preserved in the sijills of Jerusalem, the sijill materials I have examined are unedited.

[74] For a review of this problem of source selection, see Yaycioglu's review: Yaycıoğlu, "Timur Kuran, Ed., Social and Economic Life in Seventeenth-Century Istanbul: Glimpses from Court Records, Vol. 1-10 (Istanbul: Türkiye İş Bankası Kültür Yayınları, 2010–2013)."

The original sijills of Jerusalem are still housed at the qāḍī courts in Jerusalem and are difficult to access, although copies of the Jerusalem sijills are available to Israeli/Palestinian and Jordanian researchers at a few national universities in Israel/Palestine and Jordan. I was fortunate to locate copies of Jerusalem's 346 extant sijills (covering the period 936/1529 to 1280/1863) at the Turkish Religious Foundation's Islamic Research Center (ISAM) in Istanbul, and it was there, in the Spring of 2016, that I was able to access the sijill material used herein. ISAM also has copies of sijills archives for most cities of Bilād al-Shām during the Ottoman period and my review of material on Damascus and Aleppo is also derived from ISAM's collection. Since then, I became aware of a cataloguing project by the Islamic Research Center for Islamic History, Art and Culture (IRCICA) in Istanbul to produce annotated catalogues of select sijill defters from Jerusalem's sijill archive. To date, IRCICA has produced twelve such publications, each covering a Jerusalem sijill defter (for sijills nos. 36, 46, 67, 78, 96, 107, 119, 136, 149, 167, 183, 191), and these cover the period 965-6/1557-8 to 1100-1/1688-9. Some of these defters overlap with defter material I accessed at ISAM, and their availability in catalog form has allowed me to cross-check and uncover further material on individuals and institutions appearing in my dissertation. These catalogues have been published by Ibrāhīm Ḥusnī Rabāy'ah at the Quds Open University, in conjunction with Halit Erin of IRCICA and are an invaluable source to researchers, as they not only contain headings of each sijill act found in a given defter and useful indices, but more importantly, CD-ROM copies of every cataloged defter. I make selective use of sijills from the 1530s-1550s, as well as later, 1610s-1630s, however, most sijill material I have relied on is from the 1560s-1590s. Following are the most widely-used sijills in this study:

Sijill 45 – 971-2/1563-4 (uncatalogued)

Sijill 46 – 972-3/1564-5 (catalogued by IRCICA in 2017)

Sijill 57 – 984-5/1576-7 (uncatalogued)

Sijill 67 – 995-6/1586-8 (catalogued by IRCICA in 2016)

Sijill 77 – 916, 973,1003-4/1510, 1565, 1594-5 (uncatalogued)

Sijill 96 – 1023-24/1614-5 (catalogued by IRCICA in 2015)

Sijill 107 – 1032-33/1622-3 (catalogued by IRCICA in 2013)

Sijill 119 – 1041-1042/1631-2 (catalogued by IRCICA in 2014)

ISAM holds eighty-two sijills for Jerusalem in the sixteenth century, representing the period 1538-1600, and these sijills provide the most complete historical archival record for any city in Bilād al-Shām during this century. Based on my own review, it seems that the copies of the sijills used by IRCICA for their editions are identical to those housed at ISAM.

The earliest sijills from Jerusalem were written in a dynamic notarial style, similar to that found in Mamluk administrative and waqf deeds, and very different from the Ottoman scribal hand from the 1540s to the end of the century. Sijill acts from the latter half of the century are also slightly lengthier, neater and more formulaic – although no more complex in the information they contain than earlier ones. Most cover a period of one year, to a year and a half (the usual term for an Ottoman qāḍī's tenure), although several cover shorter periods. Each sijill was on average composed of two to four hundred pages. The Jerusalem sijills do not strictly cover Jerusalem and its immediate hinterland, but also encompass Hebron, and sometimes also include materials related to smaller neighboring towns such as Nablus and Ramla. On Occasion, one comes across cases from Gaza or further afield that were registered in Jerusalem because of a counterparty's residence in Jerusalem or the connection with

property in the city. Gaza, in the sixteenth century, was somewhat larger than Jerusalem and had its own court, yet the court of Jerusalem held a higher status, being one of the principal courts on the Ottoman judicial circuit (after Aleppo and Damascus in Bilād al-Shām). Further north, Tripoli and Beirut also had their own courts.

In stark contrast to Jerusalem, of 1,556 surviving qāḍī court sijills for Damascus in total, only one sijill has survived for the sixteenth century, this being the city's first extant sijill.[75] This unique sijill, which has 356 pages comprised of 666 legal acts, covers a period of roughly two years between Sha'bān 991-Rajab 993/ Aug 1583- June 1585.[76] This sijill was produced at Damascus' highest court, the *maḥkama al-kubrā* where the city's chief qāḍī sat. He also heard cases in his own diwān, referred to as maḥkamat al-Bāb in the sources. In the latter half of the sixteenth century, there were seven qāḍī courts in Damascus that came under his jurisdiction, these were distributed in the city's quarters and one in its suburb of al-Ṣāliḥīya. These included two probate courts, a qisma 'askarīya and a qisma 'arabīya for the 'askar and ra'āyā classes respectively.[77] The maḥkama al-kubrā was also known as maḥkamat al-Buzūrīya and was regularly held at the Jawzīya madrasa. It was in this location that the Mamluk era high court was also located, known as dār al-ḥukm.[78] My chapter on the lending of orphan estates relies on material from Jerusalem's court, as there was apparently only one court in that city. There are no surviving qisma court records for the sixteenth century, although the second surviving sijill for Damascus, dated 1035-6/1626-7, contains

[75] Brigitte Marino, Tūmūkī Ūkāwārā, and Da'd Ḥakīm, *Catalogue des registres des tribunaux ottomans conservés au Centre des Archives de Damas*, P.I.F.D 179 (Damascus: Institut Français de Damas ; Markaz al-Wathā'iq al-Tarīkhīah bi-Dimashq, 1999), 52.
[76] Marino et al., Catalogue, 43.
[77] Marino et al., Catalogue, 42–43.
[78] Marino et al., Catalogue, 42; Shams al-Dīn Muḥammad ibn 'Alī Ibn Ṭūlūn, *Mufākahat Al-Khillān Fī Ḥawādith Al-Zamān : Tārīkh Miṣr Wa-Al-Shām* (Cairo: al-Mu'assasah al-Miṣrīyah al-'Āmmah lil-Ta'līf wa-al-Tarjamah wa-al-Ṭibā'ah wa-al-Nashr, 1962), Vol. 2, 41, 89.

some qisma ʻaskarīya material.[79] Due to this non-survival, my analysis of lending from orphan estates (chapter five) focuses on Jerusalem, and excludes Damascus, since Jerusalem had one court that addressed all the city's legal affairs, including probate sijills in the sixteenth century.

Given time and research plan constraints, my evaluation of court records does not include those of other sijills that have survived from other cities in Bilād al-Shām from the sixteenth century, namely the seven surviving sijills for Aleppo and the (unexplainably large) thirty-one sijills from Hama. As I note above, however, I do make a few comparative references to some records from these sijills. Aleppo's seven surviving sijills for the late sixteenth century contain much mixed material from seventeenth century sijills and are reconstituted versions of original sijills.[80] Hama's thirty-one sijills for the sixteenth century covering the period 942/1536 to 1001/1592, however, are complete and original sijills.[81] Hama's sijills represent the second largest surviving qāḍī court archive for Bilād al-Shām, after Jerusalem's abovementioned eighty-two surviving sijills for the century.

Legal manuals, responsas and other works

This dissertation's reliance on legal manuals, treatises and responsa works is mostly focused on those produced during the sixteenth and seventeenth centuries by jurists (in Arabic) from Cairo and Damascus.

[79] Marino et al., Catalogue, 43. The first complete qisma sijill from Damascus, sijill no. 3, covers the period 1040-42/1631-3. Ibid.
[80] Marino et al., Catalogue, 52, 157–62.
[81] Marino et al., Catalogue, 52, 203–14.

One of the most important works I examine is the unpublished manual of legal formularies entitled *Biḍā ʿat al-qāḍī liʾḥtiyāj ilayh fī al-mustaqbal wa-l-māḍī* which exists in at least seven manuscript copies in Cairo, Istanbul, Leipzig, Berlin and Gotha.[82] The authorship of this work is unclear. At least two manuscripts of this work, at the Dar al-Kutub library in Egypt and at Istanbul's Süleymaniye library, attribute this work to Şeyhülislam Ebu's-Su'ud.[83] I have relied on the Leipzig manuscript of this work that is attributed to Darwīsh Muḥammad al-Bursawī (d. 937/1530?); for this reason, I refer to it as 'al-Bursawī's' manual. Its attribution in other copies to Ebu's-Su'ud indicates that it was intended to be a standard manual for legal administration. Another anonymous manual for qāḍīs from seventeenth century Menteşe (or Muğla) has been studied by Colin Imber and contains formularies in Arabic and Ottoman Turkish that are quite similar to *Biḍā ʿat al-qāḍī* and may be, I conjecture, from another version of this work.[84] I use this manual to model how types of credit-related court acts, particularly those using mu'āmalāt, correspond to the sijills from Jerusalem and Damascus. From the Mamluk period, I draw on the well-known legal

[82] Pīr Muḥammad b. Mūsa b. Mūhammad al-Bursawī, the author of this work also appears Darwish Muḥammad b. Iflāṭūn in other manuscripts. I have relied in my study on the manuscript owned by the Leipzig University library (Universitätsbibliothek Leipzig, Vollers No. 866). Versions of this work, which in the Leipzig case is titled *Biḍā ʿat al-qāḍī liʾḥtiyāj ilayh fī al-mustaqbal wa-l-māḍī* exist in atleast six other manuscripts. Brockelmann lists this author's name as Darwīš M. b. Aflāṭūn Ṭursūn b. Akmaladdīn Aflāṭūnzāde al-Bursawī and records that he was a judge in Istanbul who died in 937/1530. Brockelmann cites two works by this judge, several copies of a work called *Ṣukūk* that reside in five libraries, two of which are in Egypt (Äg. Bibl. Fiqh ḥan. 1059, Taimūr, Fiqh 186), and a second work, *Iḫtiyārāt al-aḥkām*, the manuscript of which is in Tunis. Guirguis' references (discussed below) to *Biḍā ʿat al-qāḍī fī ṣukūk al-sharīʿa* are certainly the copies of the work *Ṣukūk* that Brockelmann referred to, now housed at the Dar al-Kutub in Cairo. Although Brockelmann lists this author's death at 937/1530, the manuscript of this work that I have reviewed below from Leipzig, dated 985/1577, refers to the author as living, and it is dated a year before the Dar al-Kutub manuscript was copied, that Guirguis reviewed. Other copies of this manuscript are found in the Arab league manuscript library, ms. 442 (Shāfiʿī *fiqh*), and copies also exist at Gotha, and Berlin. The nearest possible biography I could locate for someone who could be the author of this work is that of Muḥammad b. Muḥmmad al-Bursawī, a Ḥanafī judge of Egypt who died at sea in 969/1561; al-Ghazzī, Kawākib, vol. 3, 26.

[83] Cairo: Dar al-Kutub Library, MS Fiqh Taymūr 382; Istanbul: Süleymaniye Library, MS Laleli 3,711. See: Magdi Guirguis, "Manhaj Al-Dirāsāt Al-Wathā'qiyya Wa Wāqiʿ Al-Baḥth Fī Miṣr," *Al-Rūznāma - Dar Al-Wathā'iq Al-Qawmīyya* 2, no. 2004 (2004): 282–83; Imber, *The Ottoman Empire, 1300-1650*, 145.

[84] This manuscript is filed under Turkish MS no. 145 at the John Rylands library, Manchester. See: Colin Imber, "Four Documents from John Rylands Turkish MS. No. 145," *Tarih Dergisi*, 2011, 173–86.

formularies of Jalāl al-Dīn Muḥammad al-Suyūṭī (d. 911/1505), *Jawāhir al-ʻuqūd* and Shihāb al-Dīn Aḥmad al-Nuwayrī's (d. 733/1333) tract of legal formularies, found in volume nine of his encyclopedia *Nihāyat al-arab fī funūn al-adab*.[85]

As for legal responsa, the ones I have used the most are those of Taqī al-Dīn al-Subkī (d. 756/1355), Şeyhülislam Ebu's-Su'ud (d. 982/1574), Khayr al-Dīn al-Ramlī (d. 1081/1670) and Muḥammad Amīn Ibn ʻĀbdīn (d. 1252/1836). I have focused on the discussion of mu'āmalāt al-shar'īya in these works to reflect the long historical arc of these legal instruments.[86] I have also relied on the eschatological work *al-Zawājir ʻan iqtirāf al-kabā'ir* (Cries against the committing of sins), produced by the Egytian-Ḥijāzī scholar Ibn Ḥajar al-Haytamī (d. 973/1566), to shed light on intellectual attitudes towards the use of ḥiyal like the mu'āmalāt al-shar'īya in the sixteenth century.

This study also makes use of recently discovered historical sources that are a hybrid of documentary and narrative sources; most notable is the diary (ta'līq) of the Damascene notary Shihāb al-Dīn Aḥmad Ibn Ṭawq (d. 915/1509), which has been recently edited in four volumes.[87] This diary's holograph, which is preserved at the Asad library, covers Ibn Ṭawq's personal and professional life as a notary in the Ṣāliḥīya district of Damascus between 885-908/1480-1503, and is unique for both being a first-personal narrative of key events, such as

[85] Muḥammad ibn Shihāb al-Dīn al-Suyūṭī, *Jawāhir Al-ʻuqūd Wa-Mu'īn Al-Quḍāh Wa-Al-Muwaqqi'īn Wa-Al-Shuhūd* (Makkah, N/D).
[86] Taqī al-Dīn ʻAlī ibn ʻAbd al-Kāfī al-Subkī, *Fatāwá Al-Subkī* (Beirut: Dār al-ma'rifa, 1990); For Ebu'su'ud's fatāwā, I have relied on the translations found in Colin Imber's work: Colin Imber, *Ebu's-Su'ud: The Islamic Legal Tradition* (Stanford, Calif.: Stanford University Press, 1997) Imbers translations are sourced from Ebu'su'ud's fatāwā found in the following collections: An anthology of Ebu'su'ud's fatāwā, (MS 7979) Chetham Oriental Collection, John Rylands Library, Manchester; M.E. Düzdağ, Şeyhülislâm Ebussuûd Efendi fetvaları ışığında 16. asır. Türk hayatı, Istanbul, 1972; and P. Horster, Zur Anwendung des islamischen Rechts im 16. Jahrhundert,. Stuttgart, 1935;; Khayr al-Dīn ibn Aḥmad al-Ramlī, *Kitāb al-Fatāwá al-khayrīyah li-naf' al-barīyah ʻalá madhhab Abī Ḥanīfah al-Nu'mān* (Cairo, 1893); Muḥammad Amīn Ibn ʻĀbdīn, *al-ʻUqūd al-durrīyah fī tanqīḥ al-Fatāwá al-Ḥāmidīyah*, 2 vol. vols. (Cairo: Maṭba'at Maymanīyah, 1893).
[87] For a review of Ibn Ṭawq's diary, see Wollina's abovementioned review: Wollina, Torsten, "Ibn Ṭawq's Ta'līq. An Ego-Document for Mamlūk Studies."

the political violence that enveloped the city in the last years of the fifteenth century, as well as a notarial record in its own right. The *Ta'līq* contains summaries and transcripts of hundreds of notarial acts which scholars are increasingly making use of.[88] Another hybrid work is the diary-biographical dictionary of the Damascene deputy qāḍī Sharaf al-Dīn Mūsā Ibn Ayyūb (d. 1002/1593-4), *al-Rawḍ al-'āṭir fī mā tayassar min akhbār ahl al-qarn al-sābi' ilā khitām al-qarn al-'āshir* (*The fragrant garden concerning the reports that have been passed down about the lives of those from the seventh to the end of the tenth centuries*).[89]

Despite the historiographical importance of Ibn Ayyūb's works, relatively little is known about him. Besides his *Rawḍ*, Ibn Ayyūb was reported to have produced only one other notable work, *Nuzhat al-khāṭir wa bahjat al-nāẓir* (*The promenade of whim and joy of the observer*), which is a diary-like chronicle of the key events in Damascus in the year 1599, interspersed with biographies of qāḍīs from the beginning of Islam to his day.[90] The Berlin copy of Ibn Ayyūb's *Rawḍ* contains a reference on its title page that refers to the same work as "al-Ayyūbī's *Tadhkira.*" The term *tadhkira* indicates that the *Rawḍ* may have been part of a commonplace book or memoir of Ibn Ayyūb.[91] The last ten pages of *al-Rawḍ* are indeed

[88] B. Shoshan has recently evaluated about 150 marriage contracts found in Ibn Ṭawq's Ta'līq: Shoshan, Boaz, "On Marriage in Damascus, 1480-1500," in *Developing Perspectives in Mamluk History: Essays in Honor of Amalia Levanoni*, ed. Ben-Bassat, Yuval (Leiden: Brill, 2017), 177–88.

[89] This work remains in manuscript, and in only two copies, the holograph is held by Damascus' Ẓāhiriyya library (MS 7814) and a copy is at the Berlin National Library. I rely below on the Berlin copy which consists of 638 folios and was copied in 1030/1620; Berlin Staatsbibliothek (Wetztein II 289). It is available for download online. Sharaf al-Dīn Mūsa b. Yūsuf Ibn Ayyūb, "Al-Rawḍ Al-'āṭir Fī Mā Tayassar Min Akhbār Ahl Al-Qarn Al-Sābi' Ilā Khitām Al-Qarn Al-'Āshir" n.d., Wetzstein II 289, Berlin National Library, http://resolver.staatsbibliothek-berlin.de/SBB00007FCA00000000; A limited collection of this work's biographies was edited with commentary by Ahmet Gunes: Ibn Ayyūb, Sharaf al-Dīn Mūsá, *Das Kitāb Ar-Rauḍ Al-'āṭir Des Ibn Aiyūb : Damaszener Biographien Des 10./16. Jahrhunderts, Beschreibung Und Edition*, ed. Güneş, Ahmet Halil (Berlin: Klaus Schwarz, 1981).

[90] The editor of this work used intertextual references in Ibn Ayyūb's Rawḍ and Nuzhat al-khāṭir to reveal biographical information about the author. Sharaf al-Dīn Mūsa b. Yūsuf Ibn Ayyūb, *Nuzhat Al-Khāṭir Wa-Bahjat Al-Nāẓir*, ed. 'Adnān Muḥammad Ibrāhīm (Damascus: Manshūrāt Wizārat al-Thaqāfah fī al-Jumhūrīyah al-'Arabīyah al-Sūrīyah, 1991).

[91] Bauden, Frederic, "Maqriziana I: Discovery of an Autograph Manuscript of Al-Maqrizi: Towards a Better Understanding of His Working Method: Description: Section 1"; Bauden, Frederic, "Maqriziana II: Discovery

pages from Ibn Ayyūb's diary for several days from the year 1000/1591.[92] Ibn Ayyūb subsequently worked as a deputy qāḍī in various district courts of Damascus, until his death around 1002/1593-4.[93]

of an Autograph Manuscript of Al-Maqrizi: Towards a Better Understanding of His Working Method: Analysis"; Bauden, Frederic, "The Recovery of Mamlūk Chancery Documents in an Unsuspected Place," in *The Mamluks in Egyptian and Syrian Politics and Society*, ed. Winter, Michael and Levanoni, Amalia (Leiden: Brill, 2004).

[92] Najm al-Dīn al-Ghazzī's Kawākib entry on Ibn Ayyūb states that the latter was born "sometime after 940 (1533)" and died during the "990s (1580s)," however, 'Adnān Ibrāhīm, whom edited Ibn Ayyūb's Nuzhat al-khāṭir, showed by comparing evidence from Ibn Ayyūb's two works and al-Ghazzī's Kawākib, that Ibn Ayyūb was actually born in 946/1539 and died after 1002/1593-4. Ibn Ayyūb, *Nuzhat*, 7–9.

[93] Sharaf al-Dīn Mūsa b. Yūsuf Ibn Ayyūb, *Dhayl Al-Thaghr Al-Bassām Fi Thakr Man Wūliyah Quḍā' Al-Shām*, ed. Ṣalāḥ al-Dīn Munajjid (Damascus: al-Mujama' al-'ilmī, 1956), 329; It is notable that Ibn Ayyūb's grandfather served as a deputy qāḍī for Walī al-Dīn al-Farfūr, the last Mamluk-era chief qāḍī of Damascus who is discussed at length below. Ibn Ayyūb, *Nuzhat*, 11–12.

Chapter One – The Legal Framework

> "It is worth imagining what the legal historiography of Ottoman Egypt would look like if the Ottoman sharī'a court records had not survived. The image of legal practice painted by the available chronicles would look more similar to that given by Mamlukists: Janissary officers, the police chief, and the muḥtasib play a key role in suppressing crime and regulating the markets; the beys hold courts in their private residences … lacking significant archival material in Egypt, far more historians would use the Prime Ministry Archive in Istanbul, and so the role of the imperial government in Egyptian legal affairs would loom much larger."[94]

For social historians of the Mamluk-Ottoman transition, the above quote from James Baldwin's new work, *Islamic Law and Empire in Ottoman Cairo* (2017), is more than simply food for thought. It posits a plausible alternate view of history based on different source constraints. As Baldwin's implies, fresh ideas do not necessarily spring from the most favored sources, but rather, at times, from the commonly overlooked ones or connections assembled from disparate threads. Baldwin is not alone in this sort of approach to contemporary social and legal historical writing on the early Ottoman period. This view is also shared by scholars working in Islamic studies, such as Talal al-Azem's *Rule-formulation and binding precedent in the Madhhab-law tradition* (2017), which builds on the work of

[94] Baldwin, *Islamic Law and Empire in Ottoman Cairo*, 33.

Wael Hallaq and Norman Calder, and depends on rethinking the genre of legal commentary as a site of judicial creativity, originality and inventiveness – an idea that would have been viewed with cynicism a few decades ago:

> "Our close analysis of Ibn Quṭlūbughā's commentary teaches us that where one looks for 'originality' will in turn determine what one is able to perceive. The writings of Norman Calder have … repeatedly argued that 'the layered writing (commentaries on commentaries) is not a sign of failure of intellect or endeavor, but of commitment to tradition.' … It is clear that writings of this genre may contain much originality and legal value, and should not be dismissed due to an assumed lack of 'independence' … that is unnecessarily viewed as the sine qua non of a scholar's creative originality."[95]

The work of Baldwin and al-Azem, among other recent studies in Mamluk and Ottoman legal history, are important to this study of credit because they delineate how judicial authority, doctrine and court practice were transmitted, developed and operated in ways that are somewhat different than traditional scholarship suggest. While a wider source base can expand our understanding of judicial practices, engaging with different methodological treatments are also useful for explaining historical change. In this chapter, I rely on the literature from both Islamic studies scholars and historians to examine the history

[95] Italics are al-Azem's. Al-Azem's studies how the idea of juristic-precedence was adopted by latter Ḥanafī jurists to assert legal authority within the "madhhab-law" tradition. Al-Azem's work analyzes, as its case study, Qāsim Ibn Quṭlūbughā's (802-897/1399-1474) *al-Taṣḥīḥ wa-l'tarjīḥ,* a legal commentary on the *Mukhtaṣar* of Abū al-Ḥusayn al-Qudūrī (d. 428/1037). Ibid., 20.

of credit in the development of jurisprudential doctrines in legal texts alongside the development of institutions and judicial practices in courts. The key question I address is whether the Ottoman transition in the sixteenth century resulted in a departure from Mamluk court practice. If so, how was this manifested, and what were its effects on everyday processes of adjudication and settlement? To what extent did structural differences in defining "law" (e.g., the Ottoman ḳānūnnāme, Ottoman Ḥanafism) alter the thinking of jurists in Bilād al-Shām with respect to the administration of justice?

Recent scholarship on the evidence of extra-judicial legal undertakings (contracts, oaths, associations, etc.) outside of courts in both the Mamluk and early Ottoman periods raise questions about the effectiveness of courts as sites of adjudication; some scholars have recently proposed that the services provided by courts mainly centered on the registration of legal acts rather than on adjudication.[96] That said, the wide executive mandate given to Ottoman qāḍīs during the sixteenth century, such as the engagement of qāḍīs in tax collection and a variety of other extra-judicial roles, also complicates the task of clearly understanding the main responsibilities of courts. One must therefore tread cautiously, since seeking justice could have involved various institutions, strategies and figures outside of the court's supervision. As Baldwin's work on the administration of law in sixteenth and seventeenth century Egypt suggests, there were, for example, multiple avenues for creditors to pursue their claims.

[96] In addition to Baldwin's abovementioned work, other scholars have recently become more interested in alternative venues for dispute resolution, with specific emphasis on extra-judicial settlement. See: Metin Coşgel and Boğaç A Ergene, *The Economics of Ottoman Justice: Settlement and Trial in the Sharia Courts*, 2016; Reem A Meshal, *Sharia and the Making of the Modern Egyptian: Islamic Law and Custom in the Courts of Ottoman Cairo*, 2014.

Although structurally different, late-Mamluk adjudication practices and institutions also offered litigants multiple adjudication venues, notwithstanding the corruption of political factions that some Mamlukists refer to as the "privatization of justice." For the Mamluk period, scholars are no longer wedded to the idea that a distinct bifurcation of justice between maẓālim courts and qāḍī courts existed, as Jørgen Nielsen argued in his famous study, wherein law fell under either "secular" or "religious" courts. Rather, the picture is complicated by the frequent convergence of legal venues and the sultan's direct engagement as mediator, and at times even as jurist.[97]

In this chapter, I argue that court administration in early Ottoman Damascus did not make a clean break from Mamluk legal institutions and procedures; rather institutional change in Syria and Palestine occurred gradually over the sixteenth century. In the first three decades of Ottoman rule, from 1516 to the late 1540s, the procedures that litigants used in qāḍī courts may not have substantially differed from Mamluk times. In addition, although the powers of the qāḍī were significantly expanded under the Ottomans (among other things, qāḍīs now supervised muḥtasibs), other responsibilities continued those of the late-Mamluk era. For instance, Mamluk qāḍīs also had supervised the collection of the jizya tax. The

[97] Jørgen S Nielsen, *Secular Justice in an Islamic State: Maẓālim under the Baḥrī Mamlūks, 662/1264-789/1387* (Leiden: Nederlands Historisch-Archaeologisch Instituut te Istanbul, 1985); Toru Miura, "Administrative Networks in the Mamluk Period: Taxation, Legal Execution, and Bribery," in *Islamic Urbanism in Human History: Political Power and Social Networks*, ed. Tsugitaka Sato (London: Kegan Paul International, 1997), 39–76; John L Meloy, "The Privatization of Protection: Extortion and The State in the Circassian Mamluk Period," *Journal of the Economic and Social History of the Orient* 47, no. 2 (2004): 195–212; Irwin, "The Privatization of 'Justice' under the Circassian Mamluks"; Rapoport, "Royal Justice"; Scholars increasingly view the fifteenth century Mamluk state as one where Mamluks integrated into various classes of society that had previously been closed to them, and this points to a gradual transformation of the Mamluk system itself, far before its ultimate demise. Such social change was accompanied by the increased presence of members of political factions in the courts. For instance, an account by Ibn Taghrībirdī from the 1450s, "observed the convergence of the provision of 'justice' and protection when Mamluk soldiers (julbān) offered their services as strong-men in the settlement of legal disputes by offering their services to plaintiffs [in sharia courts]." Meloy, "The Privatization of Protection," 210.

introduction of Damascus' first ḳānūnnāme was relatively late, coming in 1546, much later than Egypt's ḳānūnnāme of 1523-26. At the time of the Ottoman conquest, key figures of the Damascene 'ulamā', such as the (converted) Ḥanafī chief qāḍī Walī al-Dīn al-Farfūr (in office from 1518 to 1530) would serve as transitional intermediaries between the Mamluk and Ottoman eras, promoting and preserving their control over legal administration through their hold over influential jamā'āt.

While the first half of the sixteenth century witnessed Mamluk-Ottoman institutional continuities, I also contend that political-economic stresses in Syria and Palestine during the last decades of the Mamluk-era and the last quarter of the Ottoman sixteenth century had similar destabilizing effects on legal institutions. Historians writing during these periods have chronicled widespread judicial corruption. In both eras, qāḍīs took on greater political responsibilities, most notably in tax-collection that was aimed at funding military campaigns. Similarly, both periods witnessed the entrance of new classes into elite posts, artisans attained qāḍīships in the late Mamluk-era and members of artisans also began to dominate the Ottoman janissary corps in the late sixteenth century. Recent scholarship is revising the view of a stable meritocratic ilmiye order during the sixteenth century. While judicial posts circulated within a closed group of 'ulamā' patrician families, the so-called mevali or 'lords of the Law,' at the beginning of the century, its end witnessed the incorporation of previously marginal groups into the political and legal system.[98]

[98] Baki Tezcan, "The Ottoman Mevali as 'Lords of the Law,'" *Journal of Islamic Studies* 20, no. 3 (September 1, 2009): 383–407; Baki Tezcan, *The Second Ottoman Empire: Political and Social Transformation in the Early Modern World* (New York: Cambridge University Press, 2010).

1.1 The Ottoman conquest and its effects on court administration

Since, the thrust of my thesis concerns the continuity of legal practices, it is useful to first review the historiography on the immediate and medium-term social and religious historical effects that the Ottoman conquest of 1517 had on local 'ulamā' networks and legal institutions in Bilād al-Shām. One of the most significant events that marked Selim I's conquest of Damascus was his patronage of a new mausoleum-mosque complex at the site of Ibn 'Arabī's grave, which had apparently been littered with refuse when Selim descended upon it. Damascene 'ulamā' elites often ignored Ibn 'Arabī, partly owing to the controversial notion of the unity of existence (*waḥdat al-wujūd*) that is attributed to him. Influential local 'ulamā' viewed his ideas as heretical.[99] However, Ibn 'Arabī, was also revered by numerous Ottoman jurists and sultans. Over a century later, the Ottoman traveler Evliya Çelebi would commemorate Sultan Selim I's conquest. As Selim I prepared to battle the Mamluks on Marj Dābiq, Çelebi narrates that Selim I saw an apparition of Ibn 'Arabī in a dream in which the latter said "I have been expecting your arrival in Syria. I herald your Egypt campaign. Tomorrow you will ride a black horse that will carry you to me. Then build for me in al-Ṣāliḥīya a sepulcher, a Sufi convent, a mosque, a soup kitchen, a medrese, a children's school, a bath, a law court, a hospital, a fountain with running water, and more." As Michael Winter noted, "this was quite a wish list", nevertheless Selim acted on it in 1518, authorizing the construction of a mosque and Sufi lodge (*zāwīya*/*takīya*) with ten thousand dinars set

[99] Jamil M Abun-Nasr, *Muslim Communities of Grace: The Sufi Brotherhoods in Islamic Religious Life* (New York: Columbia University Press, 2007), 65–66; The patronage of sufis and their institutions by Mamluk sultans was commonplace though, and underwent renewal in the late Mamluk period under Sultan Qaytbāy (r. 872-901/1468-1496). Doris Behrens-Abouseif, "Craftsmen, Upstarts and Sufis in the Late Mamluk Period," *BSOAS Bulletin of the School of Oriental and African Studies* 74, no. 3 (2011): 375–95.

aside for the construction and the assignment of several villages' income to its new waqf.[100] This complex came to be known as the Salīmīya in Damascus. Although dwarfed by other mosques later in the century, Ibn 'Arabī's complex continued to hold great political-spiritual significance for Ottoman elites in Damascus in later periods. It was well known that Ottoman governors customarily visited and prayed at Ibn 'Arabī's turba before leaving the city after completing their term. [101]

In patronizing Ibn 'Arabī, Selim sought to cast himself as the "perfect man" (*al-insān al-kāmil*) of the Sufi tradition, and Ibn 'Arabī's in particular, projecting himself as the protector of Sunni Islam.[102] Of course this act of political legitimation in Bilād al-Shām cannot be viewed outside of the rising millenarian and Shi'ī movements in eastern Anatolia (e.g., the Kızıl Baş**)** that threatened Ottoman hegemony there.[103] Although, one is compelled to view Selim's patronage of Ibn 'al-Arabī complex in Damascus as the beginning of a building campaign that brought many new Ottoman institutions to the capitals of Bilād al-Shām, this was not the case.[104] Rather, the building of major Ottoman educational institutions

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[100] Michael Winter, "The Conquest of Syria and Egypt by Sultan Selim I, According to Evliya Çelebi," in *The Mamluk-Ottoman Transition : Continuity and Change in Egypt and Bilād Al-Shām in the Sixteenth Century*, Ottoman Studies (Göttingen, Germany) 2 (Bonn: V&R Unipress, Bonn University Press im Verlag V&R Unipress GmbH, 2017), 135; Bakhīt, *The Ottoman Province of Damascus*, 15–16.

[101] Toru Miura, "Transition of the 'Ulama' Families in Sixteenth Century Damascus," in *The Mamluk-Ottoman Transition : Continuity and Change in Egypt and Bilād Al-Shām in the Sixteenth Century*, Ottoman Studies (Göttingen, Germany) 2 (Bonn: V&R Unipress, Bonn University Press im Verlag V&R Unipress GmbH, 2017), 135; Masters, *The Arabs of the Ottoman Empire, 1516-1918*, 118.

[102] Tim Winter, "Ibn Kemāl (d. 940/1534) on Ibn 'Arabī's Hagiography," in *Sufism and Theology*, ed. Ayman Shihadeh (Edinburgh: Edinburgh University Press, 2007), 137–57; Masters, *The Arabs of the Ottoman Empire, 1516-1918*, 116; The use of the insan al-kamil as a religio-political model for propogating sultanic authority was also popular in Timurid Iran. İlker Evrim Binbaş, *Intellectual Networks in Timurid Iran: Sharaf Al-Dīn 'Alī Yazdī and the Islamicate Republic of Letters*, 2016, 254–60.

[103] Ibn Ṭūlūn reported that crowds of "a'jām" engaged in processions chanting for the martyrdom of al-Ḥusayn a few days before 'Āshūra, and that these parades were immediately suppressed by the governor, on 7 Muharram 924/19 January 1518. Later in the month, an embassy was received in Damascus bearing gifts to Sultan Selim from the Safavids. Shams al-Dīn Muḥammad ibn 'Alī Ibn Ṭūlūn, *Mufākahat al-khillān fī ḥawādith al-zamān* (Beirut: Dār al-Kutub al-'Ilmīyah, 1998), 378.

[104] From the standpoint of its political-religious symbolism and meaning, the construction of this complex was immense for the Ottoman polity. In this regard, the appropriation of Ibn al-'Arabī's tomb shared much in common with the discovery of the grave of Abū Ayyūb al-Anṣārī, a companion of the Prophet, in

only took off thirty years later. In 1546, the first mosque-madrasa complex of Hüsrev Pasha (al-Khusrawīya) in Aleppo was completed, and then in the case of Damascus, it was not until 1554, that the architect Sinān was commissioned to develop Süleymān's complex there.[105] The reason for this almost three-decade lull between the Selīmīya and the formative period of Ottoman construction in Bilād al-Shām is not clear - why did the Ottomans not patronize key institutions of learning in Bilād al-Shām earlier? One possibility is that although Bilād al-Shām was a prize for the Ottomans; it was still very much a borderland region that was the site of continuous Ottoman-Safavid warfare during the during the first decades of Ottoman rule. Despite their control of Damascus, Ottoman control over Eastern and Southern Syria was tenuous. The Ottoman expansion into Iraq and the Arabian peninsula continued well after the fall of the Mamluk state, and it would be in 1536 that Baghdad fell.[106] Consequently, this I suggest resulted in a delay in both Ottoman patronage as well as real institution-building. The beginnings of incorporating the local 'ulamā' elite families into the Ottoman legal-educational system of the center would also be delayed. The influence of local 'ulamā' notables who regularly held deputy qāḍīships, and some sporadic cases, even chief qāḍīships (invariably held by Turkish 'ulamā elites appointed from the center), is registered throughout the century.

Constantinople following Memhmed II's conquest, and the "purification" of the tomb of Abū Ḥanīfa in Baghdad following Suleyman's conquest of that city in 1535. As Guy Burak observed, "These ceremonial reconstructions of important tombs, as real acts and narrative tropes, are intriguing not only because members of the Ottoman dynasty play an important role but also because each of the three figures whose tombs were discovered and reconstructed represent a pillar of what some modern scholars have called "Ottoman Islam." Burak, *The Second Formation of Islamic Law*, 2.

[105] Masters, *The Arabs of the Ottoman Empire, 1516-1918*, 111.

[106] Kaya Şahin, *Empire and Power in the Reign of Süleyman: Narrating the Sixteenth-Century Ottoman World*, 2013, 27–29; Rhoads Murphey, *Ottoman Warfare, 1500-1700* (New Brunswick, N.J.: Rutgers University Press, 1999), 122.

The symbolism attached to the Ibn ʻArabī complex, as an Ottoman landmark, was not lost on the inhabitants of Damascus and especially not on Jānbardī al-Ghazālī (r. 924-27/1518-21), the Mamluk amīr who was granted the governorship of the province of Damascus by Selim after the region's conquest. Al-Ghazālī revolted immediately after Selim's death (8 Shawwāl 926/21 September 1520) and sought to revive the Mamluk sultanate under his rule in Damascus. By February 1521, al-Ghazālī had proclaimed himself sultan and received fealty oaths from a former Mamluk amīr, the Ḥanbalī chief qāḍī, and a few other elites. By and large, however, as Shams al-Dīn Muḥammad Ibn Ṭūlūn's (880-953/1473-1546) chronicle *Mufākahat al-khillān* suggests, there was little if any support from Damascene 'ulamā' for al-Ghazālī's revolt and it was only a matter of months before his revolt would be put down.[107] Al-Ghazālī's first largely symbolic act was to board up Selim's Ibn ʻArabī mosque-tomb complex, loot its contents, and revoke the salaries of its employees.[108]

Upon the Ottoman retaking of the city several months later, Damascus' chief qāḍī Walī al-Dīn Muḥammad Ibn al-Farfūr (d. 937/1531), inspected and reinstituted Selim's complex. Fearing for his life, al-Farfūr had taken refuge in Aleppo in January 1520.[109] Like al-Ghazālī, Walī al-Dīn al-Farfūr had been a grandee of the Mamluk-era, and arguably had greater political and social significance than al-Ghazālī. It was Walī al-Dīn who had presided over leading the Friday prayers and sermon (*khuṭba*) at the Umayyad Mosque following

[107] Bakhīt, *The Ottoman Province of Damascus*, 32.
[108] Shams al-Dīn Muḥammad ibn ʻAlī Ibn Ṭūlūn, *Ḥawādith Dimashq al-yawmīyah ghadāt al-ghazw al-ʻUthmānī lil-Shām, 926-951 H : ṣafaḥāt mafqūdah tunsharu lil-marrah al-ūlá min Kitāb Mufākahat al-khillān fī ḥawādith al-zamān li-Ibn Ṭūlūn al-Ṣāliḥī, tuwuffiya ʻām 953 H*, ed. Ahmad Ībish (Damascus: Dār al-Awā'il, 2002), 106; Bakhīt, *The Ottoman Province of Damascus*, 29.
[109] Ibn Ṭūlūn, *ṣafaḥāt mafqūdah min Mufākahat al-khillān*, 125; Bakhīt, *The Ottoman Province of Damascus*, 25.

Selim's capture of the city on 7 Ramaḍān 922/4 October 1516, during which he proclaimed Sultan Selim the "victorious servant of the two holy cities" (Mecca and Medina), thus recognizing his symbolic dominion over all Muslims, and not just his subjects in Bilād al-Shām.[110] Al-Farfūr was taken on as a trusted figure by Selim and was tasked with the planning and execution of the Ibn 'Arabī complex, a major undertaking that required the purchase of new land for the project.[111] Selim invested him with the chief qāḍīship of Damascus on 24 Muḥarram 924/5 February 1518, and as chief-justice, he now presided over four deputy qāḍīs, each representing one of the Sunnī madhhabs. Al-Farfūr's deft conversion to Ḥanafism (to serve as the chief-justice of Damascus' court) drew criticism from local Ḥanafī elites like Ibn Ṭūlūn who questioned al-Farfūr's sincerity. Unfazed, al-Farfūr reappointed as his deputies Damascus' former Mamluk-era chief justices, one for each of the four madhhabs.[112] Through political savvy, al-Farfūr secured Selim's patronage and maintained continuity for Damascus' 'ulamā'.

The foundations for Walī al-Din al-Farfūr's position had been secured by his father, Shihāb al-Dīn Aḥmad Ibn al-Farfūr (d. 911/1505) who had established the family's fortune and consolidated its control over the judiciary of Damascus, as well as that of Cairo in the late fifteenth century. Between father and son, these two figures managed to monopolize (with gaps of a few years in between) chief qāḍīships in Damascus for a combined period of roughly forty-five years, that is between 886/1481 to 936/1530. This period was split roughly in half, between father and son with Shihāb al-Dīn serving as Damascus' Shāfi'ī chief qāḍī between 886/1481 and his death in 911/ 1505; as explained below, he also briefly jointly held

[110] Bakhīt, *The Ottoman Province of Damascus*, 10.
[111] Miura, "Transition of the 'Ulama' Families in Sixteenth Century Damascus," 210.
[112] Ibn Ṭūlūn, *Mufākahat*, 1998, 381.

Cairo's chief qāḍīship between 910-11/1504-5. Walī al-Dīn inherited his father's position and became the Shāfiʿī chief qāḍī of Damascus and held that position until 921/1515, shortly before the Ottoman conquest. Apart from the period of al-Ghazālī's revolt, when al-Farfūr was reposted to Aleppo, al-Farfūr served as Damascus's chief qāḍī from 1518 to 1530.

Shihāb al-Dīn, the father, had served under Zayn al-Dīn Ibn Muzhir (d. 893/1488), the sultan's confidential secretary (*kātib al-sirr*) for many years in Cairo before raising enough funds to procure the chief qāḍīship of Damascus from Sultān Qāytbāy, a position for which he had outbid the incumbent.[113] Shihāb al-Dīn al-Farfūr's tenure then had ensured that the judicial practices that were rising in the second half of the fifteenth century became institutionalized and resilient, even after the Ottoman conquest. This was complemented by the rise of household factions (*jamāʿāt* or *abwāb*) in the latter half of the fifteenth century which had military or militia characteristics (a source for infantrymen) and also fulfilled fiscal function for the decentralized state (the collection of local taxes for mounting campaigns). As discussed below, the jamāʿāt also administered offices that replicated the key offices of state, the defterdār, ḥājib and so forth.

Purchasing offices in the jamāʿāt, a form of tax farming in itself, which could be made up of extensive mini-bureaucracies, was costly, but these offices could be lucrative if managed well.[114] In Ṣafar 886/April 1481, at the age of thirty-three, Shihāb al-Dīn al-Farfūr

[113] Miura, *Dynamism in the Urban Society of Damascus*, 138.
[114] The sale of offices in Cairo and Damascus usually ranged between 3,000 to 5,000 dinars. See: Michael Winter, "The Judiciary of Late Mamluk and Early Ottoman Damascus: The Administrative, Social and Cultural Transformation of the System," *History and Society During the Mamluk Period (1250-1517): Studies of the Annemarie Schimmel Research College I* 5 (2014): 197; Martel-Thoumian Bernadette, "The Sale of Office and Its Economic Consequences during the Rule of the Last Circassians (872-922/1468-1516)," *Mamluk Studies Review* 2005, no. 9.2 (n.d.): 49–83. Martel-Thoumian, Bernadette, "The Sale of Office and its Economic Consequences during the Rule of the Last Circassians (872-922/1468-1516),"*Mamluk Studies Review* 9.2 (2005): 49-83.

(Walī al-Dīn's father) reportedly paid the exorbitant price of thirty thousand dinars to acquire the Shāfi'ī chief qāḍīship of Damascus from Sultan Qāytbāy; at the time he had held several other lucrative posts in Cairo: viz., the superintendent of the army (*nāẓir al-jaysh*), the sultan's agent (*wakīl al-sulṭān*), and superintendent of the Citadel (*nāẓir al-qal'a*).[115] It was this office that propelled him to form his own jamā'a. Shihāb al-Dīn's purchase price was recouped in installments over the tenure of his office as he appointed (sold) a total of twenty-four deputy qāḍīship posts during his twenty-six year tenure, and had up to fourteen deputy qāḍīs operating under him at one time.[116] In Rabī' I 910/August 1504, about a year and a half before his death, Shihāb al-Dīn obtained the chief qāḍīship of Cairo, while continuing to hold that of Damascus, a first for any Mamluk qāḍī. Remarkably, Shihāb al-Dīn al-Farfūr also negotiated with Sultan al-Ghawrī to allow for a provision in the former's will that would allow for passing the Damascus chief qāḍīship to any deputy qāḍī of his choice in the event of his death. Shihāb al-Dīn specified the appointment of his son Walī al-Dīn. Upon his father's death a year and a half later, in Jumada II 911/November 1505, Walī al-Dīn al-Farfūr succeeded in claiming his father's chief qāḍī post and held it for another ten years, until Rabī' I 921/May-June 1515.[117] Adding to the stranglehold that the Ibn al-Farfūr held over the Damascus courts was Shihāb al-Dīn's influential hand in installing his nephew Badr al-Dīn (Walī al-Dīn's paternal cousin) as the Ḥanafī chief qāḍī of Damascus, a position that was held until Dhu'l-Ḥijja 913/March 1508.[118] In this way, the family controlled most of Damascus' courts (Shāfi'ī and Ḥanafī) in the sixteenth century's first decade.

[115] Miura, *Dynamism in the Urban Society of Damascus*, 138.
[116] Miura, *Dynamism in the Urban Society of Damascus*, 119, 139.
[117] Miura, *Dynamism in the Urban Society of Damascus*, 138.
[118] Shihāb al-Dīn had orchestrated Badr al-Dīn's appointment as a professor and superintendent of the Qaṣṣā'yya Madrasa beforehand, a major Ḥanafī institution in the city, and then played a hand in having the

According to Toru Miura's count, Ibn Tūlūn's *Mufākahat al-khillān*, referred to twenty-one jamā'āt of governors and qāḍīs in Damascus at the turn of the century.[119] Thirteen of these were controlled by chief and deputy qāḍīs. Notably, these jamā'āt had bureaucracies that modeled that of the sultan. The al-Farfūr jamā'a, for instance, had its own *dawādār*, *ustādār*, *nā'ib*, and *wakīl*.[120] Although Mamluk qāḍīs were mandated to carry out their activities in their specific courts, it appears that qāḍīs routinely ran courts from their homes at the turn of the sixteenth century. The reported activities of jamā'āt in this period indicate that this customary practice was the norm. In doing so deputy qāḍīs effectively supervised notaries, professional witnesses (sing. shāhid), and bailiffs (sing. *naqīb*/*rasūl*) outside of courts. It was very common for witnesses and bailiffs to pit defendants and plaintiffs against one another, by offering to secure desired legal outcomes based on bribes, and this was accentuated in periods of social instability. Moreover, this informal aspect of legal administration was compounded by the presence of professional adjudicators (sing. *wakīl*) who were tasked by qāḍīs to mediate between the courts and litigators in settling disputes that would later be registered in Mamluk courts.[121] Since each deputy had a dedicated professional staff, the judicial bureaucracy at-large became very inflated.[122]

Ḥanafī chief-judge at the time Ibn al-Qaṣīf dismissed. Miura, *Dynamism in the Urban Society of Damascus*, 139.

[119] Toru Miura, "Urban Society in Damascus as the Mamluk Era Was Ending," *Mamluk Studies Review* 10, no. 1 (2006): 164; In the same month as above, Ibn Ṭulūn reports that the number of judicial deputies was ten which implies that there was roughly one jamā'ā for each deputy-judge. Ibn Ṭūlūn, *Mufākahat*, 1998, 242.

[120] Miura, "Urban Society in Damascus as the Mamluk Era Was Ending," 164–68.

[121] Miura, "Urban Society in Damascus as the Mamluk Era Was Ending," 166–67.

[122] This task was surely complicated by the fact that the natural career path for a *shāhid* was a deputy-judgeship (*nā'ib*) position. During the fifteenth and sixteenth centuries, becoming a *shāhid* was a pathway to attaining a *nā'ib* position since judgeships did not require a madrasa pedigree. Miura observed, "we find many cases of promotion from *shāhid* to *nā'ib*, or of holding both positions at the same time. The offices of *nā'ibs* and *shāhids* might be centers of legal administration where people were trained not so much in legal theory as in legal practice, and where a personal network (*jamā'ah*/faction) would be created. Ibid., 166.

An indication of just how bloated the quasi-legal jamā‘āt were was seen when Sultan Selim I passed his legal reforms in the newly conquered Mamluk domains between Sha‘bān 922/August 1516 and Rabī ‘ I 924/ February-March 1518. Kemalpaşazâde (Ibn Kamāl), who would later become the Shaykh al-Islam (1526-1534) under Sultan Süleymān, accompanied Selim on his campaign and likely supervised the legal reforms in Damascus.[123] The objective was to force deputy qāḍīs to return adjudication back to the chief qāḍī's court and reduce, or eliminate, the influence of jamā‘āt. The reforms explicitly called for reducing the numbers of deputy qāḍīs and shuhūd associated with each chief qāḍī's court. However, Ibn Ṭūlūn's *Mufākaha* suggests that these measures had few lasting effects and both al-Ghazālī and Ibn al-Farfūr allowed for the reforms to be ignored, leaving room for reversion to Mamluk-era norms. Miura observes that "no one in Cairo or Damascus obeyed the order. After Selim's departure to Istanbul, the provincial governor of Damascus, Jānbirdī al-Ghazālī, allowed shāhids to go back to their offices and restored the jamā‘ah of the qāḍīs, that is, shāhids and rasūls. Legal factions (jamā‘ah) could survive despite the Ottoman attempt at reform because they had already taken root in urban society."[124]

It is compelling to think that Selim's reforms were the implementation of Ottoman justice in response to Mamluk corruption, but these reforms may not necessarily have been that different, in spirit at least, from previous attempts of the Mamluk regime to rein in its own judicial corruption, even when the Mamluk state was struggling for life in its last years. Allowing extra-judicial networks to exist naturally diverted valuable court revenues away from the state. Moreover, a great deal of wealth and political influence was concentrated

[123] Masters, *The Arabs of the Ottoman Empire, 1516-1918*, 116.
[124] Miura, "Urban Society in Damascus as the Mamluk Era Was Ending," 168.

among the heads of the jamā‘āt, a source of contention for the late Mamluk sultans. About a decade before the Ottoman conquest, in a period of forced taxation/sales and confiscations, Sultan al-Ghawrī had the six senior most members of Walī al-Dīn's jamā‘a imprisoned and mulcted in Dhū'l Ḥijjah 911/April-May 1506.[125] Notably, it was Walī al-Dīn's staff (rather than Walī al-Dīn himself) who were the focus of these raids, indicating the substantial wealth that his staff had accumulated in their positions. In Cairo, al-Ghawrī had also issued a decree that forbade Mamluk amīrs from allowing their bailiffs to extort payments from the parties to trials held in maẓālim courts.[126] Such action, striking similarity to Selim's own reforms of a decade later, indicates that the jamā‘āt system was problematic for the Mamluk authorities as well.

The Ottoman policy in Damascus, it seemed, had two opposing objectives: to preserve and stabilize the administrative elements of the prior regime that secured the continuity of taxation, and to undercut possibilities for rebellion, often from the same elements of the ancient regime. Some historians have recently observed that the policing and governance of the Ottoman administration in Bilād al-Shām displayed similar features of arbitrary taxation and market abuses, such as the forced sales of commodities on merchants, punishments and retributions that the late Mamluk period was famous for.[127] The Ottomans exempted Mamluk elites in Egypt and Syria from taxes that were imposed on the rest of the civilian population, giving them 'askarī status.[128] Al-Ghazzī's *Kawākib al-sā'ira* shows that

[125] Miura, "Urban Society in Damascus as the Mamluk Era Was Ending," 164; Ibn Ṭūlūn, *Mufākahat*, 1998, 242.
[126] Miura, "Urban Society in Damascus as the Mamluk Era Was Ending," 166.
[127] See Timothy Fitzgerald's analysis of the continuity of Mamluk-like practices in Aleppo and his review of Ibn al-Ḥanbali's scathing critique of Ottoman military officers and public crimes: Fitzgerald, Timothy J., "Rituals of Possession, Methods of Control, and the Monopoly of Violence: The Ottoman Conquest of Aleppo in Comparative Perspective."
[128] Shaw, *The Financial and Administrative Organization and Development of Ottoman Egypt, 1517-1798*, 19–33.

some of Ibn al-Farfūr's administration continued to serve in Damascus' judiciary long after his removal in 937/1530; such was the case of the Ḥanbalī qāḍī Muḥammad b. Ṣibṭ al-Rujayḥī, who had apprenticed under Ibn al-Farfūr's administration (al-Rujayḥī was born in 917/1511, meaning he was 19 when Ibn al-Farfūr died in 1530); al-Rujayḥī occupied the Ḥanbalī deputy qāḍīship of Damascus (al-maḥkama al-kubra) between 963/1555 and his death in 1002/1593, a period only interrupted by a brief political insurrection.[129]

The fact that Walī al-Dīn al-Farfūr held Damascus' chief qāḍīship until 1530 is a testament to the stability of the Mamluk-era judiciary, and the case of Damascus may not have been an isolated case, but rather characteristic for other Levantine cities in the first decades of Ottoman rule. L. Peirce's study on the "Ottomanization" of the provincial city of Aintab found that greater interest in asserting the central state's dictates over the Aintab's market activities and institutions, only took off quite late, in the late 1530s, after it was determined that early cadastral surveys had grossly miscalculated the tax potential of the region, and this set off the fiscal and legal reforms that came into full swing with its centrally appointed qāḍī Hüsameddin Efendi in 1541.[130]

> "Without knowledge of the identity of qāḍīs preceding Hüsameddin Efendi – whether they were local mollas or outside appointments – it is difficult to know how significant the events of 1541 were for the legal life of Aintab. But if developments in late-Mamluk Damascus, where qāḍīships became the province of a closed corporation of local families, are indicative of a general

[129] Najm al-Dīn Muḥammad ibn Muḥammad al-Ghazzī, *Luṭf al-samar wa-qaṭf al-thamar : min tarājim a'yān al-ṭabaqah al-ūlá min al-qarn al-ḥādī 'ashar*, ed. Maḥmūd al-Shaykh (Damascus: Manshūrāt Wizārat al-Thaqāfah wa-al-Irshād al-Qawmī, 1981), 26–29.
[130] Peirce, *Morality Tales*, 300–310.

> phenomenon in the northern Mamluk domains, the Aintab qāḍīships may well have been a local office, and Hüsameddin Efendi the first, or one of the first, to be appointed to the province through the central administration of the Ottomans. Moreover, given the coincidence of dates and the shifts observable in the climate of the court, it is hard to resist speculating that Hüsameddin Efendi introduced Süleymān's newly issued law book to the court of Aintab."[131]

Similar to the case of Damascus, the courts of Cairo in the years immediately following the Ottoman conquest also faced a period of consolidation and reorganization that sought to do away with the corruption of extra-judicial legal forums operated by deputy qāḍis and the dozens of shuhud (professional witnesses) who often served as their surrogates outside of court. In Ṣafar 923/March 1517, two months after the Ottoman conquest of Cairo, the four chief qāḍīs of the city were replaced with a Ḥanafī chief qāḍī. It was not until five years later that a royal decree called for reducing the number of deputy qāḍis to four, one for each madhhab, and the dismisal of all shuhud, except eight who were tasked to serve the four

[131] Peirce, 302; Gerber has also suggested that center-periphery differences could be at the heart of differences between the legal environment across the Ottoman Empire's major cities. In comparing the difference in the chief qāḍī's authority between Bursa and Aleppo, Gerber observed: "The evidence in Aleppo attests that the governor played a substantial role in judicial affairs. He had a full-fledged court that brought people to trial. This court was a byword in Aleppo for oppressive and whimsical procedure, whereas the record and prestige of the sharī'a court seem to have been quite good, especially by comparison … There is no sign in our sources that a comparable governmental court was extant in seventeenth century Bursa … I interpret the difference between the Ottoman core area and the outer provinces, where universalistic and bureaucratic processes were weaker than at the center." Haim Gerber, *State, Society, and Law in Islam: Ottoman Law in Comparative Perspective* (Albany: State University of New York Press, 1994), 106–8, and also 114-117; For similar earlier views, see: Jon Elliott Mandaville, "The Muslim Judiciary of Damascus in the Late Mamluk Period" 1969, 20–23.

deputies. Like Damascus, however, these initial attempts failed and the old networks of naibs and their shuhūd seemed to return to their former activities shortly after these reforms.[132]

Y. Rapoport has illustrated how the legal reforms of Sultan Qāytbāy (r. 872-901/1468-1496) and Sultan al-Ghawrī (r. 906-922/1501-1516), at the end of the Mamluk period, suggest that latter sultans began to assert greater authorities as sources of the law. In some respects, the actions of these sultans had similar features to the role of Ottoman sultans in the development of Ottoman legal institutions during the fifteenth-century.[133] Rapoport contends that the Mamluk legal system developed in three stages. First was the inception of the four-madhhab judiciary under Sultan Baybars which heralded an age of madhhab pluralism. Second, from around 1350, Rapoport observes that "the jurisdiction of military officers, especially the chamberlains, expands significantly to include family law and debts." This stage also witnessed the creation of a new post, that of the muftī dār al-ʿadl, dedicated to opining mainly on matters of state.[134] Lastly, the maẓālim courts became so widespread in the fifteenth century that there was significant overlap in cases between these and the qāḍī courts to such an extent that by the end of the sultanate, sultans would view "themselves as champions of the shariʿah and openly dispute the formalistic doctrines of the judiciary."[135]

At the turn of the fifteenth century, al-Qalqashandī observed in his *Ṣubḥ al-aʿshā fī sināʿat al-inshā* (completed in 815/1412) that the retinue of the dār al-ʿadl had by his time

[132] Baldwin, *Islamic Law and Empire in Ottoman Cairo*, 84; Muḥammad Ibn Iyās, *Badāʾiʿ Al-Zuhūr Fī Waqāʾiʿ Al-Duhūr* (Cairo, 1960), Vol. 5, 165, 453-454.; Aḥmad ibn Aḥmad al-Damīrī, *Quḍāt Miṣr Fī Al-Qarn Al-ʿāshir Wa-Al-Rubʿ Al-Awwal Min Al-Qarn Al-Ḥādī ʿashar Al-Hijrī* (Cairo: al-ʿArabī lil-Nashr, 2000), 214–218.
[133] Rapoport also highlights that with "the Mamluks we can also identify the emergence of important antecedents to Ottoman institutions, such as the Royal Hall of Justice, the Dār al-ʿAdl, with its associated state-appointed muftīs." Yossef Rapoport, "Royal Justice and Religious Law: Siyāsah and Shariʿah under the Mamluks," *Mamluk Studies Review* XVI (2012): 76.
[134] Nielsen, *Secular Justice*, 91–92; Rapoport, "Royal Justice," 84; Aḥmad ibn ʿAlī al-Qalqashandī, *Ṣubḥ al-aʿshá fī sināʿat al-inshā'* (Cairo, 1913), vol 11, 207.
[135] Rapoport, "Royal Justice," 76.

expanded to include three appointed muftīs (muftūn dār al-ʿadl) of the Shāfʿī, Ḥanafī, and Mālikī madhhabs, having that hierarchy of importance, and that three military qāḍīs (qāḍī ʿaskars) were also associated with these madhhabs, abiding to the same hierarchy and attached to the dār al ʿadl. By giving an account of a similar list of positions from the chancery of Aḥmad b. Yaḥya al-ʿUmarī (d. 749/1348) a little over half a century earlier, al-Qalqashandī indicates that the muftī dar al-ʿadl and the qāḍī ʿaskar positions were new.[136] The active engagement of state-appointed muftīs under Mamluk rule goes back in practice to the 1370s, when the position of chief-muftī (muftī dār al-ʿadl) was first created in Cairo. The main responsibilities of this post-holder appear to have been to advise the sultan on issues concerning "royal justice".[137] The maẓālim courts included sharia court qāḍīs, or at least those trained in fiqh, and augmented qāḍī courts rather than replaced them. Over time, however, the disputes that were heard in maẓālim and qāḍī courts overlapped. The maẓālim courts of chamberlains (*ḥājibs*) in the early fifteenth century regularly began pursuing debtors, despite several attempts by sultans to delimit such activities and keep them under the control of qāḍī courts.[138] Nielsen has noted in this period, that al-Maqrīzī, al-Qalqashandī and al-Subkī all complained about the ḥājibs' usurpation of the authority of qāḍī courts.[139] R. Irwin has shown how the dominance of maẓālim courts with respect to most aspects of the law, the so-called "privatization of justice", came into full view (being manifested at a variety of administrative levels) by the middle of the fifteenth century.[140]

[136] Al-Qalqashandī draws on al-ʿUmarī's Masālik al-abṣār fī mamālik al-amṣār for his comparison al-Qalqashandī, *Ṣubḥ al-aʿshá*, Vol. 4, 44-45.
[137] Rapoport, "Royal Justice," 84; Nielsen, *Secular Justice*, 91–92; al-Qalqashandī, *Ṣubḥ al-aʿshá*, Vol. 11, 207.
[138] Rapoport, "Royal Justice," 86.
[139] Nielsen, *Secular Justice*, 83–85, 107–9; Irwin, "The Privatization of 'Justice' under the Circassian Mamluks," 64.
[140] Irwin, "The Privatization of 'Justice' under the Circassian Mamluks."

The above developments were coeval with the formative period of Ottoman qānūn development, between the reigns of Murad II (r. 1421-1451) through to Selim I (r. 1512-1520).[141] Early developments in the fifteenth century augured the increasingly wide role that the Mamluk sultan took in managing justice. For instance, an increasing norm in this late period was the sultan's holding of an appeals court in which he personally received cases that were deemed to have been unfairly adjudicated in either the qāḍī or maẓālim courts. Further, the majālis of al-Ghawrī adjudicated disputes and procedural inconsistencies between the 'ulamā' themselves; this may partly explain al-Ghawrī's involvement in resolving disputes. A dispute between Damascene 'ulamā' from Ramaḍān 913/January 1508 serves as an example; the (Shāf'ī) appointed muftī of Damascus (muftī dār al-'adl) at the time, Muḥammad b. Ḥamza al-Ḥusaynī (d. 933/1527) issued a fatwā on the illegality of "building" in cemeteries in order to have a pretext for demolishing a newly constructed tomb complex (turba) for the son of Damascus' nāẓir al-jaysh at the time, Muḥibb al-Dīn al-Aslamī. [142] In the following months, al-Aslamī lobbied for restoring this building, and succeeded in obtaining another fatwā, this time from Taqī al-Dīn Ibn Qāḍī 'Ajlūn that overturned al-Ḥusaynī's. Of note is the fact that Ibn Qāḍī 'Ajlūn was al-Ḥusaynī's maternal uncle and more

[141] Rapoport has viewed the Mamluk legal system as having undergone three distinct phases: the first between 1250-1350 being one where the quadri-chief-judgeships, one for each Sunni madhhab, and the development of a royal dār al-'adl institution that administered justice for the Mamluks were created; the second, between 1350 and the early fifteenth century as one where the dār al-'adl's influence was extended outside of the citadel and where senior military officers who ran *siyāsa* courts began to use these to adjudication common debt and family disputes, formerly the exclusive domain of sharī'a courts; and lastly, during the last century of Mamluk rule, sultans directly intervened in the adjudication of select cases in maẓālim and sharī'a courts. Rapoport, and other scholars, have proposed the idea that certain features of the Mamluk system, such as the *muftī dār al-ʿadl*, were antecedents to the Ottoman Seyhulislām as the maẓālim courts were a gradual move towards what came to materialize under the Ottoman qānūn. In Rapoport"s view, the Ottoman state's legal institutions should therefore not be seen as exceptional in their development. Rapoport, "Royal Justice," 76, 84, 100–101; Masud, Muhammad Khalid, Messick, Brinkley, and "Powers, S. David, eds., *Islamic Legal Interpretation: Muftis and Their Fatwas* (Oxford University Press, 2005), 10–11.

[142] al-Ghazzī explicitly attributes this to a record of the event written by Ibn Ṭūlūn, but does not elaborate on the precise source. Najm al-Dīn Muḥammad ibn Muḥammad al-Ghazzī, *Al-Kawākib Al-Sā'ira b'a'Yān Al-Mā'a Al-'Āshira* (Beirut: Dār al-kutub al-'ilmiya, 1997), vols. 1, 40–43.

senior in the hierarchy of Damascene Shāfi'ī 'ulamā'. Over several rounds of failed negotiations with the Damascene notables on the matter, al-Aslamī finally appealed the matter to Sultan al-Ghawrī, relying on Ibn Qāḍī 'Ajlūn's fatwa. Al-Ghawrī summoned all the chief qāḍīs of Damascus to his majlis in Cairo, including Ibn Qāḍī 'Ajlūn and al-Ḥusaynī, and additionally requested advice from Cairo's chief qāḍīs. Following his review, the sultan ruled in favor of Ibn Qāḍī 'Ajlūn's position. This dispute resulted in the rescinding of Walī al-Dīn al-Farfūr's chief qāḍīship and its temporary award to Ibn Qāḍī 'Ajlūn's son Najm al-Dīn.[143] Ibn Ṭūlūn, who first reported this event, noted that the general disagreement (*ikhtilāf*) among the Damascene 'ulamā' at this majlis was characteristic of their nature, where each muftī would opine on the basis of his limited-interests.[144] The Damascene Shāfi'ī jurists who served the Mamluk state thus did not maintain agreement within their own madhhab (let alone others). In comparison, this was vastly different from the close relationship that Ḥanafī jurists (in the Ottoman center at least) had in adopting the norms of Ottoman Ḥanafism.

Thus, the political transition to Ottoman rule does not appear to have overhauled the legal system in Bilād al-Shām as much as set it on a course for gradual reform. Initial efforts to streamline the courts were met with resistance by Mamluk era officials who stood to lose their livelihoods. For the first twelve years of Ottoman rule, Ibn al-Farfūr presided as chief qāḍī of Damascus' courts, allowing for a smooth transition. The fact that the first extant qāḍī court sijills from Bilād al-Shām are from the mid-1530s indicates that it took at least two decades for court archival practice to adapt to Ottoman standards elsewhere. The earliest

[143] "Wa kāna mayl al-Ghawrī ila mā afta bihi al-shaykh Taqī al-Dīn." al-Ghazzī, vols. 1, 41; It appears that al-Ḥusaynī received a significant fine from al-Ghawrī, which caused him to sell most of his books to repay. al-Ghazzī, vols. 1, 117; For Najm al-Din's appointment, see: al-Ghazzī, *Al-Kawākib Al-Sā'ira*, vols. 2, 21.
[144] *Wa-kāna min kalāmihim li-l-sulṭān al-Ghawrī ana'l-'ulamā' mā-zālū yakhtalifūn fi-l-waqā'i' wa-kul afta bi-ḥasab mā-ẓahar lahu*. al-Ghazzī, *Al-Kawākib Al-Sā'ira*, vol. 1, 41.

court records from Egypt share the same trend. While subsequent chief qāḍīs in Bilād al-Shām were all Ottoman, their underlying administration relied on local staff, most notably the deputy qāḍīs. The fact that Damascus' high court continued to operate in the same location as in the Mamluk era, without a dedicated building, also presents a measure of continuity. An important sijill record from Jerusalem indicates that the court had been housed in the same place since Mamluk rule and was only relocated to the first Ottoman educational endowment in the city, known as al-madrasa al-uthmānīya, in Shaʻbān 996/July 1588.[145] This move coincided with heightened political-military instability in the area on the back of mobilizations of troops during the Ottoman-Safavid wars that would end in the following year, 997/1589.[146]

With respect to the structure of the courts, the activities of the three non-Ḥanafī madhhabs continued, albeit under the supervision of a Ḥanafī chief qāḍī. Ibn Ayyūb described the breadth of the chief qāḍī's authority in his *Nuzhat al-khāṭir*, in which he lists the various courts under the chief qāḍī of Damascus' supervision. These consisted of: the Damascus' chief-judge's court (*al-Bāb*), the city's central court (*al-Maḥkama al-Kubrā*), the city's three district courts (Qanāt al-ʻAwnī, al-Maydān, and al-Ṣāliḥīya), the city's probate (*Qisma*) court, and the eight deputy-judiciary courts of Damascus' suburbs.[147] In the year of his diary, 999/1590, Ibn Ayyūb lists the names of each of the Shāfiʻī, Ḥanbalī and Mālikī

[145] J-67-333-10 Rabāyiʻah, Ibrāhīm Ḥusnī Ṣādiq and Eren, Halit, eds., *Sijillāt Maḥkamat Al-Quds Al-Sharʻīyah* (Istanbul: IRCICA, Markaz al-Abḥāth lil-Tārīkh wa-al-Funūn wa-al-Thaqāfah al-Islāmīyah bi-Istānbūl, 2010), Vol. 9, 208.
[146] Rabāyiʻah, Ibrāhīm Ḥusnī Ṣādiq and Eren, Halit, *Sijillāt Maḥkamat Al-Quds,* Vol. 9, intoduction.
[147] "*al-nawāḥī a-thamānya*: al-Marjayn, al-Ghawṭa, Nāḥiyat Jubbat ʻAssāl, Wādī al-ʻAjam, al-Zabadānī, Ḥammāra, al-Biqāʻ, Wādī al-Nīm, and al-Turkumān." Ibn Ayyūb, *Nuzhat*, 161–62.

deputy qāḍīs of al-Maḥkama al-Kubrā and the three district courts above; Ibn Ayyūb lists himself as the deputy-qāḍī of the Qanāt al-ʻAwnī court at this time.[148]

Beyond the wide representation of non-Ḥanafī qāḍīs in Damascus' courts, which would have allowed litigants legal forum-shopping opportunities, judicial authority was wider under Ottoman rule. When Ibn Ayyūb was asked by an Ottoman Ḥanafī deputy qāḍī to list the areas supervised by Damascus' chief qāḍī (presumably these differed slightly between major cities), he issued a list that included the supervision of markets (the *ḥisba*), charitable and family waqfs, the city's mint, and public policing. As for services, the chief qāḍī's courts offered the public the services of reviewing and authenticating the validity of financial accounts (*khidmat al-muḥāsaba*), the authentication of weights for goods (*khidmat al-qubbān*), and of preparing petitions (*khidmat kitābat al-ʿurūḍ*).[149] As Baldwin's work on law in early Ottoman Egypt argues that petitioning in legal forums other than the courts was an important strategy for settling disputes, yet the courts still played an important part in this communication, and this is also apparent in the case of the notarial services that Ibn Ayyūb referenced. These services had fixed fees and provided important income to courts. The court-registered financial statements (*muḥāsabāt*) analyzed in this dissertation often include references to court expenses for preparing such statements (*rasm al-muḥāsaba*).

These notarial services were not only valuable to the public, but also provided a substantial revenue for the courts, and several biographical dictionaries of qāḍīs and notables of Damascus reported that court employed shuhūd routinely overcharged for their services, and there was often an excessive financial burden on Damascene using court services. Ibn

[148] Ibn Ayyūb, *Nuzhat*, 150–52.
[149] Ibn Ayyūb, *Nuzhat*, 163–64.

Ayyūb reported, in his biographical dictionary *al-Rawḍ al-ʿĀṭir* that when Çivizade (who would later become a Şeyhülislam) took up the chief qāḍīship of Damascus in 977/1569-70, his year in the city was preoccupied with slashing by a third the inflated rates that notaries charged for producing court notarized deeds (sing. *ḥujja*) and copies (sing. *ṣūra*). This qāḍī also clamped down on the apparently widespread judicial corruption among the deputy qāḍīs in Damascus' suburbs who, beyond overcharging, skimmed over half of the courts' revenues for themselves.[150]

1.2 Bilād al-Shām's 'ulamā' and the Ottoman ilmiye system

There are divergent scholarly views on the extent and scope of the integration of Bilād al-Shām 'ulamā' elites into the ilmiye system. The distance from the Ottoman center had mixed effects on the Damascene 'ulamā'. On the one hand, notables such as the al-Ghazzī family were able to maintain, and in some instances build, their religious-political clout and economic security as the Ottoman appointed vanguards of Shāfiʿī institutions in Damascus for most of the sixteenth century. However, on another level, some of these same families were excluded from full participation in the ilmiye system. In the first decades of Ottoman rule, I contend this undoubtedly resulted in the localization in the power of Damascene 'ulamā' elites and reinforced the jamāʿāt dynamics that had preceded the Ottoman conquest. For Ottoman military and administrative officials who were posted to Damascus, this meant working in a way that coordinate with and integrated local jamāʿāt political elements.

[150] Ibn Ayyūb, "Al-Rawḍ," fol. 259b–260a.

Further, I argue that at least into the third quarter of the century, the Ottoman ilmiye system did not substantially change the social-educational identity of the 'ulamā' class in Bilād al-Shām. Although the chief qāḍīships of Damascus and Jerusalem were held by Ottoman qāḍīs appointed from Istanbul, the attendant legal administration and bureaucracy beneath them was thoroughly a locally developed one. This was despite the fact that the new system of 'Ottoman Law' introduced a new centralized legal bureaucracy, in the form of the ilmiye system, headed by the şeyhülislam who was at once the chief jurist and muftī of the empire. Thus, the integration of learning institutions in Bilād al-Shām into the broader ilmiye system would be quite gradual.

The fact that the integration of 'ulamā from Bilād al-Shām took several generations to cement itself is reflected in the long-term madhhab conversion of the region's 'ulamā' elites. Following the Ottoman conquest, the leading non-Ḥanafī 'ulamā' families of Bilād al-Shām were not cast aside, and nor did they immediately convert to Ḥanafism, with a few notable exceptions (such as al-Farfūr's abovementioned conversion to Ḥanafism from Shāfi'īsm). Egyptian 'ulamā' appear to have followed a similar trajectory.[151] Studying madhab conversion over the long-term in Palestine, Rafeq used entries from al-Mūrādī's eighteenth century biographical dictionary to tabulate the statistics of 'ulamā' madhab affiliation in Palestine from two centuries prior. For the sixteenth century, Rafeq calculates that only 6% of the 'ulamā' notables in Palestine were Ḥanafī, while 85% were Shāfi'ī. It was only in the seventeenth century, he asserts, that evidence of conversion to Ḥanafism becomes reflected in a redistribution of madhhab affiliation whereby 53% of the 'ulamā' were now Ḥanafīs and

[151] Baldwin has posited that the resilience of non-Ḥanafī madhabs in the Ottoman-Arab territories can be explained in pragmatic terms, the "aggressive Ḥanafizing reform always risked alienating the public." Baldwin, *Islamic Law and Empire in Ottoman Cairo*, 95.

38% were listed as Shāfi'ī adherents. By the eighteenth century, though, the numerical difference between Shāfi'īs and Ḥanafīs narrows and becomes balanced, reflecting a resurgence of Shāfi'īsm:[152]

The Madhhabs of the Palestinian Ottoman 'Ulamā'*									
Century	**Ḥanafī**		**Shāfi'ī**		**Ḥanbalī**		**Mālikī**		**Total**
	No.	%	No.	%	No.	%	No.	%	
10/16	3	6.38	40	85.11	3	6.38	1	2.13	47
11/17	24	53.33	17	37.78	4	8.89	----		45
12/18	23	46	20	40	6	12	1	2	50

*Table is reproduced from Rafeq, "The Syrian 'Ulamā'", 68.

Since Rafeq's objective was to chart the conversion patterns of local 'ulamā', his data in the above table excluded figures for Ottoman Turkish Ḥanafī 'ulamā' and chief qāḍis appointed from the Ottoman center. Rafe's table suggests that a rapid conversion out of Shāfi'īsm to Ḥanafism took place between the sixteenth and seventeenth centuries, and stabilized thereafter. He attributes this to the stabilization of Ottoman Ḥanafism during the seventeenth century, on the one hand, and on the other to the growing dominance of a new "powerful class of military personnel, both janissaries and sipahis" who preferred the increased flexibility that Shāfi'ī and Ḥanbalī qāḍīs gave them to monopolize the long term lease of agricultural land belonging to waqfs over periods of several decades (Ḥanafī doctrine allowed for a maximum lease period of 3 years on waqf land).[153]

[152] Abdul Karim Rafeq, "The Syrian 'Ulamā,'" *Turcica*, no. 26 (1994): 68. This table is drawn from Rafeq's study on Palestinian ulama affiliation: Rafeq, A.K., "Filasṭīn fī 'ahd al-'Uthmāniyyīn" (Palestine under the Ottomans), in: Encyclopedia Palestina, second section: Special Studies, Anis Sayegh (ed.), 6 vols, Beirut, 1990, II, p. 788-809.

[153] Further, the fact that Ḥanafī qāḍīs continued to monopolize the courts did not appear to be a barrier for those from other madhhabs, since "such lease contracts of long duration would be referred mostly to a Shāfi'ī, and occasionally to a Ḥanbalī, qāḍī who would authorize them according to their madhhabs, the Ḥanafī (chief) qāḍī would then routinely approve the contract. Other stringent regulations observed by the Ḥanafī qāḍī but compromised by the Shāfi'ī qāḍī deal with the fairness of the rent, the violation of the terms set by the founder of the waqf, and the necessity for all beneficiaries of the waqf to be present in the court, especially if the waqf was a family waqf." Rafeq, "The Syrian 'Ulamā,'"71.

However, the arrival of Ottoman rule in the Levant did of course bring its own unique state controls over the legal-bureaucracy, and these ushered in a gradual tightening over the appointment of muftīs and their issuance of fatwās over the course of the sixteenth century. This process was detrimental to the work of local 'ulamā' notables, even though they continued to serve as deputy qāḍīs in district courts and as administrators of waqfs, albeit under the supervision of Istanbul-trained chief qāḍīs. Guy Burak's *The Second Formation of Islamic Law* observes four areas in which the new Ottoman legal bureaucratic order formalized its presence in Syria and Egypt: the integration of local 'ulamā elite into an imperial learned hierarchy; the appointment and sanctioning of muftīs by the state, rather than through the independent practice of local 'ulamā dynasties; the state's advocacy and regulation of its own specific branch of the Ḥanafī madhhab, with its own doctrines; and lastly, "the rise of dynastic law in the post-Mongol eastern Islamic lands."[154] All of these, in unison, were hallmarks of the new order, one which was markedly different from its Mamluk predecessor on a number of fronts. Burak argues that 'ulamā' elites in Bilād al-Shām developed a parallel form of Ḥanafīsm that operated next to the Ottoman state's own ilmiye "canon."

Other evidence supporting the idea that the watershed for Ḥanafī dominance came in the seventeenth, rather than sixteenth, century, can be found in the record of teaching and fatwā certificates (sing. *ijāza*) issued over time across madhhabs. While much later Syrian biographers, most notably al-Murādī, would project backwards the notion that the Ottoman reforms were "sweeping and abrupt," Burak's quantitative review of muftī licensure in the sixteenth-century indicates that change was rather shaped over many decades of the sixteenth

[154] Burak, *The Second Formation of Islamic Law*, 10-11.

century.[155] Even after the sixteenth century though, certificates obtained outside of the state-sponsored learned hierarchy, while not bankable as currency to obtain Ottoman judicial posts, continued to be bestowed by Shafi'i (in particular), Mālikī and Ḥanbalī elites.[156] Syrian Ḥanafī muftīs who did not hold an official appointment began to create their own clique, reflecting the cleavage that formed between Arab Ḥanafī muftīs who were incorporated into the Ottoman state's legal order and those Arab Ḥanafī 'ulamā' who resisted some of the Ottoman ḳānūnnāme interventions.[157] A curious feature that supported this division was the fact that none of the learning institutions in Bilād al-Shām were integrated into the ilmiye system, both those that pre-existed Ottoman rule and those that were constructed during it.[158]

Yet, there are even threads of continuity between the Arab Ottoman Ḥanafī elites in Bilād al-Shām who held official appointments and leading Ḥanafī jurists of the Mamluk-era. In a fatwā epistle from the 1670s, the chief muftī of Damascus 'Abd al-Ghanī al-Nabulusī (1050-1143/1640-1731) had instructed the state's subordinate muftīs in Bilād al-Shām to refrain from issuing judgements outside of their madhab's legal tradition, taqlid, because such junior jurists were not trained to engage in legal reasoning, (*ijtihād*). Indeed, al-Nabulusī reiterated the common refrain that no one was fit for ijtihād in his day.[159] This view is mirrored in an almost identical plea made by Ibn Quṭlūbughā's in his treatise *The Judge's*

[155] Ibid. 38
[156] Ibid. 37, cf. Ibid, note 15, p. 28; Devin Stewart, "The Doctorate of Islamic Law in Mamluk Egypt and Syria," in Makdisi, George, Joseph E Lowry, Devin J Stewart, Shawkat M Toorawa, and Trustees of the "E.J.W. Gibb Memorial," *Law and education in medieval Islam: studies in memory of Professor George Makdisi*. Cambridge: E.J.W. Gibb Memorial Trust, 2004, 45-90.
[157] Burak, *The Second Formation of Islamic Law*, 60
[158] Masters observes that "for reasons that are not clear, the system of government-controlled madrasas was not extended to the Arab provinces. The Khusrawīya Madrassa in Aleppo and the Sulaymanīya in Damascus followed a curriculum closely influenced by the Ottoman madrasa system, but neither was officially designated as belonging to the imperial network of religious schools." Masters, *The Arabs of the Ottoman Empire, 1516-1918*, 111.
[159] Ibid.

jurisdiction (*Risāla fī quḍā' al-qāḍī*). It is noteworthy that both al-Nabulusī and Ibn Quṭlūbughā were not central figures in the state's curriculum, each having held official posts only briefly during their long careers. Notably, al-Nabulusī's intellectual genealogy is connected, indirectly, to Ibn Quṭlūbughā via the works of Ibn Ṭūlūn whom al-Nabulusī studied. Significantly, the Ottoman state-sponsored tabaqāt works rarely mention Ibn Quṭlūbughā's major works, *Tasḥiḥ al-Qudūrī* and *Tāj al-tarājim*, whereas his works continued to be very popular among Ḥanafīs in the Ottoman "Arab lands well into the seventeenth century."[160]

Tropes about cultural differences between Arab and Turkish Ottoman provide a further point of differentiation between early Ottoman Syrian jurists and jurists in the Ottoman center. When the notable Damascene Shāfi'ī qāḍī and muftī Badr al-Dīn Muḥammad al-Ghazzī (d. 984/1577) visited Istanbul in the mid-sixteenth century and sought to develop relations with 'ulamā' elites at the center, his travelogue, *al-Maṭāli' al-badrīya fī al-manāzil al-rūmīya*, he related his disapointment at the lack of attention given to people of prestige and power from the Levant, such as himself.[161] However, al-Ghazzī did not view the Ottomans antagonistically. After all, he referred to Sultan Süleymān in this same work as "*Sulayman al-zamān wa-Iskandar al-'aṣr wal-awān*."[162] Yehoshua Frenkel studied the attitudes of elites in Bilād al-Shām towards Turks and Ottomans during both Mamluk and Ottoman periods, and he does not detect resentment in the writings of Arab 'ulamā' towards their new Ottoman rulers. Rather, he suggests that Ottoman Arab 'ulamā' "envisioned (the

[160] Burak, *The Second Formation of Islamic Law*, 150-1.
[161] Frenkel, Yehoshua, "The Ottomans and the Mamluks through the Eyes of Arab Travelers," in *The Mamluk-Ottoman Transition : Continuity and Change in Egypt and Bilād Al-Shām in the Sixteenth Century*, ed. Stephan Conermann and Gül Şen, 2 (Göttingen: V & R unipress, Bonn University Press, 2017), 288.
[162] Frenkel, "The Ottomans and the Mamluks," 285.

Ottomans) as a continuation or even as a renewal of the Mamluk Circassian (*jarākisah*) Sultanate."[163]

On the other hand, working on accounts from a century later, Rafeq detects a proto-Arab identity in the writings of seventeenth century authors such as Najm al-Dīn Muḥammad al-Ghazzī (d. 1651; son of Badr al-Din above) and ʻAbd al-Ghanī al-Nabulsī who expressed a sense of cultural dejection.[164] Further still, biographers from much later, such as Muḥammad al-Murādī (1173-1206/1760-1791) would register surprise when they came across members of the Syrian 'ulamā' who were fluent in Turkish, something that was considered a rarity.[165] It is not clear whether the later period marks a cultural shift away from earlier attempts at integration into the Turkish center, or that the spread of the Turkish language among the Syrian 'ulamā' was never popular to begin with. However, what is certain is that some jurists from Bilād al-Shām, like the Aleppan historian Muṣṭafa Naʻima (Tarih-i Naʻima) who lived and died in Istanbul and wrote in Turkish, did thoroughly integrate into the ilmiye system.[166]

Rafeq's analysis of al-Murādī's dictionary found that about 47% of Damascene Ḥanafī 'ulamā' elites had received some training in Istanbul during the eighteenth century, while the rate was 20% for Damascene Shāfiʻī 'ulamā' elites.[167] Syrian 'ulamā' obtained teaching degrees in Istanbul at varying levels, some were even able to obtain positions in

[163] Frenkel, "The Ottomans and the Mamluks," 284; For a wider project on Arab views of Turkic peoples through medieval history see: Yehoshua Frenkel, *The Turkic Peoples in Medieval Arabic Writings* (Routledge, 2014).
[164] Rafeq, "Relations between the Syrian '"Ulamā"' and the Ottoman State in the Eighteenth Century," *Oriente Moderno* 18 (79), no. 1 (1999): 89–95; Rafeq also notes how some of this Arab Ottoman sentiment was channeled into anti-Turkish polemics such as al-Nabulsī's Kitāb al-qawl al-sadīd fī jawāz ḫulf al-waʻīd wa'l-radd ʻala al-Rūmī al-jāhil al-ʻanīd (The Book of Sound Doctrine on the Permissibility of Opposing a Threat in Reply to an Ignorant and Obstinate Rumi). 91.
[165] Rafeq, "Relations," 80.
[166] Rafeq, "Relations," 79.
[167] Rafeq, "Relations," 76.

Sahn-i Seman, Istanbul's eight colleges.[168] However, as Rafeq observes, attendance at Istanbul's teaching institutions, by this time, was not necessarily a prerequisite for obtaining an advanced degree that was issued from the center.[169] Undoubtedly, such professional achievements were aided by a network of small but significant community of Damascene elites who had by then established permanent residence in Istanbul.[170]

From the first half of the sixteenth century, Ibn Ṭūlūn's biographical dictionary of Damascene qāḍīs, *Al-Thaghr al-bassām fī dhikr man wulliya quḍā' al-shām*, is one of a few works that traverse the Mamluk-Ottoman transition, and its supplement (*dhayl*) which was produced by Ibn Ayyūb is also an invaluable source on Damascus' legal elites. Ibn Ayyūb's highlights a few cases of apparent solidarity between Turkish chief qāḍīs and the city's local 'ulamā', who were mostly Arab. In an episode recounted by Ibn Ayyūb from 965/1557-8, the chief qāḍī of Damascus, Muḥammad Celebī b. Abī al-Su'ūd al-'Imādī[171], who we are told was held in high esteem by Damascene 'ulamā', had the custom of riding through town thrice a week led by an entourage of forty-men, which included Ottoman administrators (*yasaqīya*) and his deputy qāḍīs from the four madhhabs.[172] On one occasion, during the 'īd feast, trouble ensued between his jamā'a and the governor's:

> "The chief qāḍī's procession approached the governor's palace (*dār al-sa'āda*) and in his (the chief qāḍī's) service on that day were Shaykh 'Imād al-Dīn al-Ḥanafī, Ismā'īl al-Nābulusī [Shāfi'ī], and the [Ḥanbalī] qāḍī Kamāl al-Dīn Bin

[168] Rafeq, "Relations," 77.
[169] Rafeq notes that "Murādī quotes a number of examples where distinguished 'ulamā' … [had degrees] conferred upon them by the Shaykh al-Islam (grand muftī) of Istanbul while they were in Damascus. Others had degrees conferred on them in Istanbul without attending school." Rafeq, "Relations," 78.
[170] Rafeq, "Relations," 78.
[171] This chief-judge appears to have been Şeyhülislām Ebu's-Su'ud's son.
[172] References to 'yasaqīya' in Arabi sources from the period reflect varied uses, and indicate figures who could have been tax-collectors, Ottoman qānūn administrators, police guards; the qānūn was referred to as the 'yasaq,' as opposed to 'shar'īa' particularly in issues concerning law.

> Mufliḥ.[173] The procession passed the jamā‘a of the governor (*malik al-umarā’*) Aḥmad Bāsha … and its members were beating their drums in a garden – none paid respect to the honorable afandī [the chief qāḍī]. And so the afandī ordered their drum to be burned and their swings cut, and the drum was burned. In response, Aḥmad Bāsha's jamā‘a approached and cut the tail of the afandī's mule, and then proceeded to attack those ahead of the afandī. Shaykh Ismā‘īl fell off his horse as did all the others. Turbans fell, and the entourage fled. Word reached Aḥmad Bāsha that the sultan's drum had been burnt, and a conflict ensued between the Qāḍī and the Bāshā with each hurling accusations at the other."[174]

In spite of the ethnic and madhhab diversity among Damascene jurists, one is inclined to read Ibn Ayyūb's above entry as stressing the cohesiveness of Damascene 'ulamā'. In Ibn Ayyūb's *Rawḍ*. Ibn Ayyūb, who was a friend of Badr al-Dīn al-Ghazzī (d. 984/1574) and lived through the century's middle decades, reported that it was a regular custom for both Ottoman chief qāḍīs and governors to visit al-Ghazzī and seek his teachings and blessings. In their biographies of al-Ghazzī, both Ibn Ayyūb and Najm al Dīn al-Ghazzī (Badr al-Dīn's son) stressed that the elder al-Ghazzī grudgingly continued receiving visits by Ottoman dignitaries even after he became reticent and lived in semi-seclusion. Al-Ghazzī issued teaching certificates to a number of high-ranking Ottoman chief qāḍīs in Damascus.[175] At least three of the Turkish Ottoman qāḍīs that studied under al-Ghazzī became Şeyhülislams: Çivizade Hacı Mehmet Efendi (Shams al-Dīn Muḥammad Ibn Jawī Zādah, 1582-87), Bostanzade (Muḥammad Bin Bustān, 1589-92, 1593-98), and Malūlzade (Ibn Ma'lūl Zādah,

[173] The Nabulusī's and Ibn Mufliḥ families were leading 'ulamā' families during this period. For the Ibn Mufliḥ family see Miura, *Transition*, 214-5.
[174] Ibn Ayyūb, *Dhayl*, 328.
[175] Al-Ghazzī, *Kawākib*, Vol. 3, 4-5.

1580-82).[176] While al-Ghazzī developed friendships with the former two, Malūlzade was apparently disdainful of Badr al-Dīn al-Ghazzī's lack of deference.[177] Remarkably, although al-Ghazzī did not hold any appointments in the judiciary or ilmiye institutions, he drew a high pension of 70 akce per day in the 1560s from the Ottoman state; this income was in addition to that which he received from his various teaching and waqf supervisory duties. According to Ibn Ayyūb, al-Ghazzī held the "leadership of the [Shāfi'ī] madhhab" in Damascus up to his death, and was widely called upon to issue fatwās, despite the fact that he was not the city's state-appointed muftī.[178] Al-Ghazzī's high standing in Istanbul is evident from the type of teaching certificates that Ottoman mevalī sought from him. When Çivizade studied with al-Ghazzī in 977/1569-70, it was not to expand the former's knowledge of Shāfi'ī law. Çivizade received certificates for reciting the "six [canonical] works" of ḥadīth (*al-kutub al-sitta*), the Mu'tazalī al-Zamakhshari's tafsīr work *al-Kashshāf* (d. 538/1143), and al-Bayḍāwī's (d. 685/1286) tafsīr *Anwār al-tanzīl*, among other works.[179] According to Najm al-Dīn al-Ghazzī, one of the first orders Çivizade issued after becoming Şeyhülislam (twelve years after leaving Damascus), was to increase Badr al-Dīn's pension to 80 akce per day, a paygrade "that had never before been achieved by any member of the Arab senior jurists (*mawālī*) under the Ottoman (Banī 'Uthmān) state."[180] Çivizade's relationship with al-Ghazzī elicits no surprise from Ibn Ayyūb or Najm al-Dīn al-Ghazzī and

[176] al-Ghazzī, *Kawākib*, Vol 3, 6. The above Çivizade (Shams al-Dīn Muḥamad Ibn Jawī Zādah) was the son of the famous Qāḍī Askar and Şeyhülislam Çivizade Muhittin Mehmet Efendi (1539-41) who was a leading voice in opposing the Şeyhülislam Ebu'su'ūd in the cash-waqf controversy discussed in chapter three.
[177] al-Ghazzī, *Kawākib*, Vol. 3, 26.
[178] "Wa antahat ilayhi ra'āsat al-madhhab wa atayatahū al-fatāwā min aqṭār al-bilād" Ibn Ayyūb, *Al-Rawḍ*, fol. 242b.
[179] Ibn Ayyūb, *Al-Rawḍ*, fol. 241b.
[180] al-Ghazzī, *Kawākib*, Vol. 3, 26.

reflects the seemingly fluid social-intellectual interaction in Damascus across both Ottoman-Arab and madhhab lines.

However, the intimate portrait of Çivizade above should not be taken as a normative portrait of chief qāḍīs' relationships to Damascene 'ulamā'; the proximity or distance of such relationships was highly variable. In general, Ottoman chief qāḍīs in Bilād al-Shām were not entrenched within the social-legal networks of Syrian 'ulamā' elites. Partly, this was due to the exceedingly short tenure of their appointments; the Aleppo-Damascus-Cairo judicial circuit that most chief qāḍīs completed was a stepping-stone for achieving tenure in the Istanbul judiciary, and thus, postings in each city rarely exceeded two years. Moreover, most court administration was managed by local deputy qāḍīs, many of whom represented leading established Damascene 'ulamā' families, such as the Ibn al-Farfūr, al-Sābūni, and Ibn Mufliḥ. It is notable that Walī al-Dīn al-Farfūr's son and grandson served as deputy qāḍīs in Damascus. The grandfather of the historian Ibn Ayyūb (who himself was a deputy qāḍī in Damascus) had served as a deputy qāḍī under Walī al-Dīn al-Farfūr in the last years of the Mamluk regime. A second marker of difference was the fact that the chief qāḍīs of Damascus over the century, with two exceptions, were all Turkish Ottoman elites trained and appointed from Istanbul.

Ibn Ayyūb's supplement to Ibn Ṭūlūn's biographical dictionary of judges is also an important source for assessing norms on judicial bribery under both the Mamluks and Ottomans.[181] As noted earlier, judicial malfeasance during the Mamluk period was widely

[181] The other major biographical work on Damascene judges during this period was produced by Ibn Tulun's contemporary Abd al-Qadir b. Muhammad al-Nūaimi's (845-927/1441-1520) *al-Quḍāt' al-Shāfīyah*; see Ibn, Ṭūlūn S.-D. M. A, Ṣalāḥ -D. Munajjid, and 'Abd -Q. M. Nu'aymī. *Quḍāt Dimashq: Al-thaghr Al-Bassām Fī Dhikr Man Wulliya Qaḍā' Al-Shām*, (Dimashq: al-Majma' al-'Ilmī al-'Arabī bi-Dimashq, 1956), 5.

reported.[182] Ibn Ayyūb narrates that the chief qāḍī of Damascus Ibn al-Maʿlūl Afandī (Malūlzade), who took office in 975/1567, was not just excessively greedy but also "overbearing in responding to the public's needs", and that his days in office "were a burden upon the people"; he "accumulated an unheard of amount of money." Following his time in Damascus, this qāḍī was promoted and took up the chief qāḍīship of Cairo and would later become a şeyhülislam.[183] A little over decade later, another qāḍī, Mustafa Afandī (989/1581) is described as having mixed with grandees and notables (*al-akābir wa-l aʿyān*) and had a large appetite for money and bribes (*ṭamaʿ zāyid fī tanāwul al-māl wa akhdh al-rashwa*). A few years later, Ibn Ayyūb recorded his pleasant surprise when the city's new chief qāḍī Ahmad Afandī (994-995/1585-6) declined Ibn Ayyūb's offer to purchase a better qāḍīship for himself, and simply submitted to his request without insistence of compensation. Ibn Ayyūb recalled that Ahmad Afandī had "assigned me a district qāḍīship in the Ṣāliḥīya district of Damascus … and he did not take from me anything in value or kind, as it is the customary practice of (chief) qāḍīs when they appoint deputies (*man yūwallūnahu al-niyāba*).[184]

The norms expressed in Ibn Ayyub's narrative on judicial bribery in Damascus are corroborated by Ibn Nujaym who devoted a short treatise on judicial bribery in Cairo during the mid-sixteenth century.[185] Just as a bribe is impermissible, so too, Ibn Nujaym contends, is

[182] For cases of judicial bribery among the notable jurist families, such as the al-Subkī, Bin Ḥijjī, and Ibn al-Farfūr, see: Shams al-Dīn Muḥammad ibn ʿAlī Ibn Ṭūlūn, *Al-Thaghr Al-Bassām Fi Thakr Man Wūliyah Quḍā' Al-Shām*, ed. Ṣalāḥ al-Dīn al-Munajid (Damascus: al-Mujamaʿ al-ʿilmī, 1956), 124, 140–47, 156; For Ibn al-Farfūr: Miura, "Urban Society in Damascus as the Mamluk Era Was Ending," 161–64.
[183] Ibn Ayyūb, *Quḍāt Dimashq*, 330
[184] *Fa-lam ya'khudh minnī shay'an qil wa la jal kamā huwa ʿādat al-qūḍāt fī tawliyat man yūwallūnahu al-niyāba*,Ibn Ayyūb, *Quḍāt Dimashq*, 335.
[185] Fī bayān al-rashwa wa'aqsāmiha li-l-qāḍī wa ghayrahū (An exposition on the types of judicial and other corruption). Zayn al-Dīn ibn Ibrāhīm Ibn Nujaym, *Rasā'il Ibn Nujaym Al-Iqtiṣādīyah Wa-Al-Musammāh Al-Rasā'il Al-Zaynīyah Fī Madhhab Al-Ḥanafīyah* (Cairo: Dār al-Salām, 1998), 197–205.

the gift granted to a qāḍī from a person from whom he had never received a gift before taking up the post of qāḍī.[186] The same applies to plaintiffs who advance loans to qāḍīs, or lend them property in exchange for a desired ruling.[187] Ibn Nujaym acknowledged, however, that gifts to a qāḍī after he had issued his ruling, were permissible so long as these were given in good faith and without any prior conditions that could have influenced a ruling.[188] Ibn Nujaym also fully endorsed the discretionary punishment (*ta'zīr*) associated with calling out a litigant for trying to bribe a qāḍī – viz., removing his turban, tying it around this person's shaved head and parading him around town. Such punishment was necessary for preventing, in Ibn Nujaym's view, the widespread harm caused by such corruption in his day.[189]

Notwithstanding Ibn Ayyūb's narrative on judicial corruption, it should be noted that the sale of bureaucratic offices was a long-standing legal custom and form of legitimate income for chief qāḍīs, who sought compensation for their investment. Work as a qāḍī assumed that qāḍīs, as with other offices of state, such as that of the market inspector (the muḥtasib), would recoup their investment through the various fees and taxes that they ordinarily levied. Such income, in the eyes of the jurists of the period, was qualitatively different from the explicit bribery (*irtishā'*) paid to a qāḍī to influence a ruling.

In the late Mamluk-era, political-economic changes led to the opening up of the qāḍī post to numerous merchants, Mamluks, and other non-'ulamā' members of society. This was a source of great ire for some 'ulamā' patricians who felt increasingly left out of qāḍīships because they were out-bid by wealthier candidates. While the Ottoman ilmiye system's

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[186] Ibn Nujaym, *Rasā'il,* 200.
[187] Ibid.
[188] Ibn Nujaym, *Rasā'il,* 201.
[189] *hādha al-wajh maṣlaḥa li-l'āmma taqlīlan li-l-rashwa ma'ā kathratihā fi hādha al-zamān* Ibn Nujaym, *Rasā'il,* 205.

centralization and bureaucracy was founded on a meritocratic order, it had certainly developed into a oligarchy by the early sixteenth century; the senior-most posts in the ilmiye system and Ottoman judiciary were reserved for the so-called "Lords of the Law," the senior members of the ruling 'ulamā' elite.[190] For junior candidates, when appointments were scarce, young 'ulamā' would need to the better part of a decade before receiving a junior judicial post.[191]

By the early seventeenth century, the appointment of qāḍīships to major outside courts of Edirne, Bursa, Cairo and Damascus was increasingly subject to arbitrary sultanic appointments or venality and narratives of widespread corruption came to dominate appointments to lower judicial and teaching posts, although movement up through the ranks continued to follow the ilmiye rung-ladder system. For instance, Mulakkab Musliheddin (d. 1648), whose sobriquet reflected the many epithets that were constructed around his "unwholesome pastimes" arose from a modest background to become – very briefly – the chief qāḍī of Damascus in 1646. Shortly thereafter, he climbed further to become the chief qāḍī of Istanbul, and then finally became the Chief Justice of Rumelia, momentarily, before "he was hacked to pieces by the party that deposed Ibrāhīm I."[192] A few years prior, Sultan Ibrāhīm I had given a series of qāḍīships to Karabaşzade Hüseyin Efendi (d. 1648) that culminated with the latter becoming the Chief Justice of Anatolia in 1645. Madeline Zilfi commented about Cinci Huseyn, known by the epithet the "demon chaser" who cured the sultan's impotence and was violently murdered, that "since the new administration did not

[190] Tezcan, "The Ottoman Mevali as 'Lords of the Law.'"
[191] Cornell H Fleischer, *Bureaucrat and Intellectual in the Ottoman Empire: The Historian Mustafa Âli (1541-1600)* (Princeton, N.J.: Princeton University Press, 1986), 32–33.
[192] Madeline C Zilfi, *The Politics of Piety: The Ottoman Ulema in the Postclassical Age (1600-1800)* (Minneapolis, MN, U.S.A.: Bibliotheca Islamica, 1988), 98.

attack the system of favors any more than had the old, other Mulakkabs and Cincis continued to pass into the ulema from essentially non-ulema sources."[193]

Notwithstanding the stability of the local Damascene 'ulamā' for much of the sixteenth century, the century's end brought a period of important structural changes to the Ottoman legal order. Zilfi has illustrated how the examinations that earlier career jurists had to undergo, when vacancies arose on a somewhat ad hoc basis, became more regularized and distinguished along hierarchical lines between the academies of the Süleymaniye complex (Tr. *dahil*) and colleges outside it (Tr. *haric*).[194] Structurally, these changes appear to have been symptomatic of the unhindered fiscal expansion of the Ottoman state. Relying on state treasury data, Zilfi estimated that between 1589 and 1622 the Ottoman military corps grew from 65,000 to roughly 100,000. "For the ulema, the numbers were equally telling. Between 1550 to 1622, the number of ulema in hierarchy positions nearly tripled."[195] The overextension of both military and 'ulamā' bureaucracies was especially salient given that the above period came several decades after the greatest period of Ottoman expansion under Sultan Süleymān. In the first half of the seventeenth century, therefore, this created a bottleneck of too many ulema chasing too few jobs, however this process would be reversed – or at least balanced – after the construction of a huge number of new institutions of learning by secular elites but it was only in the second half of the seventeenth century that some parity was reached between the supply and demand for academic jobs.[196]

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[193] Zilfi, *The Politics of Piety,* 100.
[194] Zilfi, *The Politics of Piety,* 62–63.
[195] Zilfi, *The Politics of Piety,*94.
[196] Zilfi, *The Politics of Piety,* 205–14. In the second half of the century, Zilfi argued for a revival of opportunities for lower-rung ulema due to the sheer new increase in schools: "The total number of medreses in Istanbul at mid-century stood somewhere between 120-200. Between 1651-1705, at least 160 new medreses were added to the rolls." 205.

On the other hand, Tezcan explained the political rise of the lords of the law as an outcome of social-economic integration and monetization in the late sixteenth-century.[197] He had observed that qāḍīs were not only among the wealthiest members of society in the early modern period, but also among the most significant lenders in the towns and cities where they were posted.[198] Naturally, the activities of the courts that qāḍīs supervised would have expanded their opportunities to lend. But, as Tezcan has argued, it was likely the monetization of the late sixteenth-century that brought about an unprecedented expansion of power and wealth for the jurists, as a function of their increased role in tax-farming and from the increased political-administrative power wielded by the jurist bureaucracy. Accordingly, two processes ran in parallel during this period: "the gradual transformation of the Ottoman society from a predominantly feudal to a market-oriented society and the lifting of the barrier between public and private law, which led to the increasing politicization of the jurists' law."[199] Tezcan further highlights how the cash-waqf controversy cannot be viewed outside of this tension. In his view, the legitimization of the cash-waqf, an unorthodox institution in Ḥanafī fiqh, should not be viewed as the sovereign's will over that of scholars, but rather, as an outcome of the "politicization of the jurists' law." In other words, Sultan Süleymān's legitimation of the cash-waqf, while it was in opposition to the majority legal view on this instrument, was in line with the growing market custom of the cash-waqf, an accepted legal practice by certain (influential) jurists that propelled the legitimization of the cash-waqf in the first place. In that sense, "Süleyman was drawn into the sphere of the jurists' law that

[197] Tezcan, "The Ottoman Mevali as 'Lords of the Law.'"
[198] Tezcan, *The Second Ottoman Empire*, 37–40; Darling, *Revenue-Raising and Legitimacy*, chap. 7.
[199] Tezcan, *The Second Ottoman Empire*, 33 The lifting of the barrier between public and private law here refers to the erosion of the siyāsa shar'īyya norms that typified the distinctions, in both Ottoman and Mamluk contexts, between the sharī'a courts on the hand (private) and those of the maẓālim and qanūn (public). .

previously had primarily governed social relations and operated mainly within the spheres of commercial and family law."[200] Tezcan's view helps to explain why qāḍīs appeared so frequently as lenders to tax-farmers; this was due to their expanded role in the taxation system. The reformed tax regime of the late sixteenth century, which saw a transition from the timār tax-farming system to a system of direct taxation with the avāriz and other taxes, relied on the qāḍīs' management of tax farms.[201] Qāḍīs were regularly prime lenders to those bidding for tax-farms.

The Jerusalem sijills reflect the roles of qāḍīs as administrators (sing. nāẓir) of state-run endowments. In addition to being in charge of their own courts, qāḍīs were regularly employed to manage other state institutions and special courts such as the probate (qisma) courts, the treasuries for the management of Jewish properties (*bayt māl al-yahūd*), the administrative institution for the jizya tax (*diwan al-jawalī*), the military/state affairs courts (*diwan al-maẓālim*) and so on.[202] Michael Winter has observed that it was customary for qāḍīship appointments to be accompanied by "ex-officio rights" for holding other posts in "religious institutions and the civil financial administration."[203] Far beyond their juridical duties, qāḍīs in Syria, as in Egypt, carried out these activities alongside their own private business pursuits which could often involve trading in market goods and the holding of a wide variety of real estate and manufacturing enterprises such as "water mills, dye houses, tanneries, orchards, plantations, and warehouses."[204] Naturally, their intimate access to a wide

[200] Tezcan, *The Second Ottoman Empire,* 33.
[201] Darling, *Revenue-Raising and Legitimacy*, Chap. 4; Tezcan, *The Second Ottoman Empire*, 39–40.
[202] Wael Hallaq has argued for a long continuity in the organizational and administrative practices of judicial offices, which included managing several of the above listed diwans. See Wael B. Hallaq, "The 'Qāḍī's Dīwān (sijill)' before the Ottomans," *Bulletin of the School of Oriental and African Studies, University of London* 61, no. 3 (January 1, 1998): 421, and passim.
[203] Winter, "The Judiciary of Late Mamluk and Early Ottoman Damascus," 195.
[204] Winter, "The Judiciary of Late Mamluk and Early Ottoman Damascus," 198.

array of cases could often provide market opportunities that could have been closed to, or overlooked by, other elites. In the Jerusalem sijills, it is therefore not surprising at all to find qadis appearing as lenders of the highest order. [205]

1.3 The practice of the courts: inter-madhhab pluralism, the qānūn and siyāsa

How did the sovereign's "secular" laws, the qānūn, affect judicial authority in Bilād al-Shām with respect to credit dealings? How did the Ḥanafization of sixteenth-century courts and the muftī-qāḍī merger influence rulings? One of the key distinguishing features of Ottoman Law was the state's adoption of an official madhhab affiliation, in its own strand of Ḥanafīsm, and the degree to which non-Ḥanafīs as well as Ḥanafīs who did not follow the state's canon and its imposition of Ottoman Law, has been a central topic in several recent studies. Baldwin contends that scholars have overplayed the boundary lines of madhhab identity in early Ottoman Egypt courts and argues that jurists had a more utilitarian view of madhhab identity than previously assumed. He provides several examples of high ranking qāḍīs in the seventeenth and eighteenth centuries who switched madhhab confessions for employment opportunities.[206] These parallel late Mamluk period changes such as the case of Badr al-Dīn al-Farfūr (first cousin of Walī al-Dīn al-Farfūr) who switched to Ḥanafism in order to become the Ḥanafī chief qāḍī of Damascus.[207]

Yet, while the madhhab barriers may have been more important for the employment track of Mamluk era 'ulamā', it was not so for the common-folk (the *a'wām*) who would

[205] For examples of Jerusalem qāḍīs extending loans: J-Sij 4-526c, 32-164a, 77-501g, 14-120b, 18-33b
[206] Baldwin, *Islamic Law and Empire in Ottoman Cairo*, 79–82.
[207] Miura, "Transition of the 'Ulama' Families in Sixteenth Century Damascus," 210–11.

have turned to "forum shopping" to obtain the most suitable legal outcomes for their needs in the qāḍī courts (not to mention the availability of maẓālim courts and extra-judicial tribunals). As far as the qāḍī courts are concerned, al-Azem's recent study of Ibn Quṭlūbughā's work operated on the legal norm that "the four madhhab-courts all had concurrent jurisdiction" and for the common man this had legal sanction in custom as well, in the dictum that "the layman is bound by no madhhab" (*al-ʿāmmī lā madhhab lahu*).[208]

According to G. Burak in The Second Formation of Islamic Law, the bureaucratization of muftī appointments under the Ottoman state, was initiated under the Şeyhülislam, who was the most senior qāḍī and muftī of the empire, creating a process that privileged the opinions of state appointed muftīs, since only their opinions were sanctioned to be employed in Ottoman courts.[209] In Ibn Nujaym's day between the 1520s-1540s, Şeyhülislam Ebu's-Su'ud made it clear that his legal rulings that were preserved in his fatwās would not be contradicted by any Ottoman qāḍī/muftī.[210] As Burak noted, "the authority of the Ottoman muftī to issue legal rulings, unlike that of his Mamluk counterparts, was revocable. In other words, if in the Mamluk sultanate the muftīship was first and foremost a status, the Ottomans perceived the muftīship as an office. Accordingly, those who were not appointed could not have issued enforceable legal opinions."[211]

Burak's argues that proponents of a "Greater Syrian 'Ottomanized' canon" operated in contradistinction to the "authoritative texts" (*al-kutub al-muʿtabara*/*al-muʿtamada*) of the Ottoman state's legal bureaucracy, whereby these two schools were situated at two ends of a

[208] Talal Al-Azem, "A Mamluk Handbook for Judges and the Doctrine of Legal Consequences (Al-mūğab)," *Beo Bulletin d'études Orientales*, 2015, 216.
[209] Burak, *The Second Formation of Islamic Law*, 21–64.
[210] Burak, *The Second Formation of Islamic Law*, 44.
[211] Burak, *The Second Formation of Islamic Law*, 48.

legal "continuum" in the Ḥanafī madhhab, may find a parallel in the apparent power differential between local muftīs and state appointed jurists in Bilād al-Shām, if one takes al-Muḥibbī's above account as more than just hyperbole.[212] The other side of the coin may be seen in a biography of Ibn Nujaym which was written by the biographer and legal scholar Nev'îzâde Atâî (d. 1635). The latter cites that the Şeyhülislam Ebu's-Su'ud approved of Ibn Nujaym's work, al-Ashbāh wa'l-naẓā'r 'alā madhhab Abī Ḥanīfa al-Nu'mān, in his day and that several commentaries were compiled on it, making it part of the officially sanctioned Ottoman legal canon.[213] Several decades later, though, in the early seventeenth century, a fatwā issued by the Şeyhülislam Ṣun'Allāh Afandī revealed that this work may not have been as representative of the Ottoman canon. In response to the question "Do the issues contained in (Ibn Nujaym's) al-Ashbāh wa'l naẓā'ir correspond to the issues discussed in other jurisprudential texts (of the canon)?" Ṣun'Allah Afandī offered: "Although parts of the work are accepted as sound, there are also parts that are rejected."[214] However, the fact that Ibn Nujaym's work, that of a provincial deputy qāḍī in Cairo who did not rise through the legal colleges of Istanbul, could carry such cache without being a part of the legal circles of the center, indicates I think the pragmatism of the Ottoman judiciary and the tolerance of legal divergence. Notably, though, this is evidence that non-establishment authors in Bilād al-Shām "sought to establish the authority of some of his rulings by referring to works and rulings of eminent Arab Ḥanafīs, whose authority in turn rested on their scholarly credentials

[212] Burak, *The Second Formation of Islamic Law*, 132 and 148, and more generally Chapter 4: Books of High Repute (122-162). .
[213] Burak, *The Second Formation of Islamic Law*, 136; Nev'îzâde Atâî, *Hadaiku'l-hakaik fî tekmileti'ş-şakaik in Şakaik-ı Nu'maniye ve zeyilleri* (İstanbul: Çağrı Yayınları, 1989), 34.
[214] Burak, *The Second Formation of Islamic Law*, 137; Ṣun'allah Efendī , Fetâvâ, Suleymaniye Library MS Reşid Efendi 269, 42v ; See also footnote 318 in Burak's dissertation for another example: Guy Burak, ""The Abu Hanifah of His Time": Islamic Law, Jurisprudential Authority, and Empire in the Ottoman Domains (16th–17th Centuries)" (New York University, 2012), 220.

and on their affiliation with a specific chain of transmission with the Ḥanafī madhhab."[215] Ibn Nujaym's criticism of free-wheeling muftīs appears to be a veiled critique of the new legal order that appeared to accept the blurring of lines between qāḍī and muftī. Undoubtedly, as he explicitly noted, Ibn Nujaym was troubled by the historical continuity of this aspect of the law, which may have been a vestige of a developing late Mamluk practice.

In his posthumously assembled collection of short treatises, *al-Rasā'il al-zaynīya*, Ibn Nujaym paid special attention to cases of interdiction, emphasizing that a determination of mental competence (*sifh*) can only be made as part of a court adjudication process, and not independently. He was wary and critical of the practice in his day of qāḍīs issuing interdiction orders without a dispute brought to court, and his view was an outgrowth of that. In his view, such extra-judicial orders served as fatwās that were non-binding, unless they were part of a court proceeding (*da'wa*) and had evidence (*bayyina*). He reiterated the divergent views of Abū Ḥanīfa, Abū Yūsuf and al-Shaybanī on the issue of interdiction for new adults.[216] Ibn Nujaym's acerbic view is notable given that he held a qāḍīship in Cairo and received widespread recognition among scholars in Anatolia during his short life (he died at 44). Ibn Nujaym lamented:

> "The accepted practice of qāḍīs in our day, and in the past, of providing rulings without the presentation of a case proceeding or dispute (*khuṣūma*), has prompted many to question this practice in Cairo. I have issued many opinions concerning the lack of its validity, and (in spite of this), this has not

[215] Burak, *The Second Formation of Islamic Law*, 152.
[216] Ibn Nujaym, *Rasā'il*, 400.

raised any disagreement (*khilāf*) on this issue, whether the concerned qāḍī is a Ḥanafī or otherwise."[217]

Ibn Nujaym's angst is not only aimed at the Ottoman qāḍīs of his day, but also very likely the reports of this in Mamluk judicial practice. However, although the official rhetoric was that legally binding opinions could only be issued by state-appointed muftīs, during this period, the popularity of fatwās from non-state sanctioned muftīs seems to suggest that the policing of this principle may not have been strictly followed. The fatwās of the highly influential seventeenth-century Palestinian Khayr ad-Dīn al-Ramlī (993-1081/1585-1670), who drew on Ibn Nujaym, as well as the Gazan jurist al-Tumurtāshī were actively reproduced and continued to carry weight among his followers well after his death. In his biography of al-Ramlī, the seventeenth-century chronicler and biographer, Muḥammad Amin al-Muḥibbī (1061-1111/1651-1699), in *Khulāṣat al-athar fī ʿayān al-qarn al-ḥādi ʿashar*, related the power of al-Ramlī's fatwās in this way:

> "[The town of] Ramla in his times was the most just of all places, and the sharīʿa was upheld there and in neighboring areas as well. If someone was ruled against in a non-sharīʿa fashion, the person could come with a copy of the qādī's ruling and Khayr ad-Dīn could issue a fatwā that nullified that ruling, and it was his fatwā that would be implemented. Rarely would any problem arise in Damascus or other main cities without him being consulted for an opinion about it, despite the availability of many other muftīs."[218]

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[217] Ibn Nujaym, *Rasā'il,* 397.

[218] Judith E Tucker and Mary Ann Fay, "Biography as History : The Exemplary Life of Khayr Al-Din Al-Ramli," in *Auto/Biography and the Construction of Identity and Community in the Middle East* (New York: Palgrave, 2002), 15–16 (translation is Tucker's); Al-Muḥibbī, *Khulāṣat al-athar fī aʿyān al-qarn al-ḥādī ʿashar*, 134–39.

Beyond the muftī-qāḍī overlap, the introduction of Ottoman sovereign law codes, the ḳānūnnāmes, was a keystone of Ottoman law. What was the impact of the ḳānūnnāmes in Bilād al-Shām on the judicial authority of qāḍīs in qāḍī courts? Did these ḳānūnnāmes, arise from sovereign edicts that preceded them in Mamluk times, the yasa/yasaq, as the Ottoman sources imply? The promulgation of ḳānūnnāmes was often tailored for newly acquired territories, and in the case of Arab lands, the ḳānūnnāmes there ascribed their codes as incorporating those that had preceded them; Süleymān's ḳānūnnāmes for Egypt (1522-25) and for the province of Damascus (1548), claimed to have drawn on the pre-existing ḳānūnnāme of the Mamluk sultan Qāytbāy.[219] Benjamin Lellouche's study of the Ottoman Egypt's conquest reproduced an Ottoman account from the chronicler Celālzāde Ṣāliḥ Çelebi (d. 1565) who also served as a qāḍī in Egypt during the 1530s that suggests that this is indeed what happened there:

> "[We] asked the city dwellers [*şehirlü ṭāifesi*]: ''Of the *padişāhs* of the past, for whose justice are you grateful and whose *ḳānūn* did you favour?'' We shall search for his *ḳānūnnāme* and, in accordance with [that *ḳānūnnāme* we] shall promulgate a *fermān* ordering the writing of a *ḳānūnnāme*. The people said: 'We are content with the sultanic *ḳānūn* [*ḳānūn-i sulṭānīye*] that prevailed during the time of the late Sultan Qāytbāy', and they chose it. On his behalf, he [the Ottoman sultan] issued a noble *fermān* [*fermān-i hümāyūn*] ordering the search for [*buldurmışlar*] the sultanic *ḳānūnnāme* [*ḳānūnnāme-i sulṭānī*] of his [Qāytbāy's] time. He ordered that from that [day] on, the affairs of the province [of Egypt] [*umūr-i vilāyet*] will be administered according to an imperial *ḳānūnnāme* [*ḳānūnnāme-i hümāyūn*] that is compatible

[219] Ahmet Akgündüz, *Osmanlı KanunnâMeleri ve Hukukî Tahlilleri* (İstanbul: Fey vakfı : Osmanlı araştırmaları vakfı, 1990), Vol. 5, 595; Vol. 6 110-111.; Burak, "Between the Ḳānūn of Qāytbāy and Ottoman Yasaq," 9.

[with Qāytbāy's *ḳānūnnāme*]. At that same time, an imperial edict [emr-I *hümāyūn*] was issued ordering the deposit of [the *ḳānūnnāme*] in the Divan of Egypt [*divān-i Mıṣr*]."[220]

As appealing as Ṣāliḥ Çelebi's account is, there is no documentary evidence (Mamluk or Ottoman) to suggest that a Mamluk ḳānūnnāme ever existed.[221] In explaining the Ottoman establishment's insistence on a pre-existing Mamluk qānūn, Burak advocates that "the Ottoman sovereigns and their ruling elite attempted to translate the legal landscape they inherited from the Mamluks into their political-legal vocabulary. In the new rulers' vocabulary, the sultan, and more generally the dynasty, must have a *ḳānūn* – that is, a law that was associated with them, whether codified or not."[222] While the attribution of ḳānūnnāmes in the Levant to Qāytbāy is doubtful, the formulation of Ottoman codes in the region certainly drew on (with the exception of criminal codes) on Mamluk-era edicts and tax customs, particularly with regard to agricultural and market taxation.[223] For instance, in Egypt, "fees (*rüsūm*) for the maintenance of the irrigation systems as well as for land measurement (*misāḥat*) were levied according to Qāytbāy's *ḳānūn*, and in Damascus, as late as 1548, the market inspection (*iḥtisāp*) was said to follow the *ḳānūn* of Qāytbāy, as was the

[220] Lellouche, Benjamin, *Les Ottomans En Égypte: Historiens et Conquérants Au XVIe Siècle*, vol. 11, Collection Turcica (Paris: Peeters, 2006), 230–31; This English translation is Burak's translation and based on Allouche's translation and review of the Ottoman Turkish version appearing in his work. Burak, "Between the Ḳānūn of Qāytbāy and Ottoman Yasaq," 14; For an analysis of the Ottoman chronicled events of the period of the qannuname introduction in Egypt, see: Şahin, *Empire and Power in the Reign of Süleyman*, 56–58.
[221] Contrary to Inalcik's supposition of an existence of an actual "codex of Qāytbāy's laws", Meshal contends that the text of Egypt's qānūnnāme rather refers to itself as having been founded on the 'āda (practice) and qānūn that were applied in the time of Qāytbāy.' The view of the nonexistence of an actual Mamluk qānūnnāme is the consensus among scholars working on early Ottoman Egypt. Meshal, "Antagonistic Sharīʿas and the Construction of Orthodoxy in Sixteenth-Century Ottoman Cairo," 193; İnalcık, Halil, "Ḳānūnnāme," ed. Bearman, P. et al., *Encyclopaedia of Islam, Second Edition*, n.d.; Behrens-Abouseif, *Egypt's Adjustment to Ottoman Rule*, 35–34; Winter, "The Judiciary of Late Mamluk and Early Ottoman Damascus"; Burak, "Between the Ḳānūn of Qāytbāy and Ottoman Yasaq," 14–16.
[222] Burak, "Between the Ḳānūn of Qāytbāy and Ottoman Yasaq," 15.
[223] Burak, "Between the Ḳānūn of Qāytbāy and Ottoman Yasaq," 11.

administration of the city's horse market."[224] Court records and imperial edicts from Jerusalem in the 1550s and 60s also indicate that the ḳānūnnāme for that city included Mamluk era customary market taxes and tolls, such as the "measuring-tax" (*rasm al-kiyāla*) and "road tax" (*ghafar/khafar*) that was paid by pilgrims and caravans.[225]

Although the ḳānūnnāme market and agricultural taxes might not have burdened the inhabitants of Bilād al-Shām more than they had been under Mamluk times, in at least one way the new tax unleased the ire of local 'ulamā': in the form of the new marriage tax (*resm-i 'arūs*). This tax, which was levied on brides, and was "double in case of a virgin than a woman who had been married before" was considered blasphemous by many jurists in Bilād al-Shām and Egypt.[226] Writing almost a century after its introduction, one of the more colorful descriptions of this tax comes from Najm al-Dīn al-Ghazzī's (d. 1651) *al-Kawākib al-sā'ira*, in which he says that "this state [the Ottomans] had imposed illegal taxes on women's genitalia. What outrage can be worse than this? (*ḍarabat hādhihi al-dawla al-mukūs 'ala furūj al-nisā'... ayyu fitna a'ẓam min ḍālika?*)"[227] As Rafeq observed, however, the issue resented by many 'ulamā' was the usurpation of the shar'īa, and by extension, their control over law and their ability to benefit from it.[228] Both Ibn Iyās in Egypt and Ibn Ṭūlūn in Damascus observed that this tax cut into the income of local qāḍīs, and the former claimed that the "commended practice of matrimony was forsaken (*fa-imtana'a al-zawāj wa'l-ṭalāq fī*

[224] Burak, "Between the Ḳānūn of Qāytbāy and Ottoman Yasaq," 10–11.
[225] Cohen, *Economic Life in Ottoman Jerusalem*, 6, 108.
[226] Winter, Michael, "The Ottoman Conquest and Egyptian Culture," in *Conquête Ottomane de l'Égypte (1517): Arrière-Plan, Impact, Échos*, ed. Lellouche, Benjamin and Michel, Nicolas (Leiden: Brill, 2013), 293; Ibn Ṭūlūn, *Mufākahat*, 1962, Vol. 2, 30; Ibn Iyās, *Badā'i' Al-Zuhūr Fī Waqā'i' Al-Duhūr*, Vol. 5, 417-418.
[227] Appearing in: Winter, Michael, "The Ottoman Conquest and Egyptian Culture," 294; al-Ghazzī, *Kawākib*, Vol. 2, 193.
[228] Rafeq, "Relations between the Syrian '"Ulamā"' and the Ottoman State in the Eighteenth Century," 11–12.

tilka al-ayyām wa-baṭṭalat sunnat al-nikāḥ wa'l-amr li'lāh fī dhalika)".[229] As Winter comments, even ʻAbd al-Wahhāb al-Shaʻrānī, the highly influential and "usually mild and compromise-seeking man" took issue with the Ottoman qānūn, when he made the following statement about the qānūn, that he attributed to ʻAlī al-Khawwāṣ, his master:

> "The spirit of the Revelation regulates the world order. If religious laws disappear, the [secular] rule (*nāmūs*) replaces them in each generation in which they are lacking. This is what is meant now [by the term] *Qānūn* in the Ottoman state. Its application, however, is lawful only in countries that have no religious laws. As for Egypt, Syria, Baghdad, North Africa, and the other lands of Islam, the application there of the *Qānūn* is unlawful, because it is not infallible, and it may have been set down by the kings of the infidels."[230]

In an essay on judicial administration in early Ottoman Egypt, Magdi Guirguis contends that qāḍīs in the mid-sixteenth century, in producing sijills records, distinguished between cases that they heard and did not rule on versus those for which they issued rulings. That is, in official terms, the state promoted a legal distinction between the two, even if practice regularly contravened this (as Ibn Nujaym's comments suggest).[231] Just as all kinds of people used the sijills to register their transactions and disputes, as a means to register a public record, so too were qāḍī court qāḍīs required by the state to distinguish between their roles as legalizing agents of the public record, as opposed to their roles as adjudicators. Most

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[229] Rafeq, "The Syrian 'Ulamā,'" 12; Ibn Iyās, *Badāʾiʻ Al-Zuhūr Fī Waqāʾiʻ Al-Duhūr*, Vol. 5, 417-18, 424; Ibn Ṭūlūn, *Mufākahat*, 1962, Vol. 2, 30.

[230] Winter translated this passage from Shaʻrānī's al-Jawāhir wa-l-durar, printed in the margin of Aḥmad b. Mubārak al-Sijilmāsī's Kitāb al-Ibrīz alladhī talaqqāhu ʻAbd al-ʻAzīz al-Dabbāgh (Cairo, 1346/1927). Winter, Michael, "The Ottoman Conquest and Egyptian Culture," 294.

[231] Guirguis, "Manhaj Al-Dirāsāt Al-Wathā'qiyya Wa Wāqiʻ Al-Baḥth Fī Miṣr," 282–83; Cited in: Nelly Hanna, "Guild Waqf: Between Religious Law and Common Law," in *Held in Trust: Waqf in the Islamic World*, ed. Pascale Ghazaleh (Cairo: American Univ in Cairo Press, 2011), 149.

sijills records did not involve the judicial intervention of qāḍīs, however, the acts in sijills frequently end with a statement affirming a qāḍī's ruling, where none was required according to either sharī'a prescriptions or Ottoman Law. Guirguis cites evidence from al-Busrawī's shurūṭ work, *Biḍā'at al-qāḍī* to illustrate his point. In its opening pages, al-Busrawī discusses the different types of judicial remarks (*'alamāt al-quḍāt*) recorded by qāḍīs in sijills:

> "Know that agreements (*ṣukūk*) are of different types (*wujūh*). Some of them are judicial rulings (*minha ḥukman*), as in when the qāḍī records, 'this is what has transpired in my court and I have issued my ruling on it' (*jara mā fihī 'indī wa ḥakamtu bihī*), or he might say, 'it is legally valid to me' (*ṣah mā fīhī 'indī*). And there are others that do not involve his own ruling, as in when the record says, 'this is what transpired in my court' (*hadhā mā jarā mā fih 'indī*), or is accepted by some 'ulamā' has been registered with me (in my court)."[232]

Explaining the reasons behind the rise of jurist legal remarks (*'alāmāt al-quḍāt*) al-Bursawī's adds this very important distinction:

> "Agreements (*ṣakk*) are of two types in our day, sharī'a based contracts, as originally intended (*wa-hūwa'l-maqṣūd*), and ḳānūnnāme (*qānūnī*) contracts, such as military oaths, employment agreements, and financial accounts of revenues and losses from village partnerships and rural estates. These types of financial agreements (*wa'amthāl hādhihī al-buyū'*), even if they are corrupt/illegitimate (*fāsida*) are still adopted contractually (in courts). As for sharī'a contracts, the qāḍī writes atop them judicial formulas related to

[232] Guirguis, "Manhaj Al-Dirāsāt Al-Wathā'qīya Wa Wāqi' Al-Baḥth Fī Miṣr," 282–83; Abū Su'ūd Muḥammad al-'Imādī, *Biḍā'at al-qāḍī fī ṣukūk al-sharī'a*, Dar al-Kutub manuscript collection, Fiqh Taymūr 382, Microfilm 20990, p. 3-4.

rulings, however, for the qānūnī contracts, he only writes above it the following formula: 'the act is recorded as presented by the humble qāḍī so and so…' (*al-amr kamā dhūkar ḥarrarahū al-faqīr fulān*), since this formulary relates to the acknowledgement of the contract (*ṣakk*) and not a given ruling."[233]

While I have come across identical 'alāmāt to those noted above in the Jerusalem and Damascus sijills for the "qānūnī" type of contracts, they are fairly infrequent (occurring when registering military disputes among officers). Rather, the norm was that qāḍīs issued rulings all manner of sijill acts, irrespective of the categories presented by al-Busrawī above.[234] The sijills of Bilād al-Shām reviewed in the following four chapters indicate that qāḍīs had a fairly free hand to make such determinations, and typically chose to issue "rulings" on many types of proceedings that did not merit a ruling since no dispute was involved. These included cases when, for instance, executors of orphan estates or the nāẓirs of waqfs submitted balance sheets of their operations and sought a qāḍī's "ḥukm" to legally authenticate their accounts and absolve them from liability. In my view, this seems to reinforce Tezcan's view of the jurists' law becoming a synthesis of "public" (qānūn) and private (sharī'a) law. Effectively, what is attributable to "qānūnī" contracts as being that which is restricted to high affairs of state, increasingly represents a tiny sliver of court cases, while judicial rulings allowed qāḍīs authority over all manner of other things. This leads one

[233] My translation of Gerguis' transcription. Guirguis, "Manhaj Al-Dirāsāt," 283.
[234] Jerusalem *sijill* from Muḥarram 971/August 1563 (J-Sij 45-218) is of a dispute between two senior military officers from Gaza over the sale of some property in Jerusalem. The sijill contains various depositions and a history of the disputes. At the top of the sijll, are two "*'alāmāt*." One by the Mālikī deputy-judge of Jerusalem, and the other by the Shāfi'ī deputy-judge. It is phrased exactly the same as that prescribed in the jurist manual discussed by Gerguis, i.e. "*al-amr kamā dhūkir ḥarrarahū"* indicating that he is simply there to record the deed and not pass judgement.

to reconsider, as numerous scholars have pointed out, the usefulness of viewing qānūn as a discrete category, since many "qānūn" matters were adjudicated in "qāḍī" courts and not in separate "qānūnī" courts that would have been analogous to the Mamluk maẓālīm court (notwithstanding Baldwin's abovementioned study of extra-judicial venues).

Conversely, the above consideration of qāḍīs' explicit distance from taking issuing rulings over adjudication they preside over, within certain spheres of activity, may also be seen as a sign of the state's increased centralization and the central judiciary's control over qāḍīs. The ability of litigants to effectively appeal a qāḍī's decision by seeking reappraisal with another qāḍī's ruling, and similar issues of enforcement were very problematic in Ibn Qutlūbughā's day. In his treatise on the "The Qāḍī's Adjudication" (*Qaḍā' al-qāḍī*), as part of a larger collection of treatises (*Rasā'il Ibn Qutlūbughā*), Ibn Quṭlūbughā presents this dynamic by introducing a case study of an insolvent debtor who wishes to establish waqfs. In Ibn Quṭlūbughā's story, a Mālikī jurist narrates the case of a debtor going from one Ḥanafī qāḍī to another seeking a gullible jurist who will let him register his waqf on the sly (Ibn Quṭlūbughā undoubtedly chose a Mālikī narrator because qāḍīs of that madhhab allow for greater flexibility for debtors wishing to endow waqfs with mortgaged properties). Here, he presents the case of a Mālikī qāḍī who files a complaint against a Ḥanafī qāḍī who had approved a waqf for a man mired in insolvent loans (*duyūn al-mūstaghriqa*). The Mālikī qāḍī sardonically asks the erring Ḥanafī qāḍī: [235]

[235] The term *duyūn al-mu̲staghriqa* I believe refers to insolvent debts relating to the rolling interest from previous debts. I base this on *Ebu's-su'ud's* interpretation of Qur'ān 3:130 (al-'Imrān) in his tafsīr work, *Irshād al-'aql al-salīm īla mazāyā al-kitāb al-karīm*. *Ebu's-su'ud* interprets the last part of this verse, "Oh you who have believed, do not consume ribā doubled and multiplied" (*yā ayyuha aladhina āmanū lā tā'kulū al-ribā aḍ'āfan muḍā'fatan*), as referring to the practice of extending a loan to the point that a debtor can no longer service it and must keep extending it simply to keep up with interest payments, "such that an originally small obligation completely consumes the debtor's wealth, and in its place is occupied the current portion of interest"

> "Does your ruling, that which legitimizes the establishment of a waqf for an insolvent debtor, prevent one from holding the opposite view, namely that which agrees with those who believe that waqfs created by insolvent debtors are invalid?"[236]

In response, and realizing his mistake, the Ḥanafī qāḍī jumps to clarify his stance by arguing:

> "my ruling was intended to be in accordance with the consensus of jurists (*al-muttafaq ʻalayhī*), however, my adjudication was for an issue on which there is disagreement (*fi mukhtalaf fī*), and is, therefore, invalidated. There is nothing that prevents another qāḍī who disagrees with my ruling from re-adjudicating the case and overturning my ruling."[237]

In adjudicating on the validity of the above waqf scenario, Ibn Quṭlūbughā's adopts the view that the issue is not simply a matter of legal procedure, but rather one of establishing the ruling qāḍī's qualifications and his jurisprudential method in ruling over such a case. If the above Ḥanafī qāḍī was qualified to identify and rule on matters that are open to independent reasoning (*maḥal yasūgh fīhī al-ijtihād*), and not simply a lesser qāḍī, one who issues formulaic rulings based on the legally required practice of his madhhab (*al-qāḍī al-*

("*fa-yastaghraq b'l-shay' al-ṭafīf mālahū b'il-kulliyā wa-maḥallahu al-naṣbu ʻala al-ḥālīya min al-ribā*"). Abū al-Suʻūd, *Irshād al-ʻaql*, vol. 2, p. 84.

[236] Qāsim Bin Qutlūbughā, *Kitāb Rasā'il al-Marḥūm Shaykh al-Islām Qāsim b. Qutlūbughā al-Ḥanafī* , Leiden MS. Or. 789, (220ff.), 73 r.

[237] Ibid.

mūqallīd mūstawwfiyan al-mashrūṭ), then he would be able to rule on the basis of his own ijtihād. However, a less able qāḍī would be accountable unless he ruled in accordance to the letter of the law. [238] Of course, there were very few qāḍīs in Ibn Quṭlūbughā's day that he would have held in such high esteem, to rule according to ijtihad; the vast majority of qāḍīs were therefore required to rule according to the madhhab's practice, taqlid. Thus, in the case concerning this specific waqf, Ibn Quṭlūbughā determines it to be null and void (*bāṭil*) due to the Ḥanafī qāḍī's ignorance of the facts, and the latter's failure to follow the procedures of his madhhab. Ibn Quṭlūbughā's admonishment of the Ḥanafī qāḍī, we must remember, was on the grounds of this qāḍī's incompetence, rather than the general impermissibility of issuing waqfs to insolvent debtors.

In al-Azem's Rule Formulation and Binding Precedent, al-Azem observes that that Ibn Quṭlūbughā paid special attention to this problem of judicial jurisdiction in his al-Ṭaṣḥīḥ wa-l-tarjīḥ as well as in his judicial manual, Mūjabāt al-aḥkām wa-wāqi'āt al-ayyām, which, as its title suggests (Mūjabāt al-aḥkām), refers to the "consequential obligations resulting from court judgements". Ibn Quṭlūbughā developed the latter work to be used as a manual by qāḍīs and muftīs who were insufficiently trained to recognize and issue rulings following what al-Azem calls a form of "rule review" or "binding-precedent" (taṣḥīḥ) of jurists within a madhhab of senior jurists in their madhhab-tradition.[239] This is different from rule-formulation (tarjīḥ) which is the domain of master-jurists, like Ibn Quṭlūbughā.[240] "This, obviously, could lead to a break-down of the judicial system as a whole, and eventually to a destruction of the public's (or government's) trust in the practicality and coherence of the

[238] Bin Qutlūbughā, *Kitāb Rasā'il*, f. 78r
[239] Al-Azem, *Rule-Formulation*, 46–47.
[240] Al-Azem, *Rule-Formulation*, 144–45.

system. He thus wished to address procedural challenges facing qāḍīs who, as part of the pluralistic legal system, were often unsure how to respond to judgements passed by other madhhab-jurisdictions that contradicted their own, if the consequences of those rulings were then disputed, and the case was brought before his own court.[241] Al-Azem argues that by Ibn Quṭlūbughā's time in the mid-fifteenth century, the legal-pluralism of the Mamluk era was so entrenched that it pervaded the working basis of this Ḥanafī's scholar's worldview to the extent that his Ḥanafism could not be viewed outside of the unitary worldview of law:

> "as witnessed by the plethora of (Ibn Quṭlūbughā's) citations of authorities from beyond the Ḥanafī legal tradition, one can clearly delineate in Ibn Quṭlūbughā's polemic a statement as to the inherent unity of the four Sunni legal traditions in their processes and procedures regarding precedent and taqlīd, within the wider legal system (i.e. the judiciary of the Mamluk state). Likewise apparent is a respect for the distinctive internal particulars of these processes, as well as of the particular legal doctrines, of the co-existent rival traditions. Secondly, the pluralistic system bequeathes a responsibility of upholding the distinctive particulars of each tradition with the wider system; thus, the judge is under obligation to respect and observe madhhab-specific sanctioned judicial procedure as to rule-determination when passing a judgement, in order to ensure consistency in judicial procedure and provide coherency to the rulings issued within the jurisdiction of that madhhab within the judicial system. These virtues in turn benefit the populace who are under the jurisdiction of that system: consistency bequeaths predictability, in turn entailing fairness for the

[241] Al-Azem, *Rule-Formulation*, 48; al-Qāsim ibn ʿAbd Allāh Ibn Quṭlūbughā, *Mūjibāt al-aḥkām wa-wāqiʿāt al-ayyām* (Baghdād: Wizārat al-Awqāf wa-al-Shuʾūn al-Dīnīyah, 1983), 69–74.

jurisdiction's subjects, and their ability to understand the consequences of their actions."[242]

With regards to such issues complicating the real-world application of the provision of venues for the exercise of "legal-pluralism," the recent scholarship of Baldwin and al-Azem unsurprisingly takes to task the traditional view adopted by scholars of medieval Islamic law and social-historians concerning what pluralism should mean. Baldwin contends that a more correct usage of the term should refer to the existence of a plurality of competing legal systems, ones that by definition, must include those outside the control of the state – and this is not what scholars generally understand by "legal pluralism" under the Mamluk sultanate.[243] For al-Azem the issue at hand when using the term legal-pluralism to refer to the choice of Islamic madhhabs is that this term ignores the inter-borrowing between madhhabs and the practice among some jurists to deliver rulings outside of their madhhab tradition, a frowned upon, but historically prevalent practice. Rather than 'legal-pluralism', both Baldwin and al-Azem apply the term 'madhhab-pluralism'. Baldwin uses this term to describe a kind of pluralism that was constrained by enforcement capabilities and the "relationship between judgement and compromise", rather than doctrinal difference, an "institutional pluralism."[244] He argues that it is more useful to think of legal/madhhab pluralism in the sixteenth and seventeenth century as the state making available specific legal options to people: "the state structured the options available, controlling access to non-Ḥanafī doctrines … it is not clear that most litigants were well versed in legal doctrine; rather, the

[242] Al-Azem, *Rule-Formulation*, 147–48.
[243] Baldwin, *Islamic Law and Empire in Ottoman Cairo*, 10–13.
[244] Ibid. For Baldwin's use of the terms 'madhab pluralism' and related fluidity in adjudicatory frameworks, see 77-82. Baldwin observes that in some spheres, such as marriage laws, the diversity of legal options available to women in the Mamluk period carried forward into the sixteenth and seventeenth centuries, in spite of periodic Ottoman attempts of 'Ḥanafization,' to push the implementation of Ḥanafī law for marriages always. Baldwin, *Islamic Law and Empire in Ottoman Cairo*, 77.

legal solutions for different problems were encoded within the bureaucratic procedures of the court system, and professional practitioners communicated the options available to ordinary Cairenes, mediating between them and the complex madhhab-plural legal system."[245]

Lastly, extra-judicial settlements, the outcomes of which were typically recorded in court, often reflect that settlment was not necessarly the most desirable option for litigants, but rather an option out of an intractable legal conflict that could ensnare a defendant in court indefinitely. As is the case in contemporary society, litigants with more political and economic clout stand a far better chance of positive adjudication outcomes than those of lesser standing. As such, the cases of weak plaintives, without the social-economic and political network and resources of wealthier defendents, were often hampered, even when the law was on their side in a clear-cut case. More powerful defendents could delay, petition, and re-adjudicate cases in a way that could place an exceeding amount of financial and personal stress on the weaker party. Settlement, then, as today, therefore often presented the less worse option than dragging the case on in court and the court records manifest this.[246] Both earlier and recent studies have observed an overwhelming emphasis on the settlement of disputes through mediation (*ṣulḥ*) rather than through adjudication in the qāḍī courts of the empire's central lands as well as its Arab provinces.[247] Ergene has ventured to argue, in the case of Kastamanou's court, that the principal function of the courts was to register arbitration settlements rather than to serve as an adjudicatory venue. This scholarly position is, however, somewhat tenuous. since ṣulḥ registrations usually give the outcome of the

[245] Baldwin, *Islamic Law and Empire in Ottoman Cairo*, 91.
[246] Baldwin, *Islamic Law and Empire in Ottoman Cairo*, Ch. 6.; Coşgel and Ergene, *The Economics of Ottoman Justice*; Aida Othman, "'And Amicable Settlement Is Best': Sulh and Dispute Resolution in Islamic Law," *Arab Law Quarterly* 21, no. 1 (2007): 64–90; Meshal, *Sharia and the Making of the Modern Egyptian*, 187–89.
[247] Baldwin, *Islamic Law and Empire in Ottoman Cairo*, 49–53; Othman, "And Amicable Settlement Is Best"; Gerber, *State, Society, and Law in Islam*.

settlement, and rarely details about the process of mediation, (the objective of these registration was after all to clear liability of the parties involved), the procedural role of the qāḍī in ṣulḥ arrangements remains ambiguous.[248]

Notwithstanding the debate about ṣulḥ in qāḍī courts, ṣulḥ registrations were common in the sijills, particularly for debts.[249] On casual observation, it is more likely for one to observe the settlement of debt disputes through by way of mediation and ṣulḥ attestations than to let the law run its course through a debtor's ilzām proceedings and imprisonment. The reasons for this may have been several. Creditors could draw on loan collateral which many times exceed the loan value. Second, as reviewed in chapter one, debtor imprisonment was often counterproductive inasmuch as it would tie up the debtor's assets in court administration and not likely to quickly repay the debt, aside from the fact that it impaired the debtor's income-earning ability. This could be significant for people of modest means. Procedural constraints, and the cost and length of adjudication could also work against creditors, particularly those who held claims to long overdue debts. While qāḍīs would ordinarily stand by a creditor's right to being repaid their advanced loan principal, obtaining full compensation for late interest was not a foregone conclusion and always carried the risk that a qāḍī could rule against any profit beyond that obtained in the past.

[248] Baldwin, *Islamic Law and Empire in Ottoman Cairo*, 50–51.
[249] Al-Bursawī's manual contains a number of formularies related to ṣulḥ registrations such as what al-Bursawī labels as "What is written for settlement and the clearing of liability for both parties" (*Biḍā'at al-Qāḍī*, f. 55a). This manual also contains other ṣulḥ formularies such as the one concerning when a gifted asset is the subject of a dispute (*Biḍā'at al-Qāḍī*, f. 59b), and a formulary for when a debtor's liability is transferred to a third party through the use of an agency-transfer (ḥawāla) assignment (*Biḍā'at al-Qāḍī*, f. 55a-56b).

Conclusion

In this chapter, I have attempted to show that there was a broad continuity in law and its administration between the late Mamluk and the first three decades of the Ottoman period. The so-called Ottomanization of legal institutions in Bilād al-Shām and the incorporation of Damascene ‘ulamā’ households into the patronage networks of the center was slow in coming. Indeed, institutes of learning in the region were not incorporated into the ilmiye system and there is some evidence of an aloofness in attitudes of ‘ulamā’ in Egypt and Bilād al-Shām toward the Ottoman legal establishment, yet accommodation was of course a requirement for maintaining professional privileges. In this sense, lineages of ‘ulamā’ elites were able to negotiate and maintained some political power well into the end of the sixteenth century, and for some families, such as al-Ghazzī, well beyond it.

A small but growing cluster of recent studies, most notably those of Burak and al-Azem, are reshaping our understanding of what it meant to belong to the Ḥanafī madhab in the Levant in the sixteenth through eighteenth centuries. Given that the Ottoman conquest neither subverted the ‘ulamā’ of Egypt or Bilād al-Shām, nor mandated the absolute adoption of Ottomanized Ḥanafī law, how did law change on the ground? What was the response of Ḥanafīs in the previous Mamluk lands to the new order? From the perspective of juristic discourse, there was a difference between Ḥanafīs in the center and those in the Arab periphery. Studying “canonical” texts of the tradition, Burak contends that the first two centuries of Ottoman rule witnessed a continued development of a Ḥanafī legal-canon by jurists of the Arab lands (from the late Mamluk period) that was made up by a considerably different group of scholarly works than those that the Ottoman state’s learned hierarchy

pursued in their "Ottoman imperial canon." With respect to the courts, although the courts were immediately restructured under the state's Ḥanafī court system, non-Ḥanafī deputy judges continued to operate under liberal supervision, in general, in Cairo and Damascus in the first decades of Ottoman rule. While obtaining the permission of Ḥanafī judges was a requirement of any adjudication outside of Ḥanafī law, forum-shopping and the opportunities it provided to litigants continued to be in place, and as Baldwin suggests, continued to provide powerful elites the ability to successfully use the courts to assert their social-economic powers in ways comparable to what could have been obtained under the Mamluk legal system.

Notwithstanding the delay in the Ottomanization of law in the Levant, there is also evidence of continuity among leading Ḥanafī jurists in the late fifteenth century, such as in the *rasā'il* of Ibn Quṭlūbughā and Ibn Nujaym, on the problem of judicial corruption and the policing of judges who ignored the madhab's rules governing judicial procedure and rule-determination (*tarjīḥ*). Both these senior jurists held dim views concerning the abilities of judges in their day, and reported that corruption was commonplace. The worldview of these jurists, as it concerned judicial procedure, recognized the interaction of non-Ḥanafī madhabs in issues that concerned the tendency of litigants to forum-shop and disputate rulings. The domination of Ḥanafism as the state's madhab did not do away with the ongoing phenomenon of inter-madhab adjudication.

As will be elaborated in chapter two, some extra-judicial norms and political factions in Damascus continued to operate into the first two decades following the Ottoman conquest. From the Ottoman sijills alone, it is difficult to claim with confidence that the office of the chief qāḍī had overwhelming control over much of the law before the mid-1540s. Given that

qāḍīs also carried out some of these same functions under Mamluk rule, I suggest that preexisting legal custom (*ʿurf*) was enmeshed into the ḳānūnnāmes of the region. I focus on the muʿāmalāt sharʿīya to show how it became elevated and formalized in Ottoman *shurūṭ* manuals that were used in the region's courts.

Chapter Two – Ribā versus Ribḥ

This chapter addresses the moral, legal and cultural framework that surrounded instruments of credit in Bilād al-Shām between the fourteenth to sixteenth centuries. Further to studying the history of the term most often associated with usury in Islamic law, ribā, I evaluate the institutionalization of legitimized modes for the charging of interest in loans under early Ottoman rule in the practice of contracts known as muʿāmalāt shariʿīya and trace their recorded application in Mamluk courts for the management of orphan estates. In the course of discussing these developments, I engage in four core arguments on this and related topics in this chapter:

The first section addresses the discursive transformation of "ribā" in eschatological and ḥadīth works. Here, I argue that ribā moved from being a grave sin in earlier works that closely associated its consumption with punishments in the afterlife, while later works, particularly al-Haytamī's tract on grave sins, applied a more nuanced and accommodating approach to ribā, that allowed for discretion in its consumption via legal stratagems. In this section, I also review the basic juristic rules of the four Sunnī madhhabs on ribā in its three types: *ribā al-faḍl*, *ribā al-nasīʾa*, and *ribā al-Jāhilīya*.

In the second and third sections, I move on to discuss the opposite of illicit gain, ribā, that is ribḥ (profit). I show how the early sixteenth century debate over the cash-waqf resulted in an institutionalization of an effective interest rate ceiling for legitimate loans, those issued as muʻāmalāt shariʻīya. I refer to this official state sanctioned interest rate limit as the "ribḥ-ceiling". Further, I show how, while juridical prescriptive literature proscribed connecting any monetary profit explicitly to a time-period (on basis that it produces ribā) Ottoman court registers reveal that qāḍīs approved of this concept and instituted policies in support of the time-value-of-money. Qāḍīs for instance, accepted the reduction of future ribḥ (interest) owed that was settled early in court. In such cases, there was a reduction in the interest charged, in proportion to the time reduced on the loan, versus when a loan was left to mature full term. However, with respect to terminology, I contend and show that the construction of the term ribḥ as a term to describe "licit interest" that was counter posed to ribā, is a pre-Ottoman legal construction that has its basis in early fiqh works and was popularly used in Mamluk Syria. It is the Ottomans who are first to formalize and enshrine its use in a public manner, by using it in the Ottoman ḳānūnnāme from Sultan Bayezid onwards, and this was reiterated and most popularized in the fatwās of Şeyhülislam Ebu's-Suʻud.

The last section of this chapter is a study of the evidence for debtor imprisonment and its use. I argue that although imprisonment and torture were advocated by jurists such as Ibn Quṭlūbughā, there was never a systematic political-administrative policy in either Mamluk or Ottoman periods concerning the punishment of debtors, and for all practical purposes, debtor prisons did not exist as such. The imprisonment of debtors though was commonplace, and by and large, I show that it was enforced in line with the prescriptions of Ḥanafī doctrine as it

concerns debtors. I contend, in this context, that the purpose of such imprisonment was to solely to pressure debtors to reveal hidden money and settle their debts, or failing to do so, to prove their insolvency and declare them bankrupt with immediate release. These findings on imprisonment contrast to those of studies on the institution of imprisonment in medieval Europe, whereby imprisonment for debts was mostly coercive in nature, the element of mandatory clemency for extreme poverty or bankruptcy seems not to have existed – in Italy debtors remained in prison for years irrespective of their ability to pay their debts.[250]

2.1 The eroding significance of ribā as a vice in late medieval ethical and eschatological works

The Qur'ān delivers many lessons on ribā to Muslims. Among those most framed in the spirit of "commanding right and forbidding wrong," are the following Qur'anic verses:

> "Those who give, out of their own possessions, by night and by day, in private and in public, will have their reward with their Lord: no fear for them, nor will they grieve. But those who take usury (*al-ribwā*) will rise-up on the Day of Resurrection like someone tormented by Satan's touch. That is because they say, 'Trade and usury are the same,' but God has allowed trade and forbidden usury. Whoever on receiving God's warning, stops taking usury, may keep his past gains – God will be his judge – but whoever goes back to usury will be an inhabitant of the Fire, there to remain. God blights usury, but blesses charitable deeds with multiple increase: He does

[250] Guy Geltner, *The Medieval Prison: A Social History*, 2008, 52–56.

> not love the ungrateful sinner... give up any outstanding dues from usury (*mā baqā min al-ribwā*), if you are true believers. If you do not, then be warned of war from God and his Messenger. You shall have your capital if you repent, and without suffering loss or causing others to suffer loss. If the debtor is in difficulty, then delay things until matters become easier for him; still if you were to write it off as an act of charity, that would be better for you, if only you knew. Beware of a Day when you will be returned to God: every soul will be paid in full for what it has earned, and no one will be wronged." (Q 2:274-281)[251]

The above verses present the characteristic Qur'ānic juxtopositioning of rights against wrongs in several interesting ways as they relate to usury. These and other similar Qur'ānic and Ḥadīth injunctions not only would frame later discourses on debt and usury, but also would support the traditional concept of the early Muslim community as a religious movement that arose in a trading society.[252] There is the distinction that trade is just, while ribā is not and that the former can, and should exist, without the latter (Q 2:275-6). But for their contradistinction, these two are not opposites. Rather, ribā's opposite is charity (Q 2:277).[253] While usurers are repeatedly reminded of their sins, they are also offered redemption in the hereafter if they repent and abstain from their practice and "write off" their

[251] M. A Abdel Haleem, *The Qur'an* (Oxford; New York: Oxford University Press, 2004), 31–32. All English quoted passages from the Qur'an will rely on Abdel Haleem's translation. Going forward, I will simply refer to the number of the sura and verse without citing Abdel Haleem's translation. .

[252] Crone's famous critique of this notion did not overturn this still dominant view. Crone, *Meccan Trade and the Rise of Islam*.

[253] Fazlur Rahman's purpose in writing his article on riba was to support this contention: Rahman, "Ribā and Interest" I take up the connection between riba and charity in chapter three where I study the cash-waqf and its implications. Of note is that the cash-waqf was justified by some jurists on the basis that it served charitable ends, even if the means were usurious.

usury as "an act of charity" for weak debtors. These admonishments do not have attached punishments other than the accounting that will take place on the day of judgement, itself an ironic inversion of the usurer's craft "every soul will be paid in full for what it has earned" (Q 2:281).

In this section, I argue that while ribā regularly featured highly in early lists of vices compiled by polemical works of exegetes and narrators, by the sixteenth century, and probably much earlier, the moral-ethical standing of this vice became rather marginal. Legal treatises and chronicles from the late fifteenth century and sixteenth centuries illustrate that courts in Jerusalem and Damascus in the second half of the century were usually lax in their prosecution of debtors. This was especially the case creditors did not have high socio-economic standing.

A survey of epigraphic data from around the Islamicate world illustrates the extent to which the Qur'ānic eschatological topos of trade was grounded in the medieval Near East. Q 24:37-38 calls on: "men who are not distracted, either by commerce or profit (*lā-talhīhim tijāratūn wa-lā bayʿū*), from remembering God, keeping up their prayer, and paying the prescribed alms, fearing a day when hearts and eyes will turn over. God will reward such people according to the best of their actions, and He will give more of his bounty…" A search of the Max Van Berchem foundation's online Thesaurus d'Epigraphie Islamique produces sixty-one instances where these two verses were found adorning mosques and mausoleums, but most particularly caravanserais and market buildings. Roughly a third of these inscriptions are from fourteenth and fifteenth century Mamluk Egypt and Syria, but others range in provenance from Spain to Iran and Afghanistan; one of the earliest

inscriptions appears on a facade of the Ibn Ṭūlūn mosque in Cairo.[254] It is not surprising that traders and merchants always featured in tropes that often depicted their vices, and sometimes their beneficence, survive in both high-brow culture and popular representations of the premodern period, ranging al-Jāḥiẓ's *Book of Misers* (*Kitāb al-bukhalā'*) and the Arabian Nights to those appearing in the popular shadow-play of Ibn Dāniyal. However, works dedicated to the sins of usury were not, as far as I can tell, produced in the medieval Arabic literature as they were in Catholic Europe. [255] This presents a stark contrast to the treatment of this topic in medieval European scholastic writings and never did the charge of usury in the Islamicate world become associated with a charge of heresy as it did in some parts of medieval Europe.[256]

In popular terms, lists of sins were important for helping the faithful to distinguish lesser sins from graver sins, and eschatological works that contained sin-lists, largely drew on the ḥadīth collections of Muslim and al-Bukhārī, although they could vary widely in their hierarchies. There are seven oft-quoted sins that came from a single ḥadīth: polytheism (*shirk*), magic (*siḥr*), suicide (*qatl al-nafs*), usury (*akl al-ribā*), consuming orphan property (*akl māl al-yatīm*), deserting the battlefield (*al-tawallī min al-zaḥf*) and slander for adultery (*qadhf*).[257] While shirk and qadhf found their way into law as *ḥudūd* (criminal acts against God that are prescribed mandated punishments), the graveness of the others seems to have been left up to qāḍīs to determine, as discretionary punishments (*ta'zīr*). This list, which is

[254] Search was performed at http://www.epigraphie-islamique.org/epi/search.php. For fifteenth century Cairo, see for example the khan built by Sultan Qāytbāy in 877/1472-3 in Cairo and that built by Sultan Barsbāy in 835/1431-2. 'Āṣim Muḥammad Rizq, *Khānqāwāt al-Ṣūfīyah fī Miṣr : fī al-'aṣrayn al-Ayyūbī wa-al-Mamlūkī (567-923 H/1171-1517 M)* (Cairo: Maktabat Madbūlī, 1997), 638, 702.
[255] Ibn Ḥabīb's (d. 239/853) Kitāb al-Ribā is an exception to the rule. 'Abd al-Malik Ibn Ḥabīb, *Kitāb al-Ribā* (Dubai: Markaz Jum'ah al-Mājid lil-Thaqāfah wa-al-Turāth, 2012).
[256] Charles R Geisst, *Beggar Thy Neighbor: A History of Usury and Debt* (Philadelphia: University of Pennsylvania Press, 2013), 45.
[257] Muslim, Sahih, vol. 1, 38-145-89; Bukhari, Sahih, #1084.

commonly referred to as the "seven transgressions" (*as-saba'a al-mūwabiqāt*) or the "seven grave sins" (*as-sab'a al-kabā'ir*), appear frequently in early jurisprudential and exegetical works.[258] I argue that the frequent pairings of akl al-ribā and akl māl al-yatīm in tafsīr works and ḥadīth compilations are more than an aesthetic theme on the consumption (akl) of proscribed things, rather, as I illustrate in Chapter Five on orphan-estate lending, these seem to have arisen in a conjoined way out of the active association between the management of capital from orphan-estates and the lending activities provided by market-lenders who could and did serve as executors and guardians of such estates.

The imagery of akl al-ribā and akl māl al-yatīm, as "consuming" forbidden things, has eschatological significance in parallels where one finds stories of usurers eating stones and hell in early sīra works, most notably in Ibn Hishām's hagiography of the Prophet Muhammad. These certainly draw from Qur'ānic imagery, such as the verse sends a warning "to those who unjustly consume the money of orphans, they will be consumed by fire in their bellies and burn in a blaze" (Q 4:10).[259] In Ibn Hishām's narrative of the Prophet's life (sīra), in the passage where the Prophet receives a guided tour of Hell by its guardian, Mālik, sinners "receive measure-for-measure types of punishments in the first heaven: those who devoured the wealth of orphans (with hot stones shoved into their mouths); those who charged usury (with swollen bellies that got trampled); male adulterers (who left good meat for rotting meat); women adulterers (who hang by their breasts)" and so forth.[260] Such

[258] Christian Robert Lange, *Paradise and Hell in Islamic Traditions*, 2016, 173–74.
[259] Qur'ān 4:10, *ina-alladhīna ya'kulūna amwāl al-yatāmā ẓulman inama ya'kulūna fī'buṭūnihim nāran wa-sayaṣilūna sa ʿīran*.
[260] Frederick Colby, "Locating Hell in Islamic Traditions," in *Locating Hell in Islamic Traditions*, ed. Christian Robert Lange, vol. 119, Islamic History and Civilization (Leiden ; Boston, MA: BRILL, 2016), 127; Lange, *Paradise and Hell in Islamic Traditions*, 114; Ibn Ḥabīb transmits the same passage in his treatise on ribā: Ibn Ḥabīb, *Kitāb al-Ribā*, 53.

punishments echo other physical and psychological tortures that are also described of hell in the Qur'ān[261] and were popularized in medieval eschatological works like al-Qurṭubī's thirteenth century *al-Tadhkira bi-aḥwāl al-mawtā wa-umūr al-ākhirā*, as well as Ibn Ḥabīb's *Kitāb al-ribā*.[262]

In Paradise and Hell in Islamic Traditions, a work that studies the proliferation of eschatological literature between the ninth and sixteenth centuries, Christian Lange makes two observations about the historical development of this genre, relevant here. First, while early discourses focused more on instilling fear in believers of hellfire for their sins than the heavenly rewards that awaited them after death, later Islamic discourses from the high medieval period onwards reverse this emphasis. The earlier emphasis, Lange suggests, reflects an interplay with similar apocalyptic motifs in early Jewish, Christian and Zoroastrian eschatological works. This shift appears to have been accompanied by an attempt to focus less on compilation and more on the parenetical aims of instilling hope of heavenly reward, rather than fear of hellfire.[263] The second aspect is the massive expansion in the size of these sin-lists. The earliest ḥadīth compilations are not all in agreement on the total number of sins, but they numbered in the tens and dozens, rather than the hundreds and thousands that characterized later works. Lange observes that the expansion of lists of kabā'ir especially in later works represented an easing in the priority given to the veracity of such

[261] Lange, *Paradise and Hell in Islamic Traditions*, 47–48.
[262] al-Qurṭubī, Muḥammad ibn Aḥmad, *Kitāb al-Tadhkirah bi-aḥwāl al-mawtá wa-umūr al-ākhirah*, ed. al-Ṣādiq ibn Muḥammad Ibn Ibrāhīm (Riyadh: Dār al-Minhāj, 2004); Ibn Ḥabīb, *Kitāb al-Ribā*; 'Abd al-Wahhāb ibn Aḥmad al-Sha' rānī and Muḥammad ibn Aḥmad al-Qurṭubī, *Mukhtaṣar al-Tadhkirah fī aḥwāl al-mawtá wa-umūr al-ākhirah lil-Imām Abī 'Abd Allāh al-Qurṭubī* (Cairo: Maktabat al-Thaqāfah al-Dīnīyah, 1986).
[263] Lange, *Paradise and Hell in Islamic Traditions*, 71–95.

ḥadīths. In other words, authors allowed themselves greater license to accept weak ḥadīths – or to invent ones – because these sin-list works were not a genre of fiqh.[264]

Turning to the works themselves, I have attempted to identify whether akl al-ribā and akl māl al-yatīm appear to shift in the continuum of grave sins over time, as well as to get a sense of the severity of these crimes in jurists' minds. In the sixteenth century, both akl al-ribā and akl māl al-yatīm continued to appear at the top of sin lists. However, I suggest that this reflects an observance of the Qur'ān's explicit injunctions mentioned above, rather than a genuine belief in these as grave sins, because related sins to moneylenders appear much farther below in these lists. I review two important works of the sixteenth century in this regard. The first is a relatively short sins-list of 96 sins produced by the Damascene Shāfi'ī Badr al-Dīn Muḥammad al-Ghazzī (d. 984/1577) that survives in the polemical work *Ḥusn al-tanabbuh li-mā warad fī al-tashabbuh* (Guarding against the likeness of vices) that was produced by his son, Najm al-Dīn al-Ghazzī (d. 1061/1651), the Shāfī'ī muftī of Damascus and renowned author of *al-Kawākib al-sā'ira*.[265] The second is a sins-list of 467 in a work called *al-Zawājir 'an iqtirāf al-kabā'ir* (Cries against the committing of sins) by the Egyptian Shāfi'ī jurist Ibn Ḥajar al-Haytamī (d. 973/1566), who spent much of the latter part of his life teaching in Mecca. While al-Ghazzī's list is simply that, a list without elaboration, al-Haytamī's is a polemical work with extensive descriptions of the listed sins.

Although both earlier and later works exhort Muslims to follow the injunction of commanding right and forbid wrongdoing (*al-amr bi'l-ma'rūf wa-l-nahy 'an al-munkar*), I

[264] Lange, *Paradise and Hell in Islamic Traditions*, 88–92.
[265] Rafeq describes the author's purpose in writing this work as "to alert people to the backwardness of their their backwardness, comfort them that God meant well for them, and that they could overcome their backwardness and achieve pro gress by imitating the worthy people of the past." Rafeq, "Relations between the Syrian '"Ulamā"' and the Ottoman State in the Eighteenth Century," 90.

have observed, in line with Lange's findings, that the language in al-Haytamī and al-Ghazzī works is less visibly concerned with diatribes on hell-fire, than much earlier works ostensibly were. Indeed, in al-Ghazzī's work, "refuting the injunction of commanding right and forbidding wrongdoing" is recorded as sin number thirty-five, indicating its relatively lower importance. Also, sins that were on the minds of conquest-era Muslims, and reflected in works from six to eight centuries prior, such as the sin of deserting the battlefield (*al-tawallī min al-zaḥf*), which are part of the earlier mentioned mūwabaqāt ḥadīth, are of lesser importance in the latter works. The reduced eschatological emphasis in these two works not only suggests a shift in concerns, but also reflects the highly subjective nature of this genre, notably so given the fact that both authors were well known members of the same madhhab.

However, the hierarchical differences that characterize much of the material in these two-latter works is not the only distinguishing feature that sets them apart. The subject matter is arranged much like that found in books of fiqh, where sins are grouped according to subject matter. In al-Ghazzī's work this is implied, the list is not segmented under topic headings, while in al-Haytamī's case it is explicitly so. It is no surprise therefore that while the first sin that was listed in both works was that of polytheism/idolatry (shirk), the order of the sins after that differ considerably between these works. However, there is a little overlap early on. In al-Ghazzī's case, most of the first twenty or so sins relate largely to issues of the marketplace and private morals. In al-Ghazzī's list, sins seven through fifteen are market sins/public crimes (theft, seizure by force, gambling, bribes, ribā, akl māl al-yatīm, cheating in weights and measures, market taxes (*al-mukūs*), false testimony (*shihādat al-zūr*).[266] Some

[266] Al-Ghazzī, Najm al-Dīn Muḥammad ibn Muḥammad, *Ḥusn al-tanabbuh li-mā warada fī al-tashabbuh*, ed. Ṭālib, Nūr al-Dīn (Beirut: Dār al-Nawādir, 2011), 476–77.

of these appear in al-Haytamī's work, such as sins six and seven (cheating and collusion) that do overlap with al-Ghazzī's. Not surprisingly, the first seven sins presented by al-Ghazzī and al-Haytamī differ from the seven mūwabaqāt hadīth sins.

Indeed, al-Haytamī insists that the canonical version of the mūwabaqāt ḥadīth should not limit the super-sins to seven, because there are many other recensions that he lists that offer nine, twelve and more sins under this label.[267] Indeed, al-Haytamī reviews some of the disagreements between the Shāfi'ī jurists over this and lays out his rational for considering that all sins should be viewed as "grave" (*kabā'ir*), thus the title of his work.[268] In reproducing his father's list in his own work, Najm al-Dīn al-Ghazzī also observed that his father's material was sourced from a variety of leading works produced by the Shāf'īs, implying an authentic attempt to capture a madhhab-normative sin-list, and he elaborates that "scholars have disagreed about classifying vices into greater (*kabā'ir*) and lesser (*saghā'ir*); some have said that there is no such thing as a lesser vice and that all should be considered grave because of their deleterious consequences (to society)."[269] The variegation present in these works is thus emblematic of the fact that these types of work were inherently subjective, which nevertheless felt that they had to abide to their own madhhab's world-view of the kabā'ir sins, even if these were disputed.

To return to ribā, these works projected different views concerning its importance (severity), although both not grant it a somewhat lesser status. Although al-Ghazzī lists ribā and akl māl al-yatīm together, at positions eleven and twelve respectively, these appear

[267] Aḥmad ibn Muḥammad Ibn Ḥajar al-Haytamī, *al-Zawājir 'an iqtirāf al-kabā'ir*, ed. Khalīl Ma'mūn Shīḥā and Muḥammad Khayr Ṭu'mah Ḥalabī (Bayrūt. Lubnān: Dār al-Ma'rifah, 1998), Vol. 1, 8.
[268] Al-Haytamī, *al-Zawājir,* Vol. 1, 4-5.
[269] Al-Ghazzī, *Ḥusn al-tanabbuh,* 472 .

immediately before other market sins, as mentioned above, such as cheating in weights and measures and the levying of market-taxes (mukūs), both of which were supervised by the market-inspector (muḥtasib). While this may imply that these were market regulated activities, Mamluk era muḥtasib manuals are silent about moneylending. This may imply that, for al-Ghazzī the prevalence of usurious lending, although undesirable, was a market norm and it fit schematically along with other market wrongs. In al-Ghazzī's Damascus, the muḥtasib was a post that Ottoman rule continued to deploy, yet the determination of ribā and the management of orphan estates were the responsibilities of the chief qāḍī and his deputies – not the muḥtasib. It is notable that the sin of an "executor's malfeasance" (*al-iḍrār fī'l-waṣīya*) occupies the seventy-seventh position in al-Ghazzī's sin-list, which reflects perhaps the lower priority Ghazzī gave towards consuming an orphan's property, since an executor's malfeasance would often have been associated with lending of their orphan's estate.[270]

For al-Haytamī, the relative low-priority given to ribā and surrounding issues is more apparent. Like al-Ghazzī, al-Haytamī commences his list with the sin of polytheism/idolatry (*shirk*), since it represents the gravest ideological threat to the central tenant of tawḥīd, the unity of God. As for ribā, it appears as "grave sin number 185" in al-Haytamī's list of 467 sins, and also like al-Ghazzī, is placed between the sins related to sales and other commercial contracts, as well as to cheating on weights and measures. The sin of ribā, which al-Haytamī labels as those who "the use of ḥīyal for averting ribā by those who do not recognize such stratagems" ("*al-ḥīyal fī'l-ribā wa-ghayrahū ʿind man qāl bi-taḥrīmuhā*") reiterates that the ribā prohibition is a prohibition on any unwarranted increase in value of a given thing that is

[270] Al-Ghazzī, *Ḥusn al-tanabbuh,* 480–81.

not mediated by a monetary exchange.[271] However, al-Haytamī does advocate ḥiyal as a solution for removing ribā. He does this, by first reviewing the well-known prophetic ḥadīth concerning the exchange of dates with a ḥīla, to avert ribā, and then notes the doctrinal disagreement between madhhabs over the topic of ḥiyal. In large part, therefore, the sin Al-Haytamī's describes is aimed at those who flagrantly employ ribā – without using ḥiyal – and at those who reject ḥīyal as a suitable means for overcoming ribā (thus the title of this sin).

In the version of the above-mentioned ḥadīth presented by al-Haytamī, the Prophet is approached by a Medinan tax-collector who presents him with a load of high-quality dates from the tribe of Khaybar. The Prophet inquires whether the dates of Khaybar are always of such high quality, to which the tax-collector answers, "no, when we have dates of a poor quality, we trade two loads of them for one load of better quality dates." Al-Haytamī continues, "the Prophet then taught him the ḥīla of selling the two loads of poor-quality dates for dirhams. He then legally used that money to buy the better-quality dates."[272] This ḥadīth was commonly cited in fiqh texts, for defining a basic form of circumventing ribā.[273] The insistence on financial exchange, rather than barter, as a means for purifying trade from ribā would become a fundamental way that ḥiyal circumvented ribā, and would also be a cornerstone of the lending contracts, known as mu'āmalāt that arose around these ḥiyal, that are discussed later in this chapter. Since al-Haytamī was a Shāfi'ī, it is not surprising to see him advocate his school's position concerning ḥīyal. In this regard, he clarifies that "the two

[271] Al-Haytamī, *al-Zawājir*, 381.
[272] Al-Haytamī, *al-Zawājir*, 381.
[273] Abdullah Saeed, *Islamic Banking and Interest: A Study of the Prohibition of Riba and Its Contemporary Interpretation* (Leiden; New York: E.J. Brill, 1996), 33; In another version of this ḥadīth, the Prophet sends Bilāl to obtain some dates and scolds Bilāl for exchanging unequal quantities of dates, with the charge of ribā. He instructs him to sell rather than exchange the dates to avoid the potential of ribā. Muslim al-Qushayrī, *Ṣaḥīḥ Muslim*, ed. Muḥammad 'Abd al-Bāqī (Beirut: Dār Iḥyā' al-Turath al-'Arabī, n.d.), Vol. 3, 1216.

imams Aḥmad (Ibn Ḥanbal) and Mālik (Ibn Anas) … have forbidden the ḥīyal of ribā; by means of analogous reasoning (*qiyās*), equating the sale and exchange of dates with the unequal barter of dates… therefore, making the ḥīla of ribā just like ribā itself." He continued, "and so a disagreement arose (between the madhhabs) concerning the ḥīla of ribā, with al-Shāfi'ī and Abū Ḥanīfa approving the ḥīla of ribā, among other ḥīyal. Our associates (*aṣḥābunā*) approve of it."[274] Preceding his section on the ḥīla of ribā, al-Haytamī pays considerable attention (eight pages) to reviewing the three classifications of ribā (discussed further below) that arose from scripture and are agreed upon in principle by all madhhabs, and al-Haytamī spends considerable energy in decrying the sinners who engage in these, dwelling on the innumerable punishments that await them in hell, including the 'consumption of stones by those who consume ribā" variety, as mentioned earlier. Interestingly, however, in delineating the practice of one form of ribā, the ribā al-nasī'a, (the interest arising from a deferred credit-sale for a commodity), al-Haytamī notes "this type of ribā is the most prevalent form in our times and is very popular among people."[275]

In assessing al-Ghazzī's and al-Haytamī's positions, it is notable that both scholars classify the topic of ribā as a market-related sin, and place it among sins related to sales and similar contracts. Notably, however, it does not appear as a criminal act, but rather a personal sin that is to be accounted for in the hereafter. For al-Haytamī, this sin is only realized when it is not circumvented by a ḥīla, as he dedicates a complete section to explaining that ribā is contingent on neglecting the use of a ḥilā. Slight references in al-Ghazzī and al-Haytamī's work suggest though that usurious lending, whether it was treated by ḥīyal, or flagrantly

[274] al-Haytamī, *al-Zawājir*, 381.
[275] For the review of the different types of *ribā* and eschatological polemic, see: al-Haytamī, *al-Zawājir*, 367–80; For the popular use of *ribā al-nasī'a* in his day, see: al-Haytamī, *al-Zawājir*, 369.

carried out in the open, were commonplace in their societies. The above works, therefore, serve a prescriptive function, of an eschatological nature, intended to inform their readers of ideals they should aspire to, in commanding right and forbidding wrong, rather than serve as vivid reflections of the world they inhabit. It is only in occasional side-mentions (such as al-Haytamī's note about the prevalence of ribā al-nasī'a in his day) that one glimpses the real world. This mindset of ribā as a personal vice rather than a crime, and the widespread legitimation of ḥīyal as both a legal and spiritual solution to usury, inform the section below.

2.2 Classifiying ribā and the ḥīyal of muʿāmalāt in the Levant

The contemporary definition of ribā is of any form of usury or interest, yet no singular or precise definition is offered in the Qur'ān, Sunna or Ḥadīth. In the Qur'ān, ribā (from the root r-b-w) is variously described as a 'growing', 'increasing', 'swelling', a 'raising' and so forth, occurring some twenty times.[276] The closest use of the term to imply a compounding of interest occurs in Q 3-130: "Oh you who believe, do not consume usurious interest (ribā), doubled and redoubled. Be mindful of God so that you may prosper."[277] The belief in a commerce-driven ethos dominating pre-Islamic Mecca may have led early leading exegetes such as al-Ṭabarī and al-Jaṣṣāṣ to primarily define ribā as a form of illicit gain arising from lending, rather than a hidden form of interest in a sale of goods.[278] Such usurious lending is referred to in the exegetical sources as ribā al-jāhilīya. To an extent, this informed

[276] Q 2:265, 275, 276, 278; 3:130: 4:161; 13:17; 16:92; 17:24; 22:5; 23:50; 26:18; 30:39; 41:39; 69:10. Saeed, *Islamic Banking and Interest*, 20; Rahman, "Ribā and Interest," 1–2.
[277] Abdul-Haleem's translation of "usurious-interest" is problematic. Q 3:130: "*Yā ayyuhā al-lladhīna āmanū lā-tā'kulū al-ribwā'aḍ'āfān muḍā'afatan wa-'taqū-Allāh*"
[278] Saeed, *Islamic Banking and Interest*, 23 However, it is al-Ṭabarī's who observed "God has forbidden ribā which is the amount that was increased for the capital owner because of his extention of maturity for his debtor, and deferment of repayment of the debt."; Muḥammad b. Jarīr al-Ṭabarī, *Jāmi' al-bayān fī tafsīr al-Qur'ān* (Beirut: Dār al-Maʿrifah, 1986), vol. 3, 69. (Saeed's translation)

the views of medieval and modern thinkers who considered the opposite of ribā to be trade or sales (bay‘). [279] However, while Qur’ānic references to ribā do not proscribe sales, prohibitions on ribā are at times found in the same surās as those mentioning sales, or in nearby verses. For instance, the earlier mentioned verse Q:2-275, “But those who take usury (al-ribwā) will rise-up on the Day of Resurrection like someone tormented by Satan’s touch. That is because they say, ‘Trade and usury are the same’”, is followed a few verses later by one of the most important Qur’ānic verses concerning the documentation and witnessing of debts and sales:

> “You who believe, when you contract a debt for a stated term (*idhā tadāyantum bi-daynin ilā ajalin*), put it down in writing: have a scribe write it down justly between you … Do not disdain to write the debt down, be it small or large, along with the time it falls due: this way is more equitable in God’s eyes, more reliable as testimony, and more likely to prevent doubts arising between you. But if the merchandise is there and you hand it over (*tijāratan ḥāḍiratan*), there is no blame on you if you do not write it down. Have witnesses present whenever you trade with one another, and let no harm be done to either scribe or witness” (Q: 2-282)

Undoubtedly, the Qur’ānic injunction for recording all debts and would be instrumental the juridical emphasis on written procedure, even though witness-oaths remained a primary form of attestation. The phrase tijāratan ḥāḍiratan (lit. “present trade”) above, has generally been interpreted by scholars to mean trade carried out by the principal owning the capital, rather than at another time through an agent. It is worth noting that the

[279] Saeed, *Islamic Banking and Interest*, 30.

frequent opposition of ribā in the fiqh literature to buyū‘ was a product of the ḥadīth literature rather than the Qur’ān.[280] The most famous ḥadīth in this regard is the so-called “six commodities ḥadīth” which profoundly informed jurists’ understanding of what comprised ribā:

> “The Prophet said: Gold for gold, silver for silver, wheat for wheat, barley for barley, dates for dates, and salt for salt should be exchanged like for like, equal for equal and hand-to-hand [on the spot]. If the types of the exchanged commodities are different, then sell them as you wish, if they are exchanged on the basis of a hand-to-hand transaction.”[281]

Although the above reference to gold and silver above alludes to currencies, the emphasis on a quantitative and exactly equal exchange of goods also points to the importance of barter for the Meccan community. The necessity for protecting the more destitute of society from extortion by elites who could, for instance, trade good quality wheat for a disproportionate amount of lesser quality wheat and profit from was surely an impetus for this and related ḥadīths.[282] That said, this presented jurists with a host of problems. For one, the quality of the goods at hand and its role in the exchange of goods is left an open question. There is also the curious question of why anyone would want to trade in two identical goods of the same quantity, at the same time. Jurists subsequently developed a doctrine that bifurcated ribā into two general forms, that were also sub-divided into two: ribā al-faḍl and ribā al-nasī’a. Ribā al-faḍl was defined by jurists as any excess in one of the counter values

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[280] Saeed, *Islamic Banking and Interest*, 24. Saeed’s translation. al-Ṭabarī, *Jāmi‘ al-bayān*, Vol. 3, 69.; Fazlur Rahman contended that contemporary Islamist reformers (his particular criticism was at al-Mawdudi) continued to hold onto, in his view, the false premise that riba was situated as oppositional to the virtues of trade, when it should be rather be viewed as the opposite of charity (ṣadaqa). Rahman, “Ribā and Interest,” 28–31.
[281] Saeed, *Islamic Banking and Interest*, 31. Muslim, Sahih, vol. 5, 44.
[282] Saeed, *Islamic Banking and Interest*, 29–30.

being exchanged at the time of the exchange (e.g., two loads dates for one load of dates). Ribā al-nasī'a extends this to refer to the ribā implied or hidden in a deferred payment for the value of such an exchange at some point in the future, as in the hidden interest in the installments of a deferred sale on credit.[283] The aforementioned ribā al-jāhilīya, is like the ribā al-nasī'a, except that it refers to an outright usurious loan and not necessarily one where interest is concealed in a trade or sale of goods.

Among the four dominant madhhabs, this division between ribā al-faḍl and ribā al-nasī'a was significant because it allowed each tradition's jurists to develop quite variegated and multi-tiered views on what distinguished licit from illicit gain. Consequently, there is no single comprehensive view on what ribā entails and what it does not. In general, though, among the four major madhhabs, if ribā was found to be inherent to the transaction itself at the time of exchange (ribā al-faḍl), any future deferred gain would also have ribā in it. [284] That is, any exchange which displays ribā al-faḍl automatically precludes ribā al-nasī'a. Conversely, if no ribā was deemed to be present at the time of an exchange, ribā could arise in future if payment was deferred. Using analogy (*qiyās*), some jurists (of the Mālikī and Ḥanbalī madhhabs in particular) extended the types of exchanges (and the underlying goods involved) as an outgrowth from the above ḥadīth. Rules governing ribā were extended "to all species (*anwā'*) which are jointly governed by the same efficient cause (*'illa*) or belong jointly to any one of the genera (*jins*) to which the six articles in the Tradition are subordinated."[285]

[283] Nabil A Saleh, *Unlawful Gain and Legitimate Profit in Islamic Law: Riba, Gharar, and Islamic Banking* (Cambridge [Cambridgeshire]; New York: Cambridge University Press, 1986), 13.
[284] Saleh, *Unlawful Gain,* 19–25.
[285] Saleh, *Unlawful Gain,* 14.

This situation presented a challenge because, while rules on ribā between madhhabs differ widely, all madhhabs promote versions of sale contracts that support the deferment of the price of a traded good in one way or another, such as the credit-sale (*bay' bi'l-ta'khīr*) and future-sale (*salam*) contracts. Many such contract forms were refined to incorporate, or be used alongside, with various legal stratagems to allow for ribā in a circumvented form - of the ribā al-nasī'a variety. Further, sales contracts – as far as long-distance trade was concerned in the premodern period – were almost always used in conjunction with other agreements such as the agency (wakāla) and bill of exchange (suftaja). The latter were quasi-credit instruments in and of themselves that were indispensable to trading. Al-Sarakhsī (d. 483/1090), the famed Ḥanafī jurist, went as far as seeing the credit-sale as the fulcrum of trade, without which such trade could not exist.[286] The formulation of such contracts by necessity had to therefore attend to the problem of ribā, mostly through ḥīyal.

One of the first Western scholars to study the development of ḥīyal was Joseph Schacht who described them simply as "the use of legal means for achieving extra-legal ends – ends that could not be achieved directly with the means provided by the sharī'ah, whether or not such ends might in themselves be illegal."[287] Although Schacht's theory on the origins and development of Islamic law has been widely critiqued and revised, his views on the development and use of ḥīyal continue to have currency, in particular the notion that ḥiyal bridged the [since proven to be erroneous] wide-gap between legal theory and practice;

[286] "We hold that selling for credit is part of the practice of merchants, and that it is the most conducive means for the achievement of the investor's goal which is profit. And in most cases, profit can only be achieved by selling for credit and not for cash...", al-Sarakhsī, Mabsut, 22:38. (Translated by Udovitch) Udovitch, *Partnership and Profit*, 79.
[287] Udovitch, *Partnership and Profit*, 11; Joseph Schacht, "The Schools of Law and Later Developments of Jurisprudence," in *Law in the Middle East*, ed. Majid Khadduri and Herbert Liebesny, 1955, 78.

allowing for a "modus-vivendi" to operate.[288] Moreover, Shacht's own minimization of the ḥīyal's importance for other madhhabs, aside from the Ḥanafīs, has led scholars to maintain the popular view that ḥīyal were really "an exclusively Ḥanafī phenomenon".[289] This is in spite of the fact that Schacht edited early on one of the first Shāfi'ī works on ḥīyal by Maḥmūd b. al-Ḥasan al-Qazwīnī (d. 440/1048).[290] Indeed, the Shāfi'īs were adopters of the Ḥanafī ḥīyal; the prolific Egyptian Shaf'ī jurist of the sixteenth century, Muḥammad Abd al-Ra'ūf al-Munāwī (952-1031/1545-1621) was also reported to have produced a work on ḥiyal in the sixteenth-century.[291] The Shāfi'īs were especially known for advocating ḥīyal to avert ribā using the *'īna* (double-sale) or *mukhāṭara* contract, in their *makhārij* (stratagem) works, the genre of writing concerned with ḥiyal.[292] So wide was its use in the Levant that the term "contrats mohatra" were adopted by European traders in the seventeenth century to refer to such subterfuges that were used in the Eastern Mediterranean.[293]

The ḥīyal though not only resonated with Shāfi'ī jurists, but also with Mālikī ones, who relied on similar but different instruments for circumventing the ribā prohibition.[294]

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[288] Joseph Schacht, *An Introduction to Islamic Law* (Clarendon Press, 1964), 80.
[289] Udovitch, *Partnership and Profit*, 42–43.
[290] Abū Ḥātim Mahmūd ibn al-Ḥasan al-Qazwīnī and Joseph Schacht, *Das kitāb al-ḥiyal fil-fiqh (Buch der Rechtskniffe),* (Hannover: H. Lafaire, 1924); Other early Shāfi'ī jurists who wrote ḥiyal works are Muḥammad b. Abdullah al-Ṣayrafī (d. 189) and Abū al-Ḥasan Muḥammad b. Yaḥya b. Surāqa al-'Āmirī (d. 416). Saeed, *Islamic Banking and Interest*, 38.
[291] Ismail, "Legal Strategems," 166.
[292] Çağatay, "Ribā and Interest," 57 The 'īna sale was where a borrower would would sell a commodity they owned for say 1,000 dirhams and then repurchase it from the lender for 1,100, with the increase being interest. This was usually done with deferred payment or in installments and was the most common form of ḥilā described in al-Khaṣṣāf's book of legal strategems. Satoe Horii, "Reconsideration of Legal Devices (Ḥiyal) in Islamic Jurisprudence: The Ḥanafīs and Their 'Exits' (Makhārij)," *Islamic Law and Society* 9, no. 3 (2002): 346.
[293] For the "contrats mohatra" see: Frank E Vogel and Samuel L Hayes, *Islamic Law and Finance: Religion, Risk, and Return* (Boston, Mass.: Kluwer Law International, 1998), 39; Çağatay, "Ribā and Interest," 57.
[294] Even in the case of early law, the development of ḥīyal and the makhārij literature around it is not clear-cut. Satoe Horii argues that the Makhārij literature dominated by the Ḥanafīs sought to address a specific aspect of the law itself, not something outside it and in this sense early jurists working on makhārij - including Mālikī ones - were not addressing the "formalism" of the law. Horii is concerned with Mālikī views on hīyal, and differentiates between traditionalist views that rejected the hiyal and other Medinese jurists who had some of the same concerns as the Ḥanafīs. Horii, "Reconsideration of Legal Devices (Ḥiyal) in Islamic Jurisprudence"

While both Mālikīs and Ḥanbalīs rejected ḥiyal, in theory, Mālikīs recognized the common issues that the Ḥanafī ḥīyal sought to solve through their doctrine of *sadd al-dharā'i'* by emphasizing the intent underlying engaging in an illegal act, instead of its utility as the formalism of the Ḥanafī ḥīyal suggested.[295]

As for the Ḥanbalīs, they shunned the Ḥanafī form of ḥīyal, and viewed it as skirting around the law; this placed them at odds with the other three schools on the issue of ribā. However, they too were not averse to a most practical view and attacked the ribā proscription from the bottom up. That is to say, that jurists such as the famed Ḥanbalī jurist Ibn Taymīya and his student Ibn al-Qayyim conceived of ribā as something that could be tolerated if it were shown to be necessary in order to serve the public good (*al-maṣlaḥa al-rājiḥa*). Ibn al-Qayyim and Ibn Taymīya consequently held lenient views towards ribā in sales-contracts, and allowed for a type of credit-sale contract that was prohibited by the other madhhabs, the *ḍa'-wa-ta'ajjal* sale.[296] This contract was one where a debtor could retire their loan for a reduction in the amount of outstanding interest owed. Jurists from the other schools decried this practice because it inherently associated time as an element of value, whereby less interest was associated with less time, an inherently usurious affiliation that other madhhabs viewed as simply the reverse of the ribā al-jāhilīya concept where the time value of money is realized in the compounding of interest when a loan is renewed.[297]

A genre that illustrates the practical borrowings, and boundaries, between schools on ḥīyal, among other things, is that of the shurūṭ (notarial) manuals that were produced over the

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Horii notes that "Schacht did not pay sufficient attention to the commitment of non-Ḥanafī jurists to ḥīyal. In this sense, he viewed the Shāfi'īs as unsuccessful epigones of the Ḥanafīs." ; Horii, 316–17.
[295] Horii, "Reconsideration of Legal Devices (Ḥīyal) in Islamic Jurisprudence," 343–44.
[296] Ismail, "Legal Strategems," 85–86 This contract allowed a debtor to reduce the amount of loan outstanding if they prepaid early, essentially reducing the unpaid interest portion of their loan. settle .
[297] Ibid.

centuries to primarily aid notaries, but also court clerks and jurists, and the educated public, in the drafting of sundry legal documents, from oaths to contracts. There is ample evidence in these manuals that they were produced to serve the purposes of people using contracts drafted under the legal rules of different madhhabs. Shurūṭ manuals often, therefore, offered inter-madhhab compatibility in their practical use offering notaries and others, who may not have been necessarily schooled in the law of another madhhab, the basic information they needed to know to draft a contract that met the conditions of one or more madhhabs. Drawing on the shurūṭ manual of the ninth-century jurist Egyptian jurist al-Ṭaḥāwī (d. 321/933), *Kitāb al-shurūṭ al-ṣaghīr*, Abraham Udovitch observed that al-Ṭaḥāwī, in the case of his ʿinān partnership, "formulated the partnership contract in such a manner as to be acceptable to Ḥanafīs, Shāfiʿīs, and Mālikīs alike … thus making it quite easy for any notary to change or exclude certain clauses in conformity with his client's wishes." Despite the fact that al-Ṭaḥāwī was himself a Ḥanafī, a number of restrictive conditions that were attached to his model contract only benefited adherents of the Shāfiʿī madhhab.[298] As Janette Wakin has shown, such customizability was a central feature of al-Ṭaḥāwī's shurūṭ manual.[299]

Centuries later, the shurūṭ manual of the extraordinarily prolific Egyptian Shāfiʿī scholar al-Ṣuyūṭī (d. 911/1505), *Jawāhir al-ʿuqūd wa-muʿīn al-quḍāt wa-l-muwaqqiʿīn wa-l-shuhūd*, reflects a similarly pragmatic and inter-madhhab outlook. Most sections of al-Suyūṭī's work begin by summarizing the differences that mark the disagreements between the madhhabs concerning the type of contract in question. In his review of sales contracts, al-Suyūṭī reviews the different doctrinal views concerning – among others – issues such as

[298] Udovitch, *Partnership and Profit*, 133–34.
[299] Jeanette A Wakin, *The function of documents in Islamic Law* (Albany: State University of New York, 1972), 7–36.

provisions for rescinding a contract, the death of a counterparty, or the restrictions on a variety of types of sales.[300] Notably, al-Suyūṭī does not provide such a review for loans or credit dealings. His work, in common with most works of fiqh, treats the subject of debt in the context of a variety of contract-types (e.g. sales, divorce etc.) rather than an object of study in and of itself. As with the polemical works of al-Ghazzī and al-Haytamī reviewed earlier, the practical manual of al-Suyūṭī manual discusses the doctrines of ribā al-faḍl and ribā al-nasī'a in the section of the work pertaining to commercial contracts, particularly sales.[301] Notably though, although, this work provides an instructive tutorial to the untrained notary on the divergent madhhab views concerning what constituted one of the two broad forms of ribā, it does not exactly spell out the ḥīyal to be used for ribā.

Determining the extent to which shurūṭ manuals were useful, therefore, for generating desired legal outcomes applying ḥīyal for ribā is moot, if we take al-Suyūṭī's manual as representative for his period.[302] The fact that so few Mamluk court-produced documents have survived also makes the work of determining the fidelity of court documents to the manuals difficult, although D. Little has shown that the legal forms concerning depositions (*iqrār*), legal certification (*thubūt*), and sales (*buyū ʿ*) largely conform to those found in al-Suyūṭī's manual of legal formularies, *Jawāhir al-ʿuqūd*.[303] Yet, for the Mamluk case of ḥiyal, we have exceedingly few documentary sources, and only a few descriptions of how such instruments

[300] Muḥammad ibn Shihāb al-Dīn al-Suyūṭī, *Jawāhir Al-ʿuqūd Wa-Muʿīn Al-Quḍāh Wa-Al-Muwaqqiʿīn Wa-Al-Shuhūd* (Makkah, N/D), 57–60; Some of al-Suyūṭī's recommendations are amusing, such as "I caution, in view of the fact that Abū Ḥanīfa only recognized agreements that stated (a counterparty's) nasab to their grandfather, that counterparties to an agreement should include their grandfather's nasab, *it doesn't hurt*." Ibid., 75.
[301] al-Suyūṭī, *Jawāhir Al-ʿuqūd*, 63–65.
[302] Unfortunately, I have not been able to locate other shurūṭ manuals for the fifteenth century. While reference has been made to a manual produced by al-Mināwī's, I have not been successful in locating it, in published or manuscript form.
[303] Donald P. Little, *A Catalogue of the Islamic Documents from Al-Ḥaram Aš-Šarīf in Jerusalem* (Beirut; Wiesbaden: Orient-Institut der Deutschen Morgenländischen Gesellschaft ; In Kommission bei F. Steiner, 1984), 188–89, 276, 307.

were used in documentary sources. The diary of Ibn Ṭawq (d. 915/1509) presents numerous descriptions of ḥiyal he used for averting ribā. As El-Leithy observes, Ibn Ṭawq used a ḥīla to sell a Qur'ān recitation position from a waqf that he had occupied "5 times over," making a substantial profit from the interest that would accrue from selling this position on credit.[304] Ibn Ṭawq does not make direct reference to ribā, but occasionally uses the euphemism fā'ida (lit. benefit) when referring to interest. The oblique reference to usury is indicative of the great social stigma linked to it in the open, at least for aspiring scholars like him.

Other challenges present themselves when trying to square the material from shurūṭ manuals and the documentary sources, even in the Ottoman period. Court sijills usually presented precis of the contracts, oaths and other undertakings (except when legalized copies of deeds, ḥūjjas, were reproduced in the sijill). This meant that many of the contract formularies presented in al-Suyuṭī's manual may have been represented in somewhat truncated form in the sijills. The efficient retrieval and referencing of information in the sijills by court clerks would have necessitated this. The ḥiyal-laden contracts, therefore, whether sale contracts or otherwise, would have been recorded and retained only by the contracting parties. What we have therefore in the sijills are the summaries of these documents.

Unlike the shurūṭ manuals that say little about the ḥīyal of ribā, the genre of manuals known as adab al-qāḍī (lit. the "conduct of qāḍīs"), had by the sixteenth century begun to address ḥīyal quite routinely. In contrast to the shurūṭ works, that were aimed at the general

[304] El-Leithy, Tamer, "Living Documents, Dying Archives: Towards a Historical Anthropology of Medieval Arabic Archives," *Al-Qantara* 32, no. 2 (2011): 413; Aḥmad ibn Muḥammad Ibn Ṭawq, *Al-Ta'līq : Yawmīyāt Shihāb Al-Dīn Aḥmad Ibn Ṭawq, 834-915 H/1430-1509 M : Mudhakkirāt Kutibat Bi-Dimashq Fī Awākhir Al-'ahd Al-Mamlūkī, 885-908 H/1480-1502 M*, ed. Ja'far Muhājir (Damascus: Institut français du Proche-Orient (IFPO), 2000), Vol. 1, 350.

public, the adab al-qāḍī works were aimed at a specific audience, qāḍīs or jurists, and ranged in content and purpose from advising on the ideal comportment and temperament that a qāḍī should have, to works that presented boiler-plate formats displaying how sijill acts should be composed for sundry matters – as they would actually appear in the sijills.

A notable work in this regard is al-Bursawī's earlier discussed *Biḍā'at al-qāḍī* which contains a number of forms for ḥīyal related to ribā and these are called "mu'āmalāt" (lit. "transactions"), a moniker that was popularized in the Levant during the fifteenth and sixteenth centuries to refer to customary legal stratagems for usurious loans. Although this label existed as early as the first half of the fourteenth century, as I demonstrate below, it only came into full adoption as a legal norm that was endorsed by both the state and the qāḍī courts, during the first half of the sixteenth century. One routinely finds references to "mu'āmalāt" in fatwās and the ḳānūnnāmes by mid-century. While I think that this term probably borrowed from the uṣūl al-fiqh designation of fiqh al mu'āmalāt, its use in the sijills from sixteenth and seventeenth century Bilād al-Shām referred exclusively to the legal stratagems for circumventing ribā through a double-sale. The most frequently used type of double-sale in mu'āmalāt involved a scenario where, for example, Party A (a lender) would sell a silk-cloth at an inflated price to a Party B (borrower) and also provide the latter with a non-interest-bearing loan. Both loan and sale would be combined in one transaction, with the inflated price of the silk-cloth representing the interest. The non-interest loan issued would serve as the principal portion of the loan and was referred to using the legal term for "loan" in fiqh, "*qarḍ*," while the sale-value of the silk-cloth was called a "debt", "dayn." The

underlying interest in such transactions was called ribḥ or fā'ida. This type of ḥīla was the most frequently recorded form of mu'āmala in the records under study in this dissertation.[305]

Historians and Islamicists have tended to view the underlying intent and meaning that Muslim jurists ascribed to the ḥīyal of mu'āmalāt by focusing on the functional utility of these devices as subterfuges of interest, rather than on any social-legal imperatives or rationales that these jurists may have held in developing these instruments. Schacht viewed the development of mu'āmalāt as nothing more than a "legal-fiction" used to avoid an undesired outcome, "whether or not such ends might in themselves be illegal."[306] In the case of N Çağatay, although he keenly observed that the Ottoman legal system had allowed mu'āmalāt to be used as a framework for distinguishing between licit interest (anything above 15% interest rate was considered usurious), he referred to mu'āmalāt themselves as "fraudulent interest" because of their use of "deception" as a means to achieve their ends.[307] A. Rafeq, on the other hand, took a somewhat dogmatic view on the practice of mu'āmalāt as something alien to the sharī'a itself; for Rafeq it was an ethnocentric intervention of Ottoman Law, one that had not set roots in Bilād al-Shām prior to the Ottoman conquest.[308] Rafeq maintained that the qarḍ (an interest-free obligation) form was not polluted by interest before Ottoman innovations, "in an Arab-Islamic context, qarḍ always conformed to the sharī'a and

[305] The label "mu'āmala" for this and other forms of ḥīyal was first used by al-Khaṣṣāf in his Kitāb al-ḥīyal Aḥmad ibn ʿAmr al-Khaṣṣāf, *Kitāb Al-Ḥiyal Wa Al-Makhārij*, ed. Joseph Schacht (Hildesheim: Georg Olms Verlagsbuchhandlung, 1968), 6–7; M. Ismail argues that the latter westward spread of the mū'āmala in a form described as above originated from its increased legitimization in 5th-6th century/12th-13th century Balkh. Ismail, "Legal Strategems," 230–31.
[306] Schacht, *Introduction*, 77.
[307] Çağatay, "Ribā and Interest," 56. For the regulation of licit versus illicit interest: 62-66.
[308] In an essay on the distinction between Syrian and Ottoman 'ulamā' cultures in the sixteenth through eighteenth centuries, Rafeq contended that "interest on loans and credit was another source of conflict between Ottoman law and the sharī'a. Interest was authorized in the sharī'a courts in Anatolia but was not approved in the sharī'a courts in Syria." Rafeq, "The Syrian 'Ulamā,'" 13.

maintained its good, pious, interest-free character."[309] Lastly, R.C. Jennings who worked extensively on lending in seventeenth-century Kayseri, observed that the subjects of Kayseri who engaged in loans in the sijills (all via mu'āmalāt) "felt no need to conceal interest or resort to dubious ḥiyal or other "fraud."[310] Jennings' mention of interest was due to explicit references to profit (ribḥ) in mu'āmalāt that were recorded in the sijill.

For those who do not hold that Islamic law was unresponsive to change and shrouded in legal-formalism, the above views do not fully explain why the Ottoman state and its legal establishment insisted on the use of mu'āmalāt. If lawful interest-bearing loans were as popular as the court sijills indicate, why did mu'āmalāt persist? Indeed, as countless sijill records attest, mu'āmalāt were taken up wholeheartedly across many cities of Anatolia and the Levant (contrary to Rafeq's assertion, as I show below).[311] Certainly, the mu'āmalāt provided a practical solution for the problem of providing loans at interest, but there was also political-legal dimension as well. On the one hand, leaving loans to be enacted unhindered by any state supervision would lead to extortion and exploitation of the ribā al-jāhilīya variety. In the late fifteenth century, beginning with Sultan Bayezīd II, ḳānūnnāmes established by fiat the maximum legal "ribḥ" rate that could legally be enacted in courts. These of course had to be enacted via mu'āmalāt or other ḥīyal. The ribḥ-ceiling of Sultan Süleymān, in particular (an interest rate of 15%), as espoused by the writings and rulings of his Ṣeyhülislam Ebu's-Su'ud, remained as the benchmark for ribā until the introduction of

[309] Drawing on cases from the earliest surviving sijil from the city of Ḥamā, from 942-3/1535-6, Rafeq observed that 22% of credit transactions involved an interest-free loan qarḍ, 10% involved some kind of debt obligation, dayn, 63% involved a sale on credit, and lastly, 4% involved salam (a forward sale of goods). On this basis, Rafeq argued that the predominance of sales on credit and "qard" transactions, and very small place of "dayn" type credit, indicates that Ḥamā's economy had an "interest-free character". Rafeq, 15.
[310] Ronald C Jennings, "Women in Early 17th Century Ottoman Judicial Records - the Sharia Court of Anatolian Kayseri," *Journal of the Economic and Social History of the Orient*, 1975, 190.
[311] Ḥīyal in the form of *mu 'āmalāt* also preexisted the Ottomans in Bilād al-Shām and were popularly used in Bilād al-Shām.

banking institutions into the Ottoman Empire in the mid-nineteenth century. Anything above this rate was deemed usurious, and anything below it was lawful as long as it was carried out in a legal-form acceptable to the sharia courts.

For the state's jurists, these ḥīyal seemed to provide an equitable legal solution to a common problem. Certainly, the muʻāmalāt were a ruse to conceal interest; even the tone of juridical literature that discusses muʻāmalāt infers this. However, if one were to view these instruments in terms of their legal merits for borrower and lender, then it quickly becomes apparent that these arrangements provided some legal protections and, arguably afforded debtors more equitable lending arrangements. The muʻāmalāt did two things: for the lender, they guaranteed both his principal and his interest. By dividing the loans into two parts, lenders were able to legitimately register and claim both principal and interest as debt obligations with a specified loan term. For creditors who were interested in "rolling-over" their loans, they simply extended the period for repayment of the principal and entered into a new sale contract for another commodity, with a new loan term (usually of one year). For the borrower, the ribḥ (i.e., interest) of the muʻāmala was fixed and unchangeable, preventing the problem of "doubling" of interest (compound interest) that was the source of the earlier mentioned Qur'ānic prohibition, making the muʻāmala quite different from an open-ended loan. Once a loan term ended, a new loan had to be contracted, separate from the first. From the perspective of the jurists, this would allow for a balancing of risks and rewards between lender and borrower, limit the potential for loss of either party, and create a venue for supervision by the state's courts. One of the most frequent critiques that jurists levied at interest outside of muʻāmalāt was that provided a "guarantee of an absolute return" (*ribā*

maḥḍ maḍmūn), that is one that was not produced by a sale, an investment or by other productive means. As a result, it cannot have a legal basis.

There is some evidence from fatwā works that supports the individual's duty to obey the sultan's injunction to both use mu'āmalāt for usurious loans and not to exceed the abovementioned ribḥ-ceiling. Many times, loans were enacted outside of court and if such lending was not legalized in court through the appropriate mu'āmalāt, they could be nullified. Two fatwās issued by Khayr ad-Dīn al-Ramlī (993-1081/1585-1670) and Ibn 'Ābdīn (1198-1252/1783-1836), the leading muftīs from Bilād al-Shām of their periods, evidence the extremely long-lasting mu'āmala norms that Şeyhülislam Ebu'l-s-Su'ud institutionalized for the next three centuries. In the following fatwā, an executor of an orphan's estate gave out a loan to two non-Muslims, through a sale of some goods on credit (outside of court), and this transaction was not entered into using a mu'āmala format. The debtors approach al-Ramlī to inquire about what their liability is, whether the payments they had made on this loan would be deemed as ribḥ or as ribā, if they were to register their loan:

> Q: An executor of orphans transacted a loan in the form of a sale on credit (*bāshara 'aqd murābaḥa*) to two non-Muslims (*dhimmīyyayn*) and attested (*a'taraf*) that he received the profit on the transaction. Subsequently, he denied having received anything. What is valid, his attestation of receipt or his later denial? Further, if the two debtors repaid their loan and profit without having entered into a mu'āmala contract, is the resulting transaction considered usurious (*ribāwīya*), thereby, making them [the borrowers] only liable for the principal (*aṣl al-māl*) [and not the interest]?
>
> A: Yes, the executor's first attestation, concerning his receipt, is binding and irrevocable. In principle, the obligations of counterparties in contracts of sale and purchase oblige the parties to exchange a good/service at the time of payment,

irrespective of whether the contract was undertaken before or after the executor took up his position. And, I agree with the view of the latter jurists (*al-muta'akhirūn*) that permits filing a case for the purpose of obtaining a deposition (*jawāz da'wa al-iqrār*), as in the case of the oaths solicited by two dhimmīs who proved that the denial of the [executor] liar showed that he did in fact make the former attestation [of receipt]. As for the issue of profit-taking without a mū'āmala contract, this is pure and absolute usury (*fa-hūwa ribā maḥḍ muṭliqan*). This is so irrespective of whether it relates to orphans' assets or otherwise and all extant [legal] sources proscribe it. Woe to those who take it [ribā] and there is no lesson to be learned from those who go astray, for that which violates the state-Ḥanafism's law books (*al-nuṣūṣ*) is always ruled against even if they [the executor] appeals to the sky for mercy!"[312]

In another fatwā that stresses similar issues, this time by Ibn 'Ābdīn a century and a half later, the importance not only of registering mu'āmalāt is stressed, but also of abiding by the "sultan's edict" is stressed, as it concerns the maximum interest rate that could be charged in a mu'āmala, the ribḥ-ceiling:[313]

Q: If Zayd took a debt from 'Amr and additionally bought from 'Amr a dagger for a specified price on the basis of a deferred payment with a specified installment period, and Zayd began paying to 'Amr monthly installments for a full two years, completing the installment period, and thereby having repaid both the original debt as well as the value of the *murābaḥa* [for the dagger], without having entered into a mu'āmala shar'īya. At this juncture, 'Amr dies, and the executor of his

[312] al-Ramlī, *al-Fatāwā al-khayrīyah*, Vol. 1, 242-243.
[313] Ibn 'Ābdīn, *al-Fatāwā*, Vol. 2, 258-259.

estate insists that Zayd has not fully settled his abovementioned obligation. If this debt was legalized according to the legal-standard (*idha thabbat bi'l-wajh alshar'ī*), then will the past amounts paid by Zayd be recognized as settled?

A: His (Zayd's) loan principal will be recognized as settled, according to the *Jawāhir al-fatāwā* and *Ṣurrat al-fatāwā*. Ibn Nujaym opined that any profit (*ribḥ*) that has been concluded without a *ḥīla shar'īya* is considered *ribā* because it is based on a guarantee of an absolute return (*ribā maḥḍ maḍmūn*) for what has been exchanged, and the sharī'a absolutely does not support this, this (*ribā*) would be considered as part of the principal … the fatwās of Qāḍīkhān have numerous *ḥīyal* concerning sale contracts and you should consult these … I say, at the end of [Ibn 'Ābdīn's] *al-Durr al-mukhtār*, towards the end of my section on loans, "in the fatwās (*ma'rūḍāt*) of the Muftī Ebu's-Su'ud, if Zayd gave a loan out of ten-for-twelve (20% interest), or ten-for-thirteen (30% interest) in the form of a mu'āmala in our days after the existence of the sultanic edict (al-amr al-sulṭānī) and the fatwā of the Şeyhülislam that bans anyone from issuing a debt of ten for more than fifteen (15% interest) and if the lender persists in his wrongdoing he is given a discretionary punishment (ta'zīr), and if he persists, he is imprisoned until he recants … know that the above creditor's action is punishable because of a violation of the sultan's order and not a corrupt use of the sale (*al-mubāya'a*). This would be the case if a creditor lent 100 dirhams to a debtor and sold something for 20 dirhams to him in a legal-contract (*'aqd shar'ī*), even if the commodity was only worth 1 dirham.

The above fatwās, but especially Ibn 'Ābdīn's, illustrate the importance that jurists attached to the "sultan's order" in later centuries. Most notably, that the crime of exceeding the ribḥ-ceiling, was couched in terms of disobeying the sultan, and not in commercial

reasons related to not fulfilling the mu‘āmala contract. It is important here, to stress that engaging in ribā, in its own right, was therefore as only viewed as a punishable offense if it exceeded the rate set by the ḳānūnnāme, independent of whether a mu‘āmala was involved or not. In section 1.4 of this chapter, I address the extent to which discretionary punishments by qāḍīs (ta‘zīr) were used to punish creditors for such abuses, as well as assessing the use of temporary imprisonment as a means of punishment and extraction of debts from defaulting debtors, as apparent in the sijills. For now, though I would like to turn my attention to the origins of the use of the mu‘āmala in the Mamluk period.

2.3 Origins of Mu‘āmalāt in the Mamluk fourteenth century

It is notable that two of the most circulated works in the adab al-qāḍī genre from the late-Mamluk period, *lisān al-ḥukkām fī ma ʿrifat al-aḥkām* by the Aleppan qāḍī Aḥmad Ibn al-Shiḥna (d. 882/1477), and *Mūjabāt al-aḥkām wa-wāqi ʿāt al-ayyām* of the Cairene jurist Qāsim Ibn Quṭlūbughā (d. 879/1474) did not dwell on mu‘āmalāt, in stark contrast to al-Bursawī’s previously noted *Biḍā ʿat al-qāḍī* from the mid-sixteenth century which has numerous references to sijill formularies for mu‘āmalāt. Although both jurists were Ḥanafīs, their works also contain few references to ḥīyal, even though ḥīyal were associated with the Ḥanafī madhhab. Where ḥīyal do appear in these works, they appear as minor topics, and often not concerned with ribā at all. The scant attention to ḥīyal can be explained, I suggest, in the purpose and orientation of these works by Ibn al-Shiḥna’s and Ibn Quṭlūbughā’s works. They were aimed at solving problems of legal procedure and the enforcement of rulings rather than as serving as reference manuals for boilerplate templates of contracts, and,

their readership was senior jurists and not necessarily qāḍīs. However, these lacunae – and the absence of documentary evidence pointing to Mamluk era muʿāmalāt, should not lead one to think that they were a development of "Ottoman Law", as Rafeq suggested. As I illustrate below, the fatwās of the major Egyptian jurist Taqī al-Dīn al-Subkī (d. 756/1355), cast substantial light onto the world of such dealings in the heyday of the Mamluk-era, providing explicit descriptions of the muʿāmala at work, as stratagems, during his tenure as the chief-justice of the Shāfiʿī courts at different intervals in both Cairo and Damascus. In what follows, I argue that while the muʿāmala became a fully normative practice in the legal literature and court practice of the Ottomans sixteenth century, its prevalence in Bilād al-Shām (at least in the sector of managing orphan-estates) can be traced back to the first half of fourteenth century Damascus and, likely to a lesser extent, Cairo. If anything, the muʿāmala as a customary-legal practice spread and became established in the Ottoman realm after its popularization in Mamluk lands.

In his fatwā compendium, al-Subkī gives insight into his own experience as the director of the Orphan's Bureau (*Diwān al-aytām*), and narrates this bureau's common practice of commissioning agents to engage in muʿāmalāt on behalf of orphan estates managed by the state. Al-Subkī's passage on muʿāmalāt was drafted in response to the many queries posed to him on the matter of whether such "muʿāmalāt," an instrument that was apparently contentious in his day, should be a legitimate means for managing the investment of orphans' capital. He notes that he was the first person to issue a detailed fatwā on this topic. Al-Subkī begins his discussion by elaborating the nature of managing the capital of orphan estates, the ups and downs of markets, and the great uncertainty involved in investing the capital of orphans in commodities or trade because the value of goods can go up, as well

as down.[314] Al-Subkī takes that view that the investment of an orphan's estate in trade should only be undertaken when markets are prosperous, and when the executor's ability, and dedication to the investment at hand allows him to do so.[315] "If it is undertaken in this manner, I support the investment of orphan's capital", he said. Al-Subkī introduces the topic of lending out orphan capital via mu'āmalāt as a contrast to the ideal picture of trade; "as for the mu'āmala which is relied upon these days, which I have reproduced (*wa-ṣawwartuhā*), as follows:

> A man approaches the dīwān al-aytām and requests from them, for instance, 1,000 (dirhams). He agrees with them on an interest (*fā'ida*) of 200, more or less, and then reappears with a commodity (*sil'a*) worth one thousand dirhams. He sells this to the orphan and receives one thousand from them [the dīwān al-aytām on behalf of the orphan], and he takes possession of the commodity. Then, he repurchases this commodity from them [the dīwān al-aytām] for 1,200 with a deferred payment, and deposits some collateral as a guarantee. This results in the desired result of obtaining (for the orphan) 1,200 dirhams deferred. This mu'āmala is used to avert ribā (*yaj'alūn tawassuṭ hādhihi al-mu'āmala ḥadhran min al-ribā*)."[316]

Elaborating on the above practice, al-Subkī states that it is considered unlawful among the Mālikīs, Ḥanbalīs, and even by some Shāfi'ī jurists, although the Shāfi'ī madhhab permits it. That said, al-Subkī notes that, although permitted, it is a strongly-discouraged practice (*wa hiya 'indana ma'a ṣiḥḥatuhā makrūha karāhat tanzīh*).[317] According to al-Subkī, the Shāfi'ī's who call for it to be banned do so on the basis that the capital of orphans should

[314] al-Subkī, *Fatāwā*, 326.
[315] Ibid.
[316] al-Subkī, *Fatāwā*, 327.
[317] Ibid.

not be engaged in bay‘ al-‘īna (double-sale) or bay‘ al-nasī’a (deferred sales having potential of ribā al-nasī’a), and yet, the reason mu‘āmalāt have been adopted by the Orphan’s Bureau is that they affords orphans a secure and known return (*al-ribḥ fīhā ma ʿlūman*).[318] While al-Subkī himself accepts the permissibility of this practice on legal grounds, he presents a host of issues that complicate its use:

> “It should be noted that these (mu‘āmalāt) face several perils. Most debtors do not settle their debts when they become due, delaying, promising, going bankrupt, and the guarantees of some debtors are even proven to not be theirs … and there is another danger and it is that if a Mālikī or Ḥanbalī qāḍī issues a ruling that invalidates a mu‘āmala. In such event, the interest (fā’ida) due to the orphan is lost, and even their principal is at risk, and this is what a number of our (Shāfi‘ī) colleagues have also noted.”[319]

These transactions were farmed out by the state to market lenders, who would agree to lend out these sums and share a portion of the interest they collected. Per al-Subkī’s admission, obtaining a favorable return for children from such loans was challenging, given that the dīwān al-aytām shared in 25% of the profits arising from this lending, and he expressed disapproval of this practice.

> “Notwithstanding the legality of the mu‘āmala contracts, I have witnessed very few debtors who judiciously repay their loans. Rather, in most cases, the onus is on the creditor to hire intermediaries to chase down debtors and he relies on the goodwill of debtors to repay their loans. This is coupled with the fact that the Orphan’s Bureau is also affected because it is due one-quarter of the interest (fā’ida), while the creditor

[318] al-Subkī, *Fatāwā,* 327.
[319] Ibid.

> (the Orphan's Bureau) earns a profit without taking any risk (*ghanm bilā ghurm*), the poor orphan truly realizes risk (*ghurm muḥaqqaq*) because his money has left him without recompense and in the future, he does not know if his capital will be returned with its profit, making him richer, or whether some or all of would be lost, leaving him indebted. This is the truth of the matter. Man should not commit such wrongs, and God almighty is in every person's heart, and he knows about him what others do not know and what he does not know about himself. The debtor who has caution should consult his heart, because it is the orphan's interest and it is best. (that the lender should advance)[320]

In concluding his fatwā, al-Subkī decided to leave the decision of whether or not to use a mu'āmala to the discretion of the orphan's executor. As he explains, this is all contingent on the status and needs of the orphan (rich/poor, healthy/sick etc.) as well as the conditions of the market. It would not be prudent, he advances, to extend such lending during periods of market downturn or political strife. This is his conclusion of the dilemma he presented at the outset, namely, what is more just, increasing an orphan's estate by lending it out, or allowing its capital to remain uninvested (in loans), and risk depletion from the dues related to *zakāt* (the alms tax)? The usurious and proscribed option would increase an orphan's estate, and future resources for the orphan's welfare, while its avoidance might harm them.[321] Al-Subkī's view of mu'āmalāt, was thus grounded in pragmatism and not on legal or even on strictly ethical grounds. While his dour opinion does not denounce mu'āmalāt as a legal ruse per se, he provides the exact formulary that he personally administered in Mamluk courts for such loans ("*wa ṣawwartuhā*" as shown above). The fact

[320] al-Subkī, *Fatāwā,* 329.
[321] al-Subkī, *Fatāwā,* 330.

that mu‘āmala dealings relied on a commodity exchange of some kind, to disguise ribā, in the form of the ‘īna contract mentioned by al-Subkī earlier, not only exposed orphan estates to risks of debtor defaults, but also to a manipulation in the value of assets placed as collateral for such loans. As al-Subkī’s account suggests, even if collateral was deposited, these may have been nominal or trivial in value and well below what was needed to truly secure these loans.

It should be noted that al-Subkī’s use of the term “mu‘āmala” varied in application in a few parts of his fatwā, making it evident that the term did not automatically connote a ḥīla for ribā transaction in his day, but rather referred to any number of possible “transactions,” in line with the original definition of the word. Some additional evidence of this appears in another part of al-Subkī’s fatwās; in a discussion regarding the way a husband should document a debt immediately before declaring an irrevocable divorce, al-Subkī provides a formulary entitled “Question concerning when a husband says to his wife, “this divorce is irrevocable and there is only a mu‘āmala between us.” Here, al-Subkī elaborates that “if he (the husband) intends to maintain a specific mu‘āmala, such as a debt undertaking (*mudāyana*) or another kind, it is permissible for him to do so in the event (he anticipates) an irrevocable divorce, and can take an oath to such a mu‘āmala, which would not impair the marriage at the time.”[322] His alternative use of the term mu‘āmala here clearly indicates it had a more varied use in his day and did not refer to debt contracts exclusively.

Although produced three centuries later, the exegetical work, *Irshād al-ʿaql al-salīm ilā mazāya al-kitāb al-karīm*, of Şeyhülislam Ebu’s-Su‘ud imparts a similar ethos. In his exegesis of the Qur’ānic verse “give orphans their property, do not replace (their) good

[322] al-Subkī, *Fatāwā*, 311.

things with bad, and do not consume their property with your own – a grave sin"(Q 4:2). The only part of the mu'āmala transaction that Ebu's-Su'ud implies is problematic is the one that deals with the exchange of value. Interpreting the part of this verse that instructs executors to "not replace (their) good things with bad" (*lā tatabādalū al-khabīth bil-ṭayyib*), Ebu's-Su'ud stresses: "the form of mu'āmala that calls for the taking of good money from an orphan and replacing it with bad money of their own (of their guardian), has been proscribed by al-Zuhrī, al-Saddī, and al-Nakha'ī as reprehensible, not in general terms but specifically with respect to the exchange of bad for good … noting that guardians should be working for the interests of orphans, not for themselves."[323] If the problem of exchange was the key crux of the matter for Ebu's-Su'ud, then he may have agreed with al-Subkī's admonishment of the bay' al-'īna contract that was in use during al-Subkī's time. However, by Ebu's-Su'ud's time, the widely accepted mu'āmala form had taken on a different two-part sale and debt structure that has been reviewed earlier above, and this ḥīla raised far less doubt than the *bay' al-'īna* (even though the abuse of ribā was no different).

Al-Bursawī's abovementioned manual gives us several samples of the formularies to be used for this latter type of mu'āmala, a type that appears frequently in sixteenth-century Ottoman sijills from Bilād al-Shām, but also observed by social-economic historians who have worked on Bursa, Kayseri and other cities whose work has touched on this topic. Al-Bursawī's version of the mu'āmala related to the loan from an orphan's estate is substantially different from that described by al-Subkī.[324] In al-Bursawī's version, the mu'āmala is bifurcated into two loans that are viewed as one transaction, rather than as a sale and resale of

[323] Ebu al-Su'ūd, *Tafsīr Abī al-Su'ūd*, vol. 2, 140.
[324] Muḥammad b. Mūsa al-Bursawī, *Biḍā'at Al-Qāḍī Li'Ḥtiyāj Ilayh Fī Al-Mustaqbal Wa-l-Māḍī* (985/1577), fol. 55a, Vollers No. 866, Universitätsbibliothek Leipzig, http://www.refaiya.uni-leipzig.de/receive/RefaiyaBook_islamhs_00005096.

a given commodity. A non-interest loan, a *qarḍ shar ʿī*, is issued to a debtor and simultaneously, the creditor (the executor on behalf of the orphan) sells to the debtor a (fictitious) commodity on credit, and these often took the form of sales of broadcloth (*jūkh*) or soap. The interest rate is implied and represented by the value of the commodity. Unless otherwise stated, the loan durations for repayment of the loan principal was generally for one year and the interest-cum-profit (*ribḥ*) of the loan was implicit in the declared price of the commodity. Frequently, muʿāmalāt were accompanied by sureties (*ḍamān*) provided by one or more guarantors (sing. *kafīl*) as al-Bursawī's below formulary suggests:

> "Fulān (so and so), has attested that he owes the minor fulān, the son of fulān, the deceased, a muʿāmala arranged by his executor (*waṣī*), fulān, in the amount of 1,100 silver dirhams on such and such date. Of this amount, 1,000 dirhams is a *qarḍ shar ʿī* and the rest of this is a deferred payment for the value of the cloth that was purchased; both these amounts are due within one whole year from the date of this deed…and the entire amount was guaranteed by fulān of such and such place ..."

Al-Bursawī's *Biḍā ʿat al-qāḍī* provides qāḍīs with a number of the muʿāmalāt forms for different applications (although these are all of the above noted double-sale variety); these ranged from the "issuance of a muʿāmala" for a nondescript loan, and the above transcribed "muʿāmala issued by an executor on behalf of his/her legatee"[325], to the "muʿāmala to be used by the administrator (mutawallī) of a cash-waqf when issuing loans".[326] Other forms presented in Al-Bursawī's work include those such as the "the

[325] al-Bursawī, *Biḍā ʿat al-qāḍī,* f. 55a.
[326] Ibid.

settlement of mu‘āmala accounts between two traders”[327], and the “form to be used by a creditor for absolving (*ibrā’*) their debtor of any liability after the latter settle’s the full balance of their mu‘āmala”[328]. These mu‘āmala types compliment a host of other formularies for debts undertaken for sundry purposes, and a lengthy section of Al-Bursawī’s manual is dedicated to formularies of marriage debts and guarantees.[329] So popular was the use of the mu‘āmala as a lawful stratagem in the sixteenth century, that the founding deeds of a number of cash-waqfs of the sixteenth-century discussed below insisted that all transactions had to be carried out adopting “al-mū‘āmala al-shar‘īya.” The implication here was that any interest-based lending that did not use these ḥīyal in the courts was deemed usurious and violated the charters of these waqfs.

Of note from these loans records is the frequent absence of a recorded ribḥ whether absolute or in terms of a rate. However, as noted the interest amount is often deduced from the commodity’s sale price. That said, the frequent absence of the label “ribḥ” attests to the fact that most of the time, the interest involved was well above the mandated ribḥ ceiling. I contend that declaring the ribḥ in these transactions would have unnecessarily implicated most creditors, those lending at say 20% or above, in exceeding the lawful rate and could face losing much of this profit if qāḍīs were to take action against them. Qāḍīs were of course fully aware of the actual interest charged in their court sijills, yet the lack of mention of ribḥ would have allowed creditors to evade the law, from a formal point of view. Qāḍīs would only pursue such cases in the event of a debtor who complained to the court of unjust ribḥ, usually with substantial documentation of amounts paid and witnesses.

[327] al-Bursawī, *Biḍā ‘at al-qāḍī,* f. 59a.
[328] al-Bursawī, *Biḍā ‘at al-qāḍī,* f. 58a.
[329] al-Bursawī, *Biḍā ‘at al-qāḍī,* f. 61-63.

2.4 Debtor imprisonment and the policing of lending

Imprisonment in the medieval and early modern Middle East was the means to achieving a certain outcome, extracting a confession, hidden money, or information, and typically not an ends unto itself.[330] While imprisonment and torture were advocated by jurists such as Ibn Quṭlūbughā and other, there did not seem to be a systematic political-administrative view on this issue, as it concerned debtors, in either Mamluk or Ottoman periods. Very often, for debtors, the qāḍī's purpose of using imprisonment was twofold: to pressure debtors as much as possible to pay or arrive at a settlement for their debts, and, if that failed, to genuinely prove bankruptcy, which in most cases would pardon the accused. From a moral-ethical standpoint, the vice of benefiting from ribā in the sixteenth century did not carry much weight and appeared very low in lists of vices in polemical works produced by Badr al-Dīn al-Ghazzī and al-Haytamī.

When faced with imprisonment, debtors often used the legal stratagem of declaring bankruptcy; when proved bankrupt, all madhhabs except the Ḥanafīs, absolved debtors of wrongdoing. The objective of imprisonment, however, was often deployed by qāḍīs as a temporary detention during which information was extracted concerning hidden money, and it was also a period during which bankruptcy would be determined – if the debtor's bankruptcy was in doubt. Some jurists, such as Ibn Qutlūbughā occasionally advocated torture, as a tool to extract hidden money, yet as a legal method, this was generally proscribed. A complicating factor in assessing the normative legal practice in both late

[330] Bernadette Martel-Thoumian, "Plaisirs illicites et châtiments dans les sources mamloukes: fin IXe/XVe - début Xe/XVIe siècle," *Annales islamologiques.* XXXIX (2005): 275–323; Irwin, "The Privatization of 'Justice' under the Circassian Mamluks"; Meloy, "The Privatization of Protection."

Mamluk and the Ottoman sixteenth century is that both these periods faced severe political crises where torture and imprisonment were used to mulct persons of high-status, who were implicated in political crimes.

The prisons of Cairo in the fifteenth century were notorious for their terrible conditions. Per the account of al-Maqrīzī, we are told that chained prisoners were routinely paraded through the city begging for food and corvée labor was commonly used.[331] The severity of prison conditions was something that earlier Ḥanafī thinkers debated at length when considering the punishments for debtors, and these could differ widely; for instance, al-Jaṣṣāṣ (d. 981) advocated the view of al-Khaṣṣāf who held that prisoners should be able to fulfill their personal rights in prison, such as carrying out their prayers, having ease of access to their own food and drink, and even (by analogy) advocating a prisoner's legal right to sexual intercourse. On the other hand, al-Sarakhsī (d. 1096) advocated a hardline for debtor prisoners; he held that such prisoners should always be confined indoors and prevented from attending gatherings and funerals, and even be imprisoned without a bed or other amenities in order to apply the most pressure possible to force them into repaying their debts as soon as possible.[332]

From a utilitarian point of view, al-Maqrīzī viewed debtor imprisonment as an irrational choice taken by rulers, considering that this "contributed to the fiscal decline of the state … At a time of labor shortages brought on by plague mortality, the removal of debtors

[331] Carl Petry, "Al-Maqrizi's Discussion of Imprisonment and Description of Jails in the Khitat," *Mamluk Studies Review*, no. I (2003): 139; The practice of parading debtors draws on a long history. In early Islam, the punishment that debtors should face was quite debated. A decision against a debtor issued by the jurist Ibn Abī Layla (d. 765) reportedly ordered "a solvent debtor who was evading payment to be publicly paraded." Irene Schneider, "Imprisonment in Pre-Classical and Classical Islamic Law," *Islamic Law and Society* 2, no. 2 (1995): 159, footnote 9.
[332] Schneider, "Imprisonment," 168.

from the work force amounted to gross incompetence on the part of the ruling authorities. Not only would debtors be unable to reimburse their claimants, but the economy would suffer the loss of potential laborers, many of them skilled."[333] Of course, the irony that the corvée system served to bridge the state's labor shortages did not go unnoticed by al-Maqrīzī. A similar view was echoed by Ibn Ḥazm (d. 1064) who held that imprisonment for debts should be done away with because it was an injustice (*ẓulm*) to the creditor, as it deprived him of the chance to otherwise retrieve his money quickly without having to wait for the debtor's release.[334] These criticisms evidence the power held by qāḍīs to either ease or complicate the matter of debt adjudication and settlement for both debtors and creditors, especially given the fact that the punishment for defaulting on debts merited discretionary punishment (ta'zīr).[335]

That said, the default fiqh punishment for debtors was temporary imprisonment, a form of administrative detention that could last from a few days to several months (Ḥanafī doctrine advocated 4-6 months detention) where the purpose was to pressure the debtor to settle his dues with his creditor, or failing to do so, to prove the debtor's insolvency, which would establish his bankruptcy and be followed by his release.[336] Such imprisonment of debtors never served a long-term punitive purpose.[337] According to most fiqh works, the debtor should be set free "if it becomes clear that he is impecunious."[338] Significantly, early fiqh works in the four Sunnī madhhabs barred creditors from using a debtor's labor to repay his loans (Roman law called for the enslavement of debtors), but rather, to demand the

[333] Petry, "Al-Maqrizi's Discussion of Imprisonment and Description of Jails in the Khitat," 139.
[334] Schneider, "Imprisonment," 171.
[335] Ibid.
[336] Schneider, "Imprisonment," 158; Farhat J. Ziadeh, "Mulāzama or Harassment of Recalcitrant Debtors in Islamic Law," *Islamic Law and Society* 7, no. 3 (2000): 289–90.
[337] Schneider, "Imprisonment," 169.
[338] Schneider, "Imprisonment," 159.

confiscation of his property – to the extent required – in order to settle his debts. This informed the later practice of qāḍīs.[339]

The four Sunnī madhhabs all legally-sanctioned creditors to harass or stalk their debtors independently of court litigation, in a practice known as *mulāzama* ("close attachment to" or "clinging to"), and this had to be specifically allowed for by a qāḍī.[340] However, the purpose of mulāzama was usually to prevent a debtor from absconding before a creditor was able to collect witness testimony for trial, and carried out before a qāḍī's ruling. Except for the Ḥanafīs, the mulāzama of debtors was viewed as unnecessary and impermissible if the debtor was proven to be insolvent, following a period of imprisonment, with the Shāfi'īs in particular relying on the Qur'ānic injunction of "and if the debtor is in straitened circumstances, then [let there be] postponement to [the time of] ease" (Q 2:280) to free insolvent debtors from pursuit, until such time that they can begin to settle their debts.[341] Abū Ḥanīfa allowed the mulāzama of debtors even after the bankruptcy of debtors had been established in prison, while the other madhhabs did not allow for this. Ḥanafīs in the tenth through twelfth centuries appear to have largely adopted Abū Ḥanīfa's view, such that this became their dominant position.[342] However, as F. Ziadeh has questioned the prevalence of this practice by latter Ḥanafīs, since al-Shawkānī (d. 1250/1834) claimed that "the majority of jurists (*al-jumhūr*) say that mulāzama is inoperative (*ghayr ma'mūl bihā*), so that, if the plaintiff claims that his witnesses are absent, the qāḍī is to give him the choice of either

[339] Schneider, "Imprisonment," 160.
[340] Ziadeh, "Mulāzama," 289–90.
[341] Ziadeh, "Mulāzama," 292.
[342] Ziadeh, "Mulāzama," 294–95.

requiring the defendant to swear an oath denying the debt, or waiting until the witnesses appear."[343]

A late fifteenth-century fatwā from Ibn Qutlūbughā's *rasā'il* suggests that debtors in Cairo tried to preempt the claims of creditors by unilaterally requesting certificates of insolvency, for lack of a better phrase, produced by qāḍīs in self-depositions presented by the debtors and their witnesses. These seem to have been the focus of non-Ḥanafī jurists, since, as Ibn Qutlūbughā points out, his madhhab strictly prohibits this activity on procedural grounds. Ibn Qutlūbughā criticized this practice of issuing insolvency certificates, without just cause, as harmful in both obstructing a creditors' access to due-process and as a violation of basic principles of adjudication that required that such proofs only be issued in the course of evidence resulting from a court dispute. Insolvency for Ibn Qutlūbughā had to be proven through a process that necessitated the imprisonment of the debtor. According to him, "the filing of a debtor's claim (to announce his insolvency) to a qāḍī … does not have a basis in the sharī'a for our (Ḥanafī) scholars, due to their (Ḥanafī) agreement that creditors have a right to pursue debt claims at any court of their choice. Producing the (above) deposition, and related witness testimony in court, has no basis for us (the Ḥanafīs) because evidence can only be heard in (cases) that involve principals, agents, or arbitrators unless a written requested is issued by a qāḍī. In truth, evidence of insolvency (should) not be heard before imprisonment (*lā tasma' al-bayyna illā fī wajh man yakūna aṣlan aw wakīlan aw ḥakaman illā fī kitāb al-qāḍī wa lā tasma' al-bayyna bi-l'i'sār qabl al-ḥabs fī al-ṣaḥīḥ*).[344]

[343] Ziadeh, "Mulāzama," 294.
[344] al-Qāsim ibn 'Abd Allāh Ibn Quṭlūbughā, *Majmū'at Rasā'il Al-'allāmah Qāsim Ibn Quṭlūbughā*, ed. 'Abd al-'Alīm Muḥammad Darwīsh (Beirut: Dār al-Nawādir, 2013), 700–701.

In the case of Al-Busrawī's manual, there are several examples of formularies connected to different parts of the judicial process for indebtedness, perhaps the most popular would have been the formulary for authenticating (*ithbāt*) a debtor's loan to a creditor in court.[345] Such oaths served as a legal-statement of record that could be referred to by courts in the future in the event a debtor failed to meet his obligations. Although loans could in theory take the form of a contract, shurūṭ works often neglect to provide a format for a standard debt contract – and this is also reflected in court practice. I have not come across a debt undertaking in the form of a contract yet. All the debts records I have studied were registered either through attestations (iqrār) or claims (da'wa) for a debt, or through a debt that was produced as an outcome of a contract for a commodity sale, partnership, inheritance, or other claim. The reasons for this are unclear. Jennings observed that mu'āmala registrations in Anatolian courts were done in the form of depositions and that is consistent with what I have found in the court records in Bilād al-Shām.[346] For an earlier period, Goitein suggested that the limited information provided in debt depositions, may have been intended to conceal interest.[347] I contend that a likely reason for the lack of debt contracts was due to the fact that debt was already attached to contracts of specific uses, such as credit-sales (*bay' bi-ta'jīl*), forward-sales (*salam*), or usufruct and buy-back (*bay' al-wafā'*) contracts. This attachment could, using Goitein's view, be explained as imbedded in the need to conceal interest, or it could simply be due to fact that the *qarḍ ḥasan*,(interest free loan) in fiqh could not by definition have any conditions attached to it - precluding the possibility of it turning into a fully-fledged contract model in fiqh.

[345] al-Bursawī, *Biḍā'at Al-Qāḍī*, f. 60b.
[346] Jennings, "Women in Early 17th Century Ottoman Judicial Records," 172.
[347] Goitein, *A Mediterranean Society*, 1988, Vol. 1, 11.

There are also numerous other formularies in al-Bursawī's manual that relate to debts across different stages of the legal process of debt adjudication, which could include arbitration and settlement acts that were registered in courts. There is for instance, the pledge that is recorded by a guarantor for an existing debtor's debt, and this ostensibly would have been used when a debtor was already imprisoned.[348] In another formulary, a guarantor registers his pledge for a debtor in a court deposition (*maḥḍar*), for a debt that the debtor denied having taken, but that he was nevertheless shown liable for (usually as a result of witness testimony against the debtor, and in absence of contradicting written evidence).[349] There is also the formulary that a creditor would use for registering a lawsuit against a debtor in another town or city because of the latter's relocation there, something that was not uncommon in the high demographic mobility associated with the sixteenth century.[350]

Al-Bursawī's manual also provides the formulary for "what is written for a legal-ruling on (a debtor's) bankruptcy."[351] This specimen was the typical form for judicial rulings issued on insolvency in the Ottoman sixteenth and century sharia courts, and it also appears in other Ottoman manuals of qāḍīs.[352] The formulary on bankruptcy follows:

> "(1) Fulān b. fulān and fulān b. fulān and fulān b. fulān witnessed the court deposition of the court-case filed and registered by fulān b. fulān (2) that was

[348] al-Bursawī, *Biḍā'at Al-Qāḍī*, f. 56b.
[349] al-Bursawī, *Biḍā'at Al-Qāḍī*, f. 60a.
[350] al-Bursawī, *Biḍā'at Al-Qāḍī*, f. 63a.
[351] al-Bursawī, *Biḍā'at Al-Qāḍī*, f. 70a.
[352] Colin Imber studied and published four specimans of legal documents from an anonymous seventeenth century manual for judges, similar it seems to al-Bursawī's, that was compiled sometime after 1625 and likely belonged to a judge from the sanjak of Menteşe, or Muğla and filed under Turkish MS no. 145 at the John Rylands library, Manchester. Imber edited a formulary from this work, document #3 in his article, for a "deed of bankruptcy" (ḥujjat iflās) which appears in Arabic and is mostly the same as al-Bursawī's in terms of structure, but with a few minor variances in wording. Imber, "Four Documents from John Rylands Turkish MS. No. 145," 180–81.

issued concerning the holder of this deed, fulān b. fulān, the imprisoned debtor who owes a debt to the honorable fulān since a period of such-and-such, that the abovementioned person (3) is bankrupt, destitute, and incapable of settling the debt he owes. He owns nothing aside from what he wears and garments (*wa-lā-shay lahu sawā mā yalbisahu wa yaksīh*) and is in a state of (4) impoverishment. He is worthy of attaining leniency until he regains some prosperity (*ḥarīya li-l'imhāl ila ḥālat al-yasār*). This has been legally witnessed and accepted in accordance with the conditions for acceptance (of bankruptcy) (5) A ruling has been therefore issued (declaring) his bankruptcy (*fa-ḥukim bi'iflāsihi*) and he has been discharged from prison and left (to go) on his own way (*aṭlaq min al-ḥabs wa khallā sabīlahu*).[353] This legally valid ruling was enacted and recorded on such and such date."

The procedure for determining bankruptcy, as evidenced in the sijills, required several steps, at the creditor's instigation:

Step 1: Iqrār. Creditors typically registered their loans in court by requiring their debtors to attest to their loan in court, an iqrār. Once repaid, former debtors would require their creditors to evidence another iqrār clearing them of any liability (*ibrā' dhimma*, step 6

[353] In the section on adab al-qāḍī from his Mukhtaṣar, the Ḥanafī jurist al-Qudūrī uses this phrase khallā sabīlihi to indicate that the penniless debtor should be left to go in his way unmolested by his creditors after being released from prison. "If the debtor says "I am impoverished" and his creditor cannot prove that he has money, following a two or three month period of imprisonment, then the case of the debtor is revisted and if it is apparent that he has no money, then he left to go his way and his creditor is not allowed to impede it (khallā sabīlihi wa lā-yahūl baynahu wa bayn ghuramā'ihi). Aḥmad ibn Muḥammad al-Qudūrī, *Mukhtaṣar Al-Qudūrī* (Beirut: Dar al-Kutub al-'Ilmye, 1997), 226.

below). Less common was the registration of debts through a "legal authentication" (thubūt) of the debt.

Step 2: Da'wā. In the event of a debtor's default, the first step undertaken by creditors was to file a da'wā, a claim against the debtor. These could be registered without the presence of the debtor, but most often both parties would be present and be given the opportunity to submit evidence. Copies of *iqrārs* and witnesses' testimony could be given by the creditor, and the debtor would be asked to acknowledge the claim made against them or challenge it. If the debtor sought to challenge the creditor's claim, he would usually be given time to obtain witnesses or other evidence and the trial deferred.

Step 3: I'tirāf &/or Ilzām: Upon giving the debtor sufficient time to assemble his evidence or gather witnesses (typically debtors would partially or completely deny their creditor's claims), a deposition would be ordered by the qāḍī to determine liability. Both creditor and debtor were given the opportunity to provide their evidence and, per the qāḍī's review, declare personal liability. Oftentimes, when a creditors claims were exaggerated or unsubstantiated, debtors would present counterclaims, claiming that they had overpaid ribḥ, or were charged usurious amount of interest and demanded compensation. In such cases, qāḍīs would adjudicate the outcome and the guilty party would be required to register a statement of admission of guilt, i'tirāf. Per the qāḍī's discretion, the guilty party at this point could either have been afforded time, from a few days to as long as a month, to settle the claim against them (particularly if they were someone of notable standing). In the event a creditor's claim was proven valid and a debtor gave their i'tirāf, the qāḍī could also impose an ilzām order on the debtor (according to the mulāzama rules referred to above that "attach"

the creditor to pursue the debtor, without causing him bodily harm). A qāḍī's ilzām order could be issued without a voluntary admission of guilt, i'tirāf, though.

Step 4: I'tiqāl. The term i'tiqāl in the sijills refers to a period imprisonment which is rarely defined; it could be temporary or extended and refers to imprisonment in general, not just for debt-related offenses. Imprisonment was carried out at prisons attached to or under the supervision of the chief qāḍī's court. Ilzām orders could be issued with imprisonment (i'tiqāl), in the case of strict or punitive qāḍīs, an ilzām-cum-i'tiqāl. However, in most of the sijills I have reviewed, i'tiqāl was for debts was used less frequently than would suspect. During a debtor's imprisonment, which in the case of Jerusalem appears not to have extended to beyond a few months, interim court hearings (*maḥḍars*) could be held for a number of reasons such for recording the testimony of the debtor's previously unavailable witnesses, obtaining a guarantor for the debtor's debt, or a debtor's entering into a settlement with his creditor.

Step 5: Taṣāduq. Debtors with substantial assets could avoid indefinite imprisonment by reaching an amicable settlement with their creditors, recorded as a "*taṣāduq*" in court. The court records do not give sufficient details about process of court-mediated settlement, since such settlements occurred while the debtor was still in prison. However, the final terms agreed between the parties was recorded in the court sijill, and a taṣāduq deed would be produced in court, often involving a discount of the outstanding debt, or its rescheduling after a partial repayment. It is worth noting that taṣāduq did not necessarily have to be an outcome of imprisonment. Debtors who were given a grace period to settle their debts out of court, and following a mulāzama decision (step 3) could also register their mutually agreed settlement, taṣāduq, in court later on.

Step 6: Ibrā'/Iflās. Once a satisfactory and full settlement of the loan is reached, each party absolves the others liability formally, through an ibrā' statement. However, if the debtor's imprisonment failed to produce either repayment or a settlement of some sort, then it is the qāḍī's duty to carry out an investigation to identify and seize the debtor's assets and use these to the extent of repaying his debts and court administration fees and expenses. The debtor's release and absolution of debt would follow. In the event of a debtor's impoverishment, the court would be required to seek witness testimony to substantiate the debtor's claim (usually) of insolvency and after obtaining evidence to his satisfaction, the qāḍī would preside over a maḥḍar (as shown in al-Bursawī's manual above) that would declare the debtor's bankruptcy and absolve him (ibrā') of liability for his debts, until such point that he is again in a healthy financial position.

In view of the above procedural norms, I would like to now turn to the state's policing of creditors and debtors. Did qāḍīs and market inspectors have an economic policy on policing ribā abuses or the failure of creditors to use mu'āmalāt? Certainly, the explicitness of the previously noted Ottoman ḳānūnnāme on the ribḥ-ceiling of 15% should have compelled qāḍīs to crack-down on creditors giving loans exceeding that, or at least this is the suggested imperative. We have for instance Şeyhülislam Ebu's-Su'ud's two well-known fatwās on the matter that instruct qāḍīs to admonish with discretionary punishment (ta'zīr) creditors who charge above this rate. These fatwās were produced by Ebu's-Su'ud's in the period between the cash-waqf edicts of 1548 and 1565 (discussed in chapter three), and

illustrate that the punishment for usurers included "lengthy imprisonment" and was not to be taken lightly[354]:

Fatwā # 1:

> "Q: Is it licit to perform a transaction of ten for twelve (20 per cent)?
>
> A: It is absolutely forbidden. The qāḍī should chastise the offender." [355]

Fatwā # 2:

> "Q: Zeyd performs transactions at ten for twelve (20 per cent), thirteen (30 per cent) or even more. In our time, the Sultanic decree and the noble fatwās of His Excellency the Muftī of the Age are that ten should not be given for more than eleven and a half (15 per cent). If, after this admonition, [Zeyd] does not obey, but still persists, what should happen to him?
>
> A: A severe chastisement and a long imprisonment are necessary. He should be released when his reform becomes apparent." [356]

In most versions of the ḳānūnnāme of Sultan Süleymān, the ribḥ-ceiling rate was set at 10%, that is, that the code stated that "[persons] who make [loan] transactions (muʿāmalāt) in accordance with the sharīʿa shall not be allowed [to take] more than eleven for [every] ten

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[354] Heyd noted that "the ḳānūn does not usually prescribe the length of the prison term. According to a fetvā of Şeyhülislām Ebu's-Suʿud, there is no fixed limit for a 'long' prison term (ḥabs-i-medīd); it is left to the discretion of the judge, who fixes it in accordance with the commited crime." Uriel Heyd and V. L Ménage, *Studies in Old Ottoman Criminal Law;* (Oxford: Clarendon Press, 1973), 302.

[355] Imber, Ebu' Suʿud, 146; An anthology of the fatwas of Ebū-Sūʿūd and others, compiled by Veli b. Yūsuf (Veli Yegan), copied in 1584, John Rylands Library, Manchester, England, Chetham Oriental MS 7979, f. 54b

[356] Ibid.

[pieces of money lent].”[357] Some ḳānūnnāmes, however, mention a rate of ten and a half (15%) for ten and this appeared to be the legally sanctioned band for ribḥ, with 15% being the upper limit.[358] The compilation of ḳānūnnāme codices was somewhat diffused in the 1520s, and codes from older ḳānūnnāme were merged with newer ones in their process of being updated; the code on the ribḥ-ceiling was itself something that only came into being in the ḳānūnnāme of Sultan Süleymān.[359] While the officially sanctioned interest rate was in the ten to fifteen percent band, it was up to qāḍīs to determine if creditors had indeed violated the ḳānūnnāme and institute the appropriate punishment.

Notwithstanding these edicts, qāḍīs in sixteenth century Bilād al-Shām rarely seem to have administered prison sentences to creditors who violated the above ribḥ-ceiling injunction. In fact muʿāmalāt recorded in the sijills of various cities in Anatolia and Bilād al-Shām in the latter half of the sixteenth century and early seventeenth century readily exceeded 15% per annum in interest. If one was to guess at a “market rate” it would have been somewhere between 20%-25% during the last two decades of the century. While it is possible to detect slight differences in the “market” lending rates in different cities, it is quite difficult to establish a schedule of such rates over time without carrying out an exhaustive statistical analysis of interest rates for given cities. However, there are data from disparate cities, at different periods, that support the assertion that the predominant market lending rates exceeded the official ones, and were registered in sharia courts without the reprehension of sharia court qāḍīs. The fact that rates between 20% to 25% were tolerated and registered in court suggests that qāḍīs either ignored or failed to institute punishments of prison for the

[357] Heyd and Ménage, *Studies*, 122.
[358] Ibid. See footnote no. 3.
[359] Heyd and Ménage, *Studies*, 31, 230.

offence of usury. Rather, the most common punishment (to the creditor) was a qāḍī's revocation of the supposed interest that was due to them, and its replacement with the lawful interest rate of 10%-15% as a form of punishment.

In his study of Christian-Muslim relations in Cyprus in the period 1571-1640, Ronald Jennings observed numerous cases of courts cracking down on corrupt cash-waqf administrators who were lending at rates far higher than the legal limit. Jennings noted that, among many similar cases, "a mutawallī of a (cash) waqf for repairing roads and bridges in Lekosa was accused of lending money to the poor at 20% or 30% interest, thereby violating the condition of the donor that only 10% interest be charged."[360] Jennings' study of muʻāmalāt recorded in the court of the central-Anatolian trading city of Kayseri (1605-1625) yielded similar results. Taking into account that this was a period of steep monetary devaluation, general lawlessness and the Jelali revolts, it is not clear to what extent these seemingly high rates were a product of the price revolution or political instability – or both.[361] That said, the muʻāmalāt from Kayseri that Jennings reviewed were mostly in the 20% range, without any instances of repudiation by qāḍīs on the matter of ribā. In the few cases where repudiation does show up, qāḍīs repudiate creditors not for engaging in ribā, but for claiming unjustified ribḥ - that is demanding a right to ribḥ without the use of a muʻāmala sharʻīya.[362] Jennings transcribed one case as follows: "Abdur-Rahman b. Mahmud Cavus b. Haci Ahmed

[360] Ronald Jennings, *Christians and Muslims in Ottoman Cyprus and the Mediterranean world, 1571-1640* (NYU Press, 1992), 45.
[361] Jennings also observed that the vast majority of loans were "atomized", that is given out by unrelated parties who did not enter into subsequent contracts. He also did not observe a visible class of lenders in the city. Jennings, "Loans and Credit in Early 17th Century Ottoman Judical Records : The Sharia Court of Anatolian Kayseri," 172–79.
[362] See for example the following case reported by Jennings: "Abdur-Rahman tm Mahmud Cavus bn Haci Ahmed of Kizil Viran village: On campaign I gave Mahmud 50 gurus for 17 gurus interest (faide). He gave me a camel and an ox worth 54 gurus. 13 gurus remains. Mahmud claims the rate of interest was not mu'amele'-i ser'iyye and that he should not even have paid the extra 4 gurus. Abdur-Rahman confesses that he collected unlawful interest. He is ordered to restore the 4 gurus to Mahmud." Jennings, "Loans and Credit," 198.

of Kizil Viran village: On campaign I gave Mahmud 50 gurus for 17 gurus interest (*faide*). He gave me a camel and an ox worth 54 gurus. 13 gurus remains. Mahmud claims the rate of interest was not *mu'amele'-i ser'iyye* and that he should not even have paid the extra 4 gurus. Abdur-Rahman confesses that he collected unlawful interest. He is ordered to restore the 4 gurus to Mahmud."[363] By way of comparison, for eighteenth-century Aleppo, A. Marcus reported that "for all intents and purposes the credit market operated freely without effective regulation" and that "lenders agreed on all sorts of rates, depending on the familiarity between them, the terms of the loan, the perception of the risk, and the current cost of money."[364]

In this context, I argue that the records from sixteenth century Jerusalem and Damascus courts show that loan adjudication took place largely in line with fiqh prescriptions and was administered as a purely corrective measure to get a creditor's money back and not meant to advance punitive or reformative justice. I contend that Bilād al-Shām qāḍīs, like those in Anatolia, were really concerned with making sure that lending was transacted through legal muʿāmalāt forms, rather than with punishing market usurers. In effect, the courts were interested in maintaining overall order of the markets and rather disinterested in regulating market morality. While scholars have generally observed that interest rates varied widely, and some, as Marcus has, observed that courts took a passive approach to regulating lending, I rather argue that courts were keen to only ensure the rights of creditors who engaged in what they deemed to be "legal transactions" and expressed this view in sijill acts. So, whereas qāḍīs do not seem to have been concerned with market

[363] Jennings, "Loans and Credit," 198.
[364] Marcus, *The Middle East on the Eve of Modernity*, 185.

morality, they *were* concerned with maintaining the legal norms of interest-based lending, which was only sanctioned on the basis of using muʻāmalāt. Any interest-bearing loans that did not fall outside of the law and were not recognized by courts. Further, as noted earlier, Çağatay had argued that Ottoman jurists before the mid-nineteenth century held that ribā was only that interest that exceeded the lawful muʻāmala sharʻīya rate, what I have referred to as the ribḥ-ceiling of 15% per annum. Yet Çağatay, and other scholars, did not investigate the extent to which this was reflected in the sijills. In the few examples below, and more so in other parts of this dissertation, I attempt to show that while Çağatay's assertion was correct in nominal terms, qāḍīs did not follow up their views of excessive "ribā" and were largely not concerned with the punishments prescribed by Ebu's-Suʻud's fatwās. The sijills under review in this study do not show any systematic, or even occasional concern, with the level of interest rates, which in most cases exceeded the lawful rate.

The sijills of Jerusalem indicate that discretionary debtor imprisonment and fines were not the preferred corrective measures of qāḍīs – in general. There are some exceptions, however. Sijill 46, covering a period of seventh months during 972/1564-5, provide an unusually high number of debtor related punishments instituted on a variety of members of society. In this sijill, we find for instance, the court's bailiff, the Maḥḍarbāshī Muḥammad b. Mūsā bringing to court a man named Ahmad b. Ibrāhīm al-Musalsaʻ who he raised a claim against for owing the former five sulṭānīs. After soliciting the debtor's admission, the qāḍī jailed him (without even first issuing an ilzām order).[365] In what appears to be a one month punishment, exactly one month later, on 15 Shaʻbān/17 March, the same debtor and the

[365] J-46-154-4, 14 Rajab 972/15 February 1565

Maḥḍarbāshī recorded a taṣāduq settlement for a reduced amount to his debt.[366] This Maḥḍarbāshī's use of jailing as a coercive measure to obtain repayment from his debtors was of course within his legal rights, although one can also view his actions as an abuse of his power and influence in the court. This Maḥḍarbāshī had previously imprisoned other debtors and was active in Jerusalem's soap trade.[367]

Far less questionable, as far as conflicts of interest go, was the common practice of wives who raised cases against their husbands, requesting temporary imprisonment (i'tiqāl) as a coercive measure to force them to meet their marital expense commitments, those that were contractually prescribed in their marriage deeds (the history of which is discussed at greater length in chapter six).[368] As is discussed in chapter six, although such practices were criticized and debated by Mamluk polemicists, such as Ibn al-Ḥājj, they were the order of the day in late-Mamluk Cairo and Damascus, and Mamluk qāḍīs often sided with women against their husbands, instituting punishments. Again, for Jerusalem, such cases appear in select sijills (as in the case of sijill 46), and do not appear to have been routinely used much of the time. Rather, wives had to make do with an ilzām injunction ordered by the qāḍī, and when that proved ineffective, wives could request courts to forcibly sequester their husband's assets. However, sijill 46 does provide one example of the stricter practice. On 3 Ramaḍān 972/ 4 April 1565, the chief-qāḍī of Jerusalem jailed al-Zaynī 'Abd al-Qādir Abī al-Sifa after

[366] J-46-204-5
[367] J-46-256-5 and 6
[368] Of course, usually in such cases imprisonment was preceded by numerous complaints submitted in court that included "da'wā" and "mulāzama" acts, before wives had to resort to imprisonment. Moreoever, such acts were often – but not exclusively – raised by close male relatives of women raising cases against their husbands, acting as their agents. These cases therefore were usually heavily mediated by extended-family members and their concerns and should not be viewed exclusively as women simply asserting their rights against husbands in court. It should also be noted that the cases of wives imprisoning their husbands were a minority relative to those involving *ilzām*, which were sufficient to frieghten most husbands in repaying debts, even at the cost of incurring debts themselves to do so. For such cases see: From Jerusalem's sijill 67, see acts 487-4, 292-6/7, 293-7, 311-10, 317-1, 319-4, 353-7, 377-3, 8-3,

reviewing a case brought against him by his wife, Um al-Ḥamd bt. Khalīl Minṭāsh. ʻAbd al-Qādir admitted that he had long overdue dotal gift payments related to clothing (*kiswa*) that he owed to his wife.[369] After spending the night in jail, Umm al-Ḥamd arranged to drop the charges against him, having arrived at an amicable settlement (taṣāduq) for the amount owed, and this was recorded in court by the same qāḍī.[370]

The Jerusalem sijills do point to the normative practice of qāḍīs holding depositions of *iflās*, bankruptcy, however, the length and treatment of the prisoner was absolutely discretionary. In theory, legal procedure called for exhausting attempts to prove a debtor's solvency. Failing to do so, and after a prolonged imprisonment of several months, debtors would be issued with a bankruptcy ḥujja declaring their insolvency, in line with al-Bursawī's earlier mentioned specimen of a "bankruptcy deed." This could be given easily, or with difficulty, as the two following examples show. In an article on communal-legal strategies, A. Cohen examined one such case for a debtor from Jerusalem's Jewish community in the 1590s, Isḥāq Ibn Murdukhāy. Ibn Murdukhāy had been imprisoned for his role in organizing a collective debt by the Jewish community that had later defaulted. He was absolved of his initial liability when he was found to be genuinely insolvent. The key to his insolvency was that he held nothing to his name; and this could not be (legally) affected by the fact that his wife was wealthy.[371] This case follows the legally prescribed model concerning insolvency, that is that insolvency was determined solely by calculating an individual's balance sheet, that is the assets and capital owned by him or her, independent of his capacity to repay a loan

[369] J-46-228-3. For another case from the same month, see that of ʻUthmān al-Sharīf b. ʻAlī who is jailed by his wife for not paying her dowry (*mahr*). J-46-240-1.
[370] J-46-230-1. For other cases of a husband's imprisonment for not paying for his wife's clothing payments, *kiswa*, see J-46-36-7 and J-46-137-3.
[371] Amnon Cohen, "Communal Legal Entities in a Muslim Setting Theory and Practice," *Islamic Law and Society* 3, no. 1 (1996): 87 J-79-471.

through family and other connections. While this was the letter of the law, not all qāḍīs followed its prescription. Yet in this debtor's case, "he now had become insolvent … because he had spent all that he had at his disposal toward (payment of) the debt, he was no longer well to-do … when his insolvency became evident to him (the qāḍī), he released him from jail and set him free and lawfully forbade anyone else to contravene him by demanding payment, since he is incapable of paying the debt, or even part of it." (*fa-lamma ẓahar lahu iflāsihi aṭlaqahu min al-sijn wa khallā sabīlahu wa mana' man yu'āriḍahu … wa taḥaqaq 'adam iqtidārahu wa-l-muflis fī amān Allāh ta'ālā*).[372] This sijill notes that this decision had followed a "long-imprisonment" and "much interrogation." In contrast, in another (unrelated) case of insolvency from a little under a decade earlier, a qāḍī who was ill-disposed to allowing a debtor flexibility can be seen in a case brought by a former muftī of Jerusalem, 'Afīf al-Dīn Bin Jamā'a al-Kannānī, against his debtor Muḥammad b. Abī al-'Aḍma. The latter was imprisoned for failing to settle his 80 sulṭānī debt, and the debtor's son appeared in court to plead with the qāḍī to release his father from custody on the grounds that he was extremely ill, and to allow him to arrange the sale of their house which was sequestered by the court – and he was presumably already shown insolvent. While the son's deposition was taken, the qāḍī neither allowed for the father's release nor allowed the debtor to manage the disposition of his property to settle the debt.[373] The repayment of debts while in prison, appears therefore, to have been a negotiated process, and was never independent of social status or influence.[374]

[372] Cohen, "Communal Legal Entities," 88. J-79-471, line 13.
[373] J-67-8-7
[374] Not surprisingly, a commonly observed trend in the sijills is that people on the margins, rural peasants or the urban poor, suffered the punishment of imprisonment with greater frequency than elites did. Imprisonment could be metted even for very small debts of one sulṭānī or less, that is a few week's wages for the urban poor. For instance: J-57-105-3: "Arafat b. Mūsa al-Qar'ī filed a case against (*ad 'ā*) Abī Bakr b. Nūḥ, concerning the

With respect to interest rates, the thrust of Ebu's-Su'ud's warning was rarely heeded by creditors, and especially not by qāḍīs who themselves were among the key creditors and cash-waqf nāẓirs in Jerusalem and Damascus. As in our own day, the interest rate a debt carried was often dependent on a variety of factors, such as the supply of money, the credit-worthiness of the debtor, the perceived risk of the loan, which could be mitigated through collateral and guarantors. Moreover, one's social-standing only took one so far. Towards the last decade of the century, an elite member of society, such as a sipāhī (cavalry officer) who was hard-pressed for credit could easily secure a mu'āmala with an interest rate of 30%, without attaching any collateral.[375] Conversely, an artisan with modest means could secure an interest rate of 13%, by providing substantial collateral (often mortgaging a share or entire title of their house) that likely in itself exceeded the value of the loan, along with the personal guarantees of one or more sponsors.[376] Nevertheless, the "norm" for many loans in this period was a rate of exactly 20%, particularly were those given by cash-waqfs that were flush with cash in the last two decades of the century and would at times lend indiscriminately at one point annually. That said, in reviewing hundreds of debt cases, I have not come across any creditor's imprisonment for charging ribḥ above the ribḥ-ceiling rate.[377]

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debt of one sulṭānī, which was given as a non-interest loan (*qarḍ shar'ī*). He (the debtor) was asked about this and he accepted liability (*al-'itirāf*). He was required to pay it and did not. His oath was then recorded, and he was imnprisoned lawfully (*wa-'taqal i 'tqāl shar'īyan*)." In another case from J-67-446-5, a judge imprisoned two Christian men for a debt of 1.5 sultānī to a certain Ḥasan b. Fawwāz and were released shortly after serving a short period following its settlement.

[375] Such an example is the case of a debt-renewal to a "*timārī*" sipāhī in Damascus who rolled over a *mu'āmala* from a Jerusalem based lender, Shaykh Abd al-Wāḥid al-Surūrī of 10 sulṭānī principal, with 3 sulṭānī of new interest from 10 Ṣafar 966/7 January 1588. J-67-80-4. Shaykh Abd al-Wāḥid al-Surūrī was sub-contracted Jerusalem's Jizya tax-collection for that year, see J-67-96-1. See also J-67-86-9 for another unsecured loan at 30% in following month.

[376] From same sijill as above, J-67-142-3

[377] Cohen cited only case of a judge censuring a creditor for riba, from his review of all the legal acts pertaining to Jerusalem's Jewish community over the course of the sixteenth century, but it did not involve imprisonment. Amnon Cohen, *A World within: Jewish Life as Reflected in Muslim Court Documents from the Sijill of Jerusalem (XVIth Century), 2 Vols.* (Philadelphia, PA: Center for Judaic Studies, University of Pennsylvania, 1994), 201 J-80-17-2.

While the introduction of the cash-waqf to Bilād al-Shām (in Aleppo, Jerusalem, and, in a few cases, Damascus) in the middle of the sixteenth century certainly created new institutional venues for credit, these institutions neither supplanted the pre-existing channels of credit and market networks (such as the practice of lending of capital from orphan estates, which later co-existed with cash-waqfs in providing market credit), nor did the cash-waqfs alter the legal framework for debt-taking – all cash-waqfs depended on the customary and legally sanctioned mu'āmala subterfuges that had preexisted them. Rather, what is noticeable is the mushrooming in the value of loans in the last quarter of the century, the increased pace of lending, and in the century's last decade, the frequency of defaults amidst a credit-crunch. Undoubtedly, these were effects of the currency inflation associated with the price-revolution of that period (a subject tackled in chapter three), however, it must be noted that the increase in the velocity of money did not alter the structures of credit from earlier in the century.

Conclusion

Beyond the myriad ways in which usurious lending could be defined across madhhabs, and the intersecting subterfuges that were used to facilitate it in Islamic law, this chapter has shown how jurists from the era through the Mamluk-Ottoman transition came to recognize a common legal-credit structure, the mu'āmalāt, as a popular lending contract. Its simplicity and widespread adoption across madhhabs would secure its success, and entry into the Ottoman qānūn. The increased popular legitimation of this credit contract coincided, in the late fifteenth and early sixteenth centuries, with a wane in the importance of ribā as a sin, when compared to other leading sins, in moralistic works of eschatology. Ibn al-Haytamī's

tract on the hīyal of ribā, in particular, not only offers a window onto the popular circulation of such instruments, but also frames such solutions as a pragmatic solution to averting strife in the afterlife.

A central argument of this chapter has been that the adjudication of disputes in Bilād al-Shām during the fifteenth and sixteenth centuries had a similar view of adopting fiqh prescriptions that sought to administer punishments, typically debtor imprisonment, as a purely corrective measure to get a creditor's money back and not as means to institute an indefinite punitive measure, or to fulfill some kind of reformative justice. Thus, the judicial emphasis in Bilād al-Shām, as well as those in Anatolia, for the adoption of mu'āmalāt was to use these instruments as a legal means for prosecuting debtors, rather than as a way to punish market usurers, something that is rarely evidenced in the sijill records.

Chapter Three – Waqf Lending

This chapter examines the lending activities of waqfs in Bilād al-Shām along two lines: the cash-waqfs of Jerusalem, most notably those of the sixteenth century's last quarter, and the use of credit by three conventional waqfs in the city: the Ṭāzīya waqf, a significant Mamluk-era madrasa, the Hasekī Sultan waqf, and the Ḥaramayn endowments in the city. I also selectively draw on a few examples of cash-waqfs in Damascus and Aleppo for comparison. After reviewing the cash-waqf controversy, I examine the impact that credit had on the waqf dominated economy of Jerusalem and its hinterland in the latter half of the sixteenth century. Jerusalem's sijills provide some evidence that conventional waqfs (i.e., waqfs that were endowed with land or other property, rather than cash) advanced and received loans on a limited basis in connection with their operations. This raises the issue of urban-hinterland economic exchange and the frequent indebtedness that results from, among other things, pestilence and drought.

I argue that the cash-waqf's legalization, following its official sanctioning by Sultan Süleymān in 1548 following a three-year period of intense debate over its legality, quickly gave rise to its adoption in Bilād al-Shām, in both Aleppo and Jerusalem in the year 1556, paving the way for the creation of numerous new cash-waqfs that had significant impact on the regional economy. The presence of such waqfs would give greater legitimacy to the infrequent, but preexisting pattern, of lending that was undertaken by conventional waqfs. Mu'āmalāt shar'īya were used throughout, as the legitimate loan form used by cash-waqfs. I suggest that the new cash-waqfs shifted dominant local juridical norms concerning the giving out of credit by waqfs in general, and resulted in a loosening of the legal rules that, at least in

theory, heavily restricted this activity only to cases of absolute necessity. At the turn of the seventeenth century, I argue that it was no longer a taboo for a conventional waqf in Jerusalem to issue a loan, on a limited basis, irrespective of the waqf's financial health.

With respect to the cash-waqfs of Jerusalem, I show that the interest rates charged by them do not reflect a sophisticated market mentality or profit motive by their administrators; rather, the activities of cash-waqf administrators accurately reflected the wishes of their waqf's founders, that is to simply issue enough loans, at uniform rates, in order to meet their stipulated charitable expenses. In contrast to the findings of M. Çizakça, who contended that the administrators of cash-waqfs in Bursa exploited them as sinking funds of cheap capital used by themselves and merchant-bankers to relend at higher rates in commercial markets, I have found little evidence of such activities by the cash-waqfs of Jerusalem at the turn of the seventeenth century. This may have been due to Jerusalem's smaller size and markets. Nor did Jerusalem's cash-waqfs display bank-like features. Because of their uniform lending style, I suggest that the loan management of cash-waqfs could not have been at par with that of professional moneylenders. While interest rates were sometimes in line with the rates established by cash-waqf founders, often 15% in the late sixteenth century, interest rates were typically higher, 20% to even 30%. That being the case, however, the interest rates charged by a given cash-waqf were very stable across its pool of debtors (i.e., all loans for a given waqf would be at exactly 20% or 25%), despite the fact that debtors came from all walks of life and social-backgrounds.

The sijills registrations of registered cash-waqf loans indicate that loans were often enacted out of court and registered in court in batches, over several days during intervals in a given year, or once a year. This aspect of their operations gives the unusual appearance of

uniformity and points to, as I argue, an indirect court supervision of these institutions. This is supported by the fact that most financial accounts (muḥāsabāt) of cash-waqfs are absent from the sijill record, which suggests one of three possibilities; it may have been that cash-waqf administrators were not required to submit accounts to the courts; or that qāḍīs had a separate extra-judicial process for reviewing and administrating them; or that cash-waqf administrators simply failed to abide with the court's requests for such statements. I advocate one of the first two possibilities. Of 27 cash-waqfs examined in sijill 67, covering a fifteen-month period during 995-97/1586-87, only three cash-waqfs (or a little more than 10%) provided muḥāsabāt of their balance sheets and loan portfolios (noting that such accounts do not appear to have been related to mismanagement or graft). Such muḥāsabāt make it clear that qāḍīs were in-charge of supervising these institutions, vetting their administrator appointments, the validity of their loans, and deduction of expenses related to their charitable purpose. However, the exceedingly low percentage of muḥāsabāt in the sijills, suggests that court supervision was both selective and inconsistent.

There is no doubt that Ottoman qāḍīs during this period were in charge of the state's fiscal-economic regulation, at a local level, they were in charge of regulating lending and market interest rates in their districts. In my chapter on law, I investigated the transition towards uniformity in legal doctrine and court procedures, towards a state-sponsored Ḥanafism; here, I investigate how such changes affected the juridical views of non-Ḥanafīs on how credit was deployed by waqfs. The scholarly consensus is that the cash-waqf institution, being a development of Ottoman Ḥanafism, was one that was not warmly embraced in Bilād al-Shām by Shāfi'īs who represented both a numerical majority and had a historically greater mindshare of control over legal life in comparison to Ḥanafīs, who

occupied a second-place position in the region in Mamluk times. Contrary to the perception of a historical resistance to the cash-waqf, I argue that not only was the cash-waqf widely adopted by local ‘ulamā’ in Bilād al-Shām (frequently appearing as founders, administrators and debtors of these waqfs) but that, moreover, Shāfi‘ī qāḍīs were indispensable to the activities of such institutions. A sizable minority of Jerusalem cash-waqfs in the second half of the sixteenth century, that I have examined herein, were established and managed by local ‘ulamā’ notables, both Ḥanafīs and Shāfi‘īs. I illustrate how Shāfi‘ī deputy qāḍīs in Jerusalem were regularly requested to register mu‘āmalāt in sijills when loan collateral was deposited, this being due to the fact that Shāfi‘ī fiqh provided debtors more rights in their use of collateralized property than did Ḥanafī rules. I argue that pragmatism and a view towards inter-madhhab operability was, therefore, a key driving force facilitating cash-waqf mu‘āmalāt in the region. The solution for registering collateral for cash-waqf loans in cities where Ḥanafism was overwhelmingly dominant, such as in Istanbul or Bursa, would surely have been different.

Although prominent Damascene jurists, such as the Shāfi‘ī muftī of Damascus Najm al-Dīn al-Ghazzī, railed against Ottoman legal “innovations” (*bida‘*), such as the marriage tax – something they considered foreign as well as un-Islamic, their response to the cash-waqf was mostly characterized by remarkable silence. Their voices were not heard among the chorus of Ottoman Turkish ‘ulamā’ in Istanbul who wrote treatises against the cash-waqf. The notable Levantine jurists of the sixteenth century, such as al-Tumurtāshī and al-Ghazzī, did not publish polemics against this Ottoman institution. This may have to do with the fact that the cash-waqf controversy was officially settled by its legalization in 1548, a decade or

so before the development of Ottoman endowments went into full swing, as discussed in my chapter on law.

This chapter begins with a review of the doctrinal views surrounding the cash-waqf's origins and its controversy in Istanbul. Subsequently, I review the scholarship on activities of known cash-waqfs in Bilād al-Shām followed by a discussion on the likely indirect effects that this institution had on conventional waqfs. Thereafter, I take up as a case study the operations of the Ṭāzīya madrasa waqf of Jerusalem at the turn of the seventeenth century, and make some general observations about the role of debts in urban-rural exchange using this waqf as an exemplar. I also draw on some observations of credit activities of the large public waqfs of Jerusalem in the last quarter of the sixteenth century to support my views.

3.1 The cash-waqf controversy

The cash-waqf controversy was as much about Şeyhülislam Ebu's-Su'ud's carving out of political authority for the Ottoman legal establishment as it was about ensuring a system of new institutions for public welfare and the stability of a new monetary order.[378] The opposition to the cash-waqf was significant, and its opponents, most notably the chief qāḍī of Rumelia, Çivizade, were not at all marginal figures. Rather, they represented a politically powerful madhhab-normative view that was shared by those in Bilād al-Shām.[379] However, the cash-waqf had been taken up as a practice from the second decade of the fifteenth century in the Ottoman Balkans and by the time of its political controversy (1546-8), Çivizade's opposition may have been too little, too late. As Mandaville observed:

[378] Tezcan, *The Second Ottoman Empire*, 31–36.
[379] Imber, *Ebu's-Su'ud*, 144–45.

> "Suddenly the conflict between traditional Islamic judicial theory and practice and that of the Ottoman establishment broke out in the open. It had done so, it seems, long after there was any chance for a reversal of the practice. Yet however unrealistic the opposition, the debate continued on through that century and into the next, scholarly surrejoinder following rejoinder. Gradually the cash-waqf became a major issue in the larger ongoing struggle between Ottoman strict, as opposed to loose, constructionists of political, legal, and religious policy - between the liberals and the conservatives."[380]

Even though Çivizade was a pillar of the conservative camp, and one time şeyhülislam, opposing the Ottoman dynasty's patronage of Ibn 'Arabī and other Sufis, he remained politically powerful during the early years of Süleymān's reign.[381] The voice given to Çivizade's opposition in the sultan's court has, in my view, pushed some scholars to interpret the muted reception of the cash-waqf in Bilād al-Shām as a silent adoption of Çivizade's view that this new instrument was an assault on the mainstream Ḥanafī tradition.[382] My own research into this question shows that such a determination, at least in the late sixteenth century, is not so clear-cut. Moreover, one cannot claim that the cash-waqf's rise in Anatolia was the result of Ottoman Law's corruption, because Ottoman Law was undergoing a considerable shift at the time. Although Ebu'l-s-Su'ūd did have Sultan Süleymān's ear, the rising legalization of this institution was not a given. The view of 'ulamā elites from the periphery of Bilād al-Shām during the 1540s observing this debate was seemingly one of pragmatic silence; although they may have been produced, I have failed to uncover any polemical tracts by Syrian 'ulamā' against the cash-waqf.

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[380] Mandaville, "Usurious Piety," 297.
[381] John Curry, *The Transformation of Muslim Mystical Thought in the Ottoman Empire: The Rise of the Halveti Order, 1350-1650* (Edinburgh University Press, 2010), 126.
[382] al-Arna'aūṭ, "Dalālāt Ẓuhūr Waqf Al-Nuqūd Fī Al-Quds Khilāl Al-Ḥukm Al-'Uthmānī."

Doctrinal views on the cash-waqf in Islamic law

At the center of early Muslim debates on the institution of the waqf, Abū Ḥanīfa's position on the wholesale rejection of the waqf is famous and stands in stark contrast to the views of his disciples, Abū Yūsuf and al-Shaybānī. Abū Ḥanīfa held that allowing the endowment of an asset into perpetuity (*ta'bīd*) would give such an institution legal primacy over the inheritance rights of a waqf founder's children, and go against their inheritance rights enshrined by the sharī'a. He therefore did not accept the legal irrevocability (ilzām) of the waqf but rather left it up to qāḍīs to apply their judicial reasoning (ijtihād) when ruling on the specific circumstances that could warrant a waqf's establishment. On the contrary, Muḥammad Ḥasan al-Shaybānī and Abū Yūsuf held views that defined the normative position of the Ḥanafī madhhab, which absolutely accepts the waqf (i.e., endowment in perpetuity) of land and buildings. With respect to endowing movables, Abū Yūsuf accepted their permissibility so long as movables were related to a land's given use. For instance, horses and farm tools on a farm could be endowed along with the land of the farm into a joint waqf. Al-Shaybānī went a step further and stipulated that by following the principle of juridical preference (*istiḥsān*), a variety of other movables could be endowed independent of any land or physical property, on the basis of the popular/customary use (*ta'āmul*) of such movables.[383] However, al-Shaybānī and Abū Yūsuf never issued rulings approving the endowment of money; for them capital in the form of coins and currency were viewed as an

[383] al-Sarakhsī, Muḥammad ibn Aḥmad, *Kitāb al-Mabsūṭ* (Beirut: Dār al-Ma'rifah, 1993), Vol. 12, 45; al-Marghīnānī, 'Alī b. Abī Bakr, *Al-Hidāya Fī Sharḥ Bidāyat Al-Mubtadī* (Beirut: Dār Iḥyā' al-Turāth al-'Arabī, 1995), Vol. 3, 17-18; Mas'ūd Ibn-Aḥmad al- al-Kāsānī, *Badā'i' aṣ-ṣanā'i' fī tartīb al-sharā'i'* (Beirut: Dār al-Kutub al-'Ilmīya, 1997), Vol. 6, 349.

altogether separate category outside of the physical things that could not be endowed and therefore did not merit discussion.[384] However, as elaborated below, Ottoman apologists for the cash-waqf, most notably Ebu'l-s-Su'ūd, would conveniently ignore this aspect in arguing for their position.

At the center of Ottoman opposing views on the cash-waqf, such as those of Çivizade, two seemingly unsurmountable issues had to be resolved to warrant its valid use. First was the concern that trading in a waqf's money would unnecessarily expose the waqf to a loss of its capital over time, due to devaluation. Second, although cash was a movable asset, it was also a fungible one (its use entailed its consumption), and this would be deleterious to the condition that a waqf be held in perpetuity (ta'bīd).[385] Early debates on endowing movables as waqf centered on evaluating the extent to which an asset was fungible. Most jurists (aside from Abū Ḥanīfa and the Ḥanbalīs) accepted the endowment of movable assets that could largely retain their nature after use, such as animals, books, equipment and furniture. However, more fungible assets, such as food, oil, and money did not qualify for endowment in the eyes of most jurists, since their use required their consumption.[386] The cash-waqf, as it was understood and debated by Ottoman jurists in the late-fifteenth and early sixteenth century, was not a form of waqf that existed (or therefore discussed or debated) in the earliest founding fiqh texts of the four Sunnī madhhabs. This is one reason that warranted it being termed by some modern scholars a "distinctly Ottoman contribution to Islamic Civilization." Those who called for its adoption, however, most notably the Şeyhülislam Ebu's-Su'ud, did so by broadly interpreting a minority opinion of a disciple of Abū Ḥanīfa, al-Imām Zufar (a

[384] Mandaville, "Usurious Piety," 295.
[385] Mandaville, "Usurious Piety," 293.
[386] Mandaville, "Usurious Piety," 299.

disciple of al-Shaybānī), that allowed for waqfs that invested their capital in trade using *muḍāraba* (the commenda) and deploying the profits from such trading to be used to benefit the community in perpetuity.[387] The Ottoman adoption of Zufar's view was also based on the juristic favoring of adopting laws that drew on customary market practice, particularly those that served a societal good.

Zufar was the only early Ḥanafī authority who supported the waqf of money, as long as it was invested in trade, through a muḍāraba (commenda) or similar contract. The exchange of money for goods would alleviate or remove the risk of devaluation and fungibility. While Zufar's ruling would be the basis for the Ottoman's legitimation of the cash-waqf, the most closely related form to the cash-waqf can actually be found in the teachings of the Mālikī madhhab. The jurist Ṣaḥnūn, in his authoritative *al-Mudawwana*, which transmitted the ruling of Mālik Ibn Anas, the madhhab's founder, relates that Mālik allowed the lending of money (on a non-interest basis) to be used as a means to pay for communal needs, through the payment of zakat (alms).[388] In his chapter on zakāt, Mālik responds affirmatively to the question: "If a man endowed 100 dināars to be lent out, and people return this money, is it considered a form of zakat?"[389] The Shāfi'īs and Ḥanbalīs are not known to have endorsed the cash-waqf on the account of their strict views on the endowment of fungibles, such as money.

Mandaville argued that the pro-cash waqf Ottoman jurists, led early on by the practice of Mulla Hüsrev (Ar. Munlā/Mullā Khusrū), did so "simply by neglecting to mention that

[387] Mandaville, "Usurious Piety," 294.
[388] Mandaville, "Usurious Piety," 293.
[389] 'Abd al-Salām ibn Sa'īd Saḥnūn and ibn Anas Mālik, *Al-Mudawwana Al-Kubrá Li-Imām Mālik Ibn Anas Al-Aṣbaḥī* (Dār al-Kutub al-'Ilmīyah, 1994), Vol. 1, 380.

Muḥammad [al-Shaybānī] and Abū Yūsuf explicitly denied the validity of the cash-waqf," by exercising "judicious silence".[390] That is, the magnum opus of Mulla Hüsrev (who served as Şeyhülislam between 1460-1480), *Durar al-ḥukkām fī sharḥ ghurar al-aḥkām*, which was used as a core textbook in the ilmiye system curriculum centuries onwards, only referred to Zufar's ruling by mentioning that "Imām Muḥammad [al-Shaybānī] accepted certain movables on the basis of 'generally recognized practice' (*ta'ārūf*).[391] As I discuss below, an analogous explanation was provided by the leading Damascene jurist Ibn 'Ābdīn to explain the cash-waqf's validity in the eighteenth and early nineteenth centuries.

The practice of the cash-waqf was first observed in Balkan courts in the 1420s; the first cash-waqf that Mandaville found recorded was one from Edirne in 1423 and its popular spread did not cause any public debate until the number of such waqfs came to be the predominant newly registered waqfs at the end of the fifteenth century, and by 1540 it "could not be overlooked any longer."[392] The fact that Mulla Hüsrev signed on several extant cash-waqfs deeds while in office as Şeyhülislam points to this commonplace practice before the first quarter of the sixteenth century; in addition many notable qāḍīs of the period issued such deeds and engaged in a form of 'silent practice'.[393] However, "sometime between 1545 and 1547, the military justice of Rumeli, Çivizade (d. 1547), issued an opinion which completely opposed the practice of the cash-waqf."[394] Almost immediately, Ebu's-Su'ud issued a treatise in Arabic, *al-Risāla fī jawāz waqf al-nuqūd*, in response to Çivizade's ruling, in which he

[390] Mandaville, "Usurious Piety," 295.
[391] Ibid.
[392] Mandaville, "Usurious Piety," 290, 292.
[393] Mandaville reported two extant cash-waqf deeds that Mulla Husrev signed dating from 1462 and 1467. Mandaville, "Usurious Piety," 296.
[394] Mandaville, "Usurious Piety," 297.

strongly argued for the legal-validity of the cash-waqf. This prompted a backlash from Çivizade's supporters and instigated a century long debate over the cash-waqf.

Ebu's-Su'ud's treatise called for the recognition of the waqf al-nuqūd on the basis of it fulfilling three qualities. First, the fact that capital in a cash-waqf was exchanged as a part parcel of its activities would mean that a cash-waqf's capital could not be viewed as "fungible", thereby meeting a key requirement for the endowment of movables.[395] Second, the fact that the cash-waqf was already widely in-use during his day allowed Ebu's-Su'ud to argue for its recognition on the basis of *ta 'āmul*, as well as on the basis of its custom ('urf). Both these legitimizing techniques adopted the guidance of the Ḥanafī imām, Muḥammad al-Shaybānī. Third, Ebu's-Su'ud insisted that the perpetuity of the cash-waqf was not compromised by inflation or currency devaluation, on market grounds, that whatever affects cash-waqfs equally affects other things in markets, and therefore (ceteris paribus) the condition of cash-waqfs in the long-run would even out any short-term inconsistencies related to such risks.

Although he does not show evidence for it in the fiqh literature, Ebu's-Su'ud asserts that it is evident that the cash-waqf is legally valid because the principle of common usage (ta'āmul) advocated by al-Shaybānī for the waqf of movables, applied to it.[396] Ebu's-Su'ud states that "the leading jurists (*mashāyikh*) of every age choose to attach conditions (in their dealings) that meet their general requirements and they bring into each specific article things that they determine to add or discard according to the popular custom of their day (*wa-yujībūn fī kull māda bi-l'ījāb wa-l-nafī ḥasbamā 'āyanū fī a'ṣārihim min al-ta'āruf*) as relates

[395] Ebu's-Su'ud would reiterate the view presented by Mulla Husrev that is elaborated further below.
[396] Mandaville, "Usurious Piety," 299.

to (the waqfs of) movables.[397] With respect to the problematic nature of money's devaluation, and its associated complications for the waqf's condition of perpetuity, Ebu's-Su'ud is unabashedly forthright in minimizing the effects that such changes could have on a waqf's longevity. Per Mandaville's review, Ebu's-Su'ud did not express concern about the fluctuation of currency over time, Ebu's-Su'ud states: "I say it does not matter. It evens out in time. Today some say 60 dirhams to the dinar, some say 59. It varies from place to place, and even in the sample place from time to time. No one profits over another in the long run."[398] Ebu's-Su'ud's rationale evinces an uncannily modern laissez-faire attitude towards the market for money and its effects on such waqfs.

Ebu's-Su'ud's argument drew inspiration from a minority Ḥanafī opinion to support the opposite claim, that money was as validly used for creating waqfs as property and had the benefit of being easier to exchange. Significantly, Ebu's-Su'ud did not argue against the use of a mu'āmala framework for this, but rather depended on it. The mu'āmala, Ebu's-Su'ud argued, was used for all sorts of movables and land. Ebu's-Su'ud "shows how many things have been added to the 'movables' category … ta'āmul applies to cash as well."[399] While Mandaville observed this, he gave more attention to the issue of usury than it actually played in the debate itself. The advent of the cash-waqf, I contend, did not bring a revolution (at least in the central Ottoman lands) as much as a legalization of existing practice that was already managed by courts. As Mandaville showed in his essay, evidence of cash-waqf deeds

[397] Muḥammad ibn Muḥammad Abū al-Sa'ūd, *Risāla Fī Jawāz Waqf Al-Nuqūd* (Beirut: Dār Ibn Ḥazm, 1997), 27.
[398] Mandaville, "Usurious Piety," 299.
[399] Mandaville, "Usurious piety", 299

registered in courts goes back at least one hundred years before the controversy (the first cash-waqf was established in Edirne in 1423).

By moving the cash-waqf from a customary instrument to an official one, the Ottoman state established a better means for distinguishing between legitimate market interest (profit/ribḥ) and illicit market interest (usury/ribā). This was not a new practice. Bayezid's qānūn, and likely earlier ones, attempted to place an explicit cap on market interest, but in general terms for all market debts. On the other hand, an instrument like the cash-waqf, as an instrument that dealt only with money, rather than the plethora of other assets that were used as the underlying assets for market lending, could better serve as a common denominator for what was acceptable and not. The state's official interest-rate range became expressed through this common denominator that could serve as the barometer for legitimate versus illegitimate gain. The way that courts actually used the benchmarked rates to distinguish between excessive and lenient uses is addressed in my first chapter. However, suffice it to say, that Ebu's-Su'ud's reform should be viewed as a market-organizing and regulating reform as much, if not more, than a legal reform for legalizing the practice of the cash-waqf.

It is notable that the legal impediments to the establishment of the cash-waqf in the debate between jurists did not account for other market factors, such as the credit-worthiness of borrowers, or for that matter an elaboration of the legality of the mu'āmalāt that such waqfs depended on. The longevity of waqfs in general has been a topic that has been studied by a number of Ottomanists. In his article "the cash-waqfs of Bursa, 1555-1823," M. Çizakça set out to test the hypothesis of jurists who opposed the cash-waqf because of concern over

economic loss from devaluation and the perpetuity debate.[400] A much earlier study by Barkan and Ayverdi of the Istanbul waqfs (both conventional property waqfs and cash-waqfs) in the mid-sixteenth century showed that over a relatively short period of 76 years, the majority of waqfs in the three taḥrīr registers they reviewed had disappeared.[401] Çizakça's own review of (only) 761 cash-waqfs in the city of Bursa over a 268 years found that 148 (or 19%) survived more than a century, which demonstrates, that cash-waqfs probably did not suffer a different fate from conventional ones in terms of longevity. Further, Çizakça shows that of the 148 long-living cash-waqfs in his study, 81% had relied on an infusion of capital (above their initially endowed capital) at some point in order to prevent their insolvency.[402]

Almost immediately after Ebu's-Su'ud's treatise response, Çivizade's rejoinder came in the form of a short essay that outlined the twenty or so most important scholarly references that Ebu's-Su'ud had drawn upon and called his reliance on generalities to be unconvincing, arguing that "the weakness of Zufar is manifest; under no circumstances, certainly, could it support irrevocability. As for ta'āmul … 'there is no guide or clarification for its permissibility."[403] Where Çivizade's response was a comprehensive scholarly critique of Ebu's-Su'ud's position, it would be the treatises of the grammarian and Sufi moralist Mehmet Birgevi, from the Anatolian town of Birgi, that would deliver the sharpest blows to the argument in favor of the cash-waqf in the eyes of conservative jurists. Over a span of three decades, Birgevi produced five treatises against the cash-waqf, the most famous of which was "The Sharp Sword for the Inadmissibility of the Movable and Cash Waqfs (*al-*

[400] Çizakça, "Cash Waqfs of Bursa, 1555-1823," 316–17.
[401] Ömer Lûtfi Barkan and Ekrem Hakkı Ayverdi, *İstanbul Vakıfları Tahrîr Defteri: 953 (1546) tâRîhli* (İstanbul: Baha Matbaası, 1970); Çizakça, "Cash Waqfs of Bursa, 1555-1823," 319.
[402] Çizakça, "Cash Waqfs of Bursa, 1555-1823," 319, 325.
[403] Mandaville, "Usurious Piety," 301.

Sayf al-ṣārim fī ʿadam jawāz waqf al-manqūl wa'l-darāhim).[404] In an early treatise, Birgivi presented a scholarly criticism of Ebu's-Su'ud's approach:

> "Waqf is defined as property that has been frozen, cannot be transferred to another. It is clearer than the sun that this definition does not include the cash-waqf. Obviously, property that has been put into a partnership (muḍāraba), used as capital for commerce, or loaned at interest using legal devices (mu'āmala) has been transferred to another. In the established texts, the argument of Zufar, which is connected with its permissibility, is a weak one. Kāḍikhān, for example, gives it in citation thus. There are respectable works that were written to reconcile the differences of opinion among the scholars [on certain problems]; the subject doesn't even come up there. In general, the statement of Zufar in regard to its admissibility is weak. Zufar's student, al-Anṣarī, mentions it; certain persons not entirely devoid of intelligence relate it. But since, of the classical works, neither the Imāms Abū Ḥanīfa, Abī Yūsuf, Muḥammad, nor other masters of the school permit it, clearly they did not accept this aforementioned weak statement. This is why it is not permitted. As for its irrevocability, there is not a single statement to this effect. Zufar says nothing about it. There is nothing in the arguments (of Ebu'l-s-Su'ūd) supporting anything of irrevocability, absolutely nothing. Those who rule and record in favor of irrevocability of awqaf are acting on something about which they know nothing."[405]

In a more moralistic tone from his *al-Sayf al-ṣārim*, the same author lambasts the waqf nāẓirs who take up the cash-waqf as only doing so to fulfill their own greed:

> "most of the waqf administrators are ignorant and do not recognize the pictures [examples?] of usury in the Book; they make profit with loans and sale. Any

[404] Mandaville, "Usurious Piety," 304–5.
[405] Mandaville, "Usurious Piety," 305.

> loan from which profit is made is usurious. Some of them lead a dissolute life, taking interest without even going through the motions of using legally permissible devices to do so. They make waqf of usury and the forbidden, pure and simple, giving it to the administrators who consume the usury. They are in the same position as someone struck mad and frenzied by the devil…"[406]

While the debate continued over the century, the clear winner was Ebu's-Su'ud, considering the support his position received from Sultan Süleymān. The economic prosperity and public services of much of the Rumelian territories were founded on cash-waqfs, and in the fifty years preceding the cash-waqf debate, the registration of cash-waqfs consistently outnumbered conventional ones by a significant margin.[407] Following his fatwā of 1546, Çivizade's "persuaded the Sultan [Süleymān] to abolish them by decree" and the sultan became convinced of Ebu's-Su'ud's private argument that legalizing the cash-waqf would best serve the public interest, and did so in an edict issued in 1548 that reformed the qānūn.[408] C. Imber has argued that Ebu's-Su'ud's objective was that the legalization of such waqfs would allow for their regulation and the restriction of runaway usurers from abusing cash-waqfs that had been in existence for decades.[409] By doing so, Ebu's-Su'ud exercised his legal knowhow as well as displayed his widely recognized political savvy.

The view from jurists in the Bilād al-Shām periphery

[406] Mandaville, "Usurious Piety," 306.
[407] Barkan and Ayverdi, *İstanbul Vakıfları Tahrîr Defteri*, xxx–xxxviii; Reproduced in Mandaville: Mandaville, "Usurious Piety," 291.
[408] Imber, *Ebu' Su'ud*, 144.
[409] Imber, *Ebu' Su'ud*, 145.

What was the reception of the cash-waqf within the periphery of Bilād al-Shām? From a legal point of view, the cash-waqf certainly would have been a point of consternation to many jurists of Bilād al-Shām, since the Shāfi'ī madhhab continued to be numerically dominant well into the second half of the sixteenth century and Shāfi'ī deputy qāḍīs were well represented in courts.[410] For the Shāfi'ī s, the main bone of contention with the cash-waqf, and Ebu's-Su'ud's *Risāla*, would have been on its glossing over of the problem of currency devaluation's interference with the waqf's condition of perpetuity. Ebu's-Su'ud himself acknowledges that the al-Shāfi'īs would find it problematic, and he says of al-Shāfi'ī, "but his analogy is not our [Ḥanafī] analogy; his plea (*ta'līl*) is not our plea" and later hypothesizes that al-Shāfi'ī would have likely allowed for an exception for this waqf's problem on the basis of their own form of juristic preference (*istiḥsān*).[411] Reactions from jurists in Bilād al-Shām, however, on the establishment of the cash-waqf are hard to come by. Perhaps these jurists were evidencing their own kind of "silent-practice" and protecting their academic and judicial positions by not entering into overt critiques of the regime, even though treatises admonishing certain Ottoman-introduced taxes, such as the previously noted marriage-tax (resm-i 'arūs) were written. It may very well have been that the cash-waqf, which had yet to manifest itself in Bilād al-Shām at the time of the controversy, was not significant enough for comment in the sixteenth-century, unlike the marriage tax that was instituted from the very beginning of Ottoman rule. One has to wonder though at the fact that even works on waqfs by leading sixteenth-century Shāfi'ī figures, such as the Egyptian al-Munāwī's (d. 1031/1621) *Taysīr al-wuqūf*, do not analyze or review this debate. This work

[410] Refer to Rafeq's statistical analysis of the breakdown of the Palestinian 'ulamā' over the sixteenth century, reproduced in chapter two.
[411] Mandaville, "Usurious Piety," 299.

does not mention the cash-waqf at all, even though it has sections on what constitutes permissible and impermissible forms of waqfs, the debt-taking and guarantees of waqf nāẓirs and the recourse that creditors could obtain from the assets of waqfs established by debtors.[412]

The view from Damascene jurists becomes clearer much later on, in eighteenth and nineteenth century commentaries, most notably (the Ḥanafī) Ibn ʻĀbdīn's (d. 1252/1836) *Radd al-muḥtār ʻalā al-durr al-mukhtār*, the most famous commentary on al-Ḥaskafī's (d. 1088/1677) *al-Durr al-mukhtār fī sharḥ tanwīr al-abṣār*, which itself was a commentary on the Gazan jurist al-Tumurtāshī's (d. 1004/1596) *Tanwīr al-abṣār wa-jāmiʻ al-biḥār*. Here what one observes is a reinforcement of the official doctrine promulgated by Ebu's-Su'ud. In his section on the prerequisites for the waqfs of movables, Ibn ʻĀbdīn begins by reviewing the popular consensus (*mashhūr*) of jurists on Muḥammad al-Shaybānī's position concerning the permissibility of endowing movables in common use. Regarding the cash-waqf, al-Ḥaṣkafi (as related in Ibn ʻĀbdīn's commentary) first cites the Egyptian Ḥanafī jurist al-Shurunbulālī (d. 1069/1659) who "permitted the waqf of dirhams and dinārs in our day, after its common usage in our days in Bilād al-Rum and other territories, and these were accepted on the basis of Muḥammad's (al-Shaybānī's) ruling on all movables, without needing to refer to the approval of its specific use given by the Imām Zufar" (*falā yaḥtāju ʻala hadhā ilā takhṣīṣ al-qawl bi-jawāz waqfihā bi-madhhab al-imām Zufar*).[413] Then Ibn ʻĀbdīn provides the view of the Palestinian jurist al-Ramlī (d. 1081/1671) who contended that this waqf was contingent only upon the specific ruling (of an issuing qāḍī) on the non-fungibility of money

[412] ʻAbd al-Ra'ūf al-Munāwī, *Taysīr Al-Wuqūf ʻalá Ghawāmiḍ Aḥkām Al-Wuqūf* (Makkah: Maktabat Nizār Muṣṭafá al-Bāz, 1998), 32–35, 322–325.
[413] Muḥammad Amīn Ibn ʻĀbdīn, *Rad Al-Muḥtār ʻalā Al-Durr Al-Mukhtār* (Beirut: Dar al-Fikr, 1992), Vol. 4, 363.

that it is to be endowed, that is that its investment does not result in the asset's depletion.[414] Ibn ʻĀbdīn weighs in on the issue of fungibility by first attesting that this instrument is legally sound, on the basis of Ebu's-Suʻud's fatwās (the "*maʻrūḍāt*"), but then argues that "(the waqf of) money should not be evaluated through (this) asset's quantification. The benefit (of the cash-waqf) is not obtained through the prevention of its depletion, but rather through the means of exchange as a stand-in for (solving the problem of) asset quantification."[415] In supporting his assertion, Ibn ʻĀbdīn refers to a report of al-Anṣārī, a student of Zufar, who stated that in his day money endowed as muḍāraba would be used to purchase goods that would be dedicated to charity (*ṣadaqa*) and then resell them to attain specie again. Ibn ʻĀbdīn argues, by analogy (*qiyās*) that this kind of exchange resolves the question of the cash-waqf's fungibility. Further, he gives an example of other applications for exchange; he suggests that fungibles such as grains can be endowed in a waqf to benefit farmers who would plant such grain, and then retrieve a share from its profits at harvest.[416]

From the point of view of court practice, jurists would certainly have had experience with the common form that such "exchanges" of goods took in registrations of muʻāmalāt from cash-waqfs, even if they were not necessarily widespread in their midst. Al-Bursawī's court manual which would have been found in libraries of the region's qāḍīs, provides a succinct formulary for "what is written for a debt owed to a waqf through a muʻāmala (issued by) its mutawallī":

> "(1) Fulān b. fulān attests that he owes to the waqf of the deceased fulān b. fulān through a muʻāmala issued by his mutawallī, the holder of this record (2) fulān b.

[414] *Naẓar idha hiya mimmā yantafiʻ bihā baqāʼ ʻaynihā*. ibid., Vol. 4, 363.
[415] Ibn ʻĀbdīn, *Rad Al-Muḥtār,* Vol. 4, 365.
[416] Ibn ʻĀbdīn, *Rad Al-Muḥtār,* Vol. 4, 364.

fulān in the amount of three thousand and three hundred silver dirhams in current circulation. (3) Three thousand of this is a loan (qarḍ) and the remainder of the amount (4) consists of the transferred cloth (to the debtor) sold on a deferred basis on this date (to be repaid) until one complete year from it. His (the debtor's) gold bracelet weighing thirty (5) *mithqāls*, and a silver drinking cup worth one hundred dirhams, and his tall blond and blue-eyed Russian slave named Yūsuf b. 'Abd Allah, (6) have all been recorded and received as mortgage by the above-referenced mutawallī with respect to meeting the loan obligation noted above. (7) This legally valid attestation has been duly recorded. Fulān b. Fulān, the silversmith, is present and has given the received above-referenced mortgaged items which have been registered as a legal guarantee. Executed on such and such date.."[417]

3.2 The cash-waqfs of Bilād al-Shām in the second half of the sixteenth century

The cash awqaf of Bilād al-Shām are understudied, although they were important economic institutions in at least three cities during the second half of the sixteenth century: Aleppo, Jerusalem and Damascus. Al-Bursawī's formulary on cash-waqf lending was frequently reproduced in the sijills of these cities and appears often in the Jerusalem sijills. It is useful to review the literature concerning these waqfs prior to delving into examples of their operations and to discuss the key questions that concern their use.

With respect to Jerusalem, the existence of dozens of cash-waqfs in Jerusalem during the sixteenth and seventeenth century has long been known to historians of the city's waqfs, most notably K. al-'Asalī and M. al-Ghawsheh, who edited and published numerous cash-

[417] al-Bursawī, *Biḍā'at Al-Qāḍī*, Fol. 55a.

waqf endowment deeds, found among conventional waqfs of Jerusalem.[418] However, the secondary scholarship on the activities of these waqfs is scant. There are but a few works that tackle their operations from the vantage point of social history; perhaps most exhaustive, although by way of a catalogue, is Yusuf Natshah's study, *Ottoman Jerusalem: The Living City*.[419] Recently, M. al-Arna'aūṭ, who has long written on the topic of the cash-waqf in the Balkans and Anatolia, published an article on Jerusalem's cash-waqfs, and he also has contributed to a comparative discussion of their role in his co-edited study with Mandaville and Sućeska on the spread and reevaluation of the cash-waqf in the Ottoman empire.[420] Al-Arna'aūṭ's estimates that roughly half of the waqfs established in Jerusalem in the first two centuries of Ottoman rule were cash-waqfs.[421] According to his own count, al-Arna'aūṭ identified waqfīyas for 65 cash-waqfs from Jerusalem and asserts that far more cash-waqfs existed in that city than those we know of since not all cash-waqfs were legalized in courts. This is evident from the fact that the sijills record debts issued by cash-waqfs, the founding deeds of which have not survived.[422]

Al-Arna'aūṭ identifies the first cash-waqf founded in Jerusalem as being that of Jerusalem's governor Farrūkh Bey in the amount of 16,000 dirhams in 964/1556, the interest from which was used to pay for ten Qur'ān reciters at Abraham's tomb in Hebron.[423] al-Arna'aūṭ attributes the large number of waqfs established in Jerusalem to the increased

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[418] Kāmil Jamīl al-' Asalī, *Wathā'iq Maqdisīyah tārīkhīyah*, vol. 1 ('Ammān: al-Jāmi'ah al-Urdunīyah, 1983); Muḥammad Hāshim Mūsá Dāwūd Ghūshah, *Al-Awqāf Al-Islāmīyah Fī Al-Quds Al-Sharīf : Dirāsah Tārīkhīyah Muwaththaqah* (Istanbul: IRCICA, Markaz al-Abḥāth lil-Tārīkh wa-al-Funūn wa-al-Thaqāfah al-Islāmīyah bi-Istānbūl, 2009).
[419] Sylvia Auld, Robert Hillenbrand, and Yūsuf Sa'īd Natshah, *Ottoman Jerusalem: The Living City: 1517 - 1917 2. 2.* (London: Altajir World of Islam Trust, 2000).
[420] al-Arna'aūṭ, "Dalālāt Ẓuhūr Waqf Al-Nuqūd Fī Al-Quds Khilāl Al-Ḥukm Al-'Uthmānī"; al-Arna'aūṭ, Mandaville, and Sućeska, *دراسات في وقف النقود*.
[421] al-Arna'aūṭ, "Dalālāt Ẓuhūr Waqf Al-Nuqūd Fī Al-Quds Khilāl Al-Ḥukm Al-'Uthmānī," 41.
[422] al-Arna'aūṭ, "Dalālāt Ẓuhūr Waqf Al-Nuqūd," 41.
[423] al-Arna'aūṭ, "Dalālāt Ẓuhūr Waqf Al-Nuqūd," 40.

prominence that Jerusalem took under the Ottomans as a site of religious patronage, since the heavenly rewards for doing so in this city were many-fold higher than for establishing endowments elsewhere.[424] Of the sixty-five cash-waqfs identified by him, all except for two, instructed their nāẓirs to lend out their capital at specific rates. Five waqfīyat called for lending at 10%, forty-five instructed to lend at 15% and 13 waqfīyat instructed to lend at 20%.[425] With the exception of a few references, Arna'aūṭ does not provide a list of the names or dates of the 65 waqfs he studied. In spite of the clear prominence of these institutions in Jerusalem and their important influence on the city's economic profile during the sixteenth and seventeenth centuries, al-Arna'aūṭ adopts the traditional scholarly narrative used to explain the lack of the cash-waqf's success in Bilād al-Shām, in general terms. He notes that most of the waqfīyat of the Jerusalem cash-waqfs refer that to the juristic disagreement (ikhtilāf) between conservative 'ulamā' and the ruling of the Imām Zufar and describe a legalistic process of rescindment and reinstatement by Jerusalem's qāḍī, to verify and uphold the efficacy of the cash-waqf at its founding.[426] More explicitly, al-Arna'aūṭ argues that despite the large numbers of cash-waqfs established in Jerusalem, local 'ulamā' elites did not establish cash-waqfs, reflecting their antipathy towards this institution.[427] Of the 65 waqfs reviewed, al-Arna'aūṭ observes that the vast majority were founded by Ottoman elites from Bilād al-Rūm (Anatolia or the Balkans). Seven (or roughly 15%) of these were established by Ottoman women elites, who were also Rūmīs, with the exception of one that was founded by a daughter of a local 'ālim whom he names as Fakhr bt. Muhammad al-Jā'ūnī.[428] Following a

[424] al-Arna'aūṭ, Ibid.
[425] al-Arna'aūṭ, "Dalālāt Ẓuhūr Waqf Al-Nuqūd," 43.
[426] al-Arna'aūṭ, Ibid.
[427] al-Arna'aūṭ, "Dalālāt Ẓuhūr Waqf Al-Nuqūd," 45.
[428] al-Arna'aūṭ, Ibid.

line of argument similar to Rafeq's (reviewed in chapter one), al-Arna'aūṭ contends that the number of active cash-waqfs in Jerusalem receded during the eighteenth and nineteenth centuries as a result of its unpopularity with local 'ulamā' and the increase in power of new local political elites (*a'yān*).[429]

With respect to Aleppo, three historians of this trading city's sijills, Masters, Marcus and Wilkins, have all observed that cash-waqfs had an important place and function in Aleppo during the seventeenth and early eighteenth centuries. There are no earlier studies on earlier periods because that city's first complete sijills only commence from the first third of the seventeenth century. For the period 1640 and 1700, Wilkins identified at least 16 cash-waqfs serving different neighborhoods of Aleppo, which were organized by city quarter and mostly endowed with the objective of serving the taxation need of the residents of their respective quarters. In this period, the Ottoman *avariz* (Ar. *'awāriẓ*) taxes were levied on city neighborhoods and much of the lending issued by the cash-waqfs of Aleppo was in the form of communal loans to facilitate the settlement of such taxes. Aleppo's cash-waqfs in the seventeenth century were much like those in large Anatolian cities, most notably Bursa.[430] Wilkins compares his list of waqfs to a list of later waqfs for the years 1751-57 that was tabulated by Marcus for Aleppo and concludes that by the eighteenth century, the number of these waqfs had dropped to seven.[431] He suggests several possibilities, and attributes the decline in numbers of such waqfs to the same factors that Çizakça's argued for in the case of Bursa, namely that the longevity of waqfs was unsustainable without ongoing injections of new capital, and this took place less frequently in latter centuries as other sources of market

[429] al-Arna'aūṭ, Ibid.
[430] Wilkins makes several comparative references to Çizakça's abovementioned study of Bursa's cash-awqāf.
[431] Wilkins, *Forging Urban Solidarities*, 106–8; Marcus, *The Middle East on the Eve of Modernity*, 308–9.

credit became available. Masters also recognized the role of the city's cash-waqfs in supporting poverty alleviation and the city's services.[432] Masters identifies the first cash-waqf that was endowed in the city as that of its governor Aḥmad Mataf in 1597.[433] More recent scholarship on cash-waqfs by M. al-Arna'ūṭ has shown that the roots of this practice began several decades earlier in the mid-sixteenth century, shortly after the legalization of the waqf al-nuqūd by the Ottoman state. Al-Arna'ūṭ has argued, also relying on waqfīya copies derived from seventeenth century sijill records, that a much larger cash-waqf of 30,000 gold dinars was established by Aleppo's governor Muhammad Pasha Dūwākīn in 964/1556.[434] The capital of this waqf was to be invested by his heirs for the creation of various markets and religious institutions in the city. The waqf's deed called for the deployment of its capital in specific terms, as credit to merchants and government officials, at a rate of 10%.[435] This rate, as discussed below, was the official state-sanctioned lending rate for waqfs in the mid-1550s, and would increase to a ribḥ ceiling of 15% later in the century.

Masters also observed that it was generally the case that cash-waqfs in Aleppo in the mid-seventeenth century lent at higher rates than that those set in their founding deeds.[436] Masters reproduced Volney's well-known impressions of the city in this regard, when the latter observed:

> "But nothing is more destructive to Syria, than the shameful and excessive usury customary in that country. When the peasants are in want of money to purchase grain, cattle, etc. they can find none but by mortgaging the whole, or part, of their

[432] Masters, *Origins*, 160–3.
[433] Masters, *Origins*, 162.
[434] Muḥammad M. al-Arnā'ūṭ, *Daur al-waqf fi 'l-muğtama'āt al-islāmīya*, (Bairūt: Dār al-Fikr al-Mu'āṣir, 2000), 71, 77.
[435] Ibid.
[436] Masters, *Origins*, 162.

> future crop, greatly under its value … the most moderate interest is twelve per cent, the usual rate is twenty, and it frequently rises as high as even thirty."[437]

For Volney, writing in the 1780s, given the fact that interest rates in Europe were ridiculously low, less than ten percent in the heyday of late mercantilism, the predominance of lending norms at twenty percent in Syria justifiably made no sense. That said, it is important to consider that Volney's observations could be as readily applied to lending rates in Jerusalem in the second half of the sixteenth century, as I show below. I am not suggesting that the cash-waqfs should be viewed in monolithic terms, since they were responsive to their own market milieu. However, I think it is important to distinguish that these institutions should not be thought of as the "banks" or "financial-institutions" of their day. They were not. In the majority of cases I have reviewed, cash-waqfs were keenly tied to their charitable missions, and operated under (in Jerusalem's case) the strict supervision of the district's chief qāḍī. The fact that interest rates appeared rather static was therefore, I advance, more a condition of these cash-waqfs' requirement to provide a fixed-return to support their required (charitable) expenses than a flexible mission to maximize returns while minimizing risk. As I show below, while the interest rates of loans given out by cash-waqfs could be responsive to the borrower's creditworthiness, and the collateral and guarantors available, their loans could also be completely void of any such distinctions.

Before turning to an investigation of the cash-waqf records, the issue of the cash-waqfs of Damascus should be noted, since I am not aware of any studies that point to their existence. As previously noted, Rafeq and al-Arna'aūṭ presented a general claim that cash-

[437] Masters, *Origins*, 161; Constantine Volney, *Travels through Syria and Egypt in the Years 1783, 1784, and 1785* (London, 1787), Vol. 2, 411-12.

waqfs in Bilād al-Shām were not widely used, and they rely on evidence from mid-17th century juristic literature. My own review of Damascus' first sijill (966/1583), and the only one recorded for the sixteenth century, indicates that at least three cash-waqfs were operating in the city during that year. Their activities are obscured by the greater and more extensive lending activities of the city's merchants and janissaries that are littered throughout this sijill.

Although the majority of cash-waqfs founded in Jerusalem and Aleppo were established by Ottoman military elites, governors and qāḍīs, there were also several in Jerusalem that were founded by Jerusalemite 'Ḥanafī ulamā, such as that of the imām Mūsā al-Dayrī, a scion of the al-Dayrī family in the mid-century which had produced a long line of Mamluk-era qāḍīs in Jerusalem. Several sijill acts relating to his waqf have a bearing on a number of chapters in this study. More interesting is the fact that a significant minority of the larger cash-waqfs had nāẓirs who were Shāfi'ī qāḍīs from well-known Palestinian 'ulamā' families. This finding seems to go against Rafeq's argument concerning the rigid Shāfi'ī' opposition to adoption of the cash-waqf in Bilād al-Shām. Their resistance, at least in the case of sixteenth century Palestine, seems to not have been so firm if my research data is taken as indicating norms. It was not the mere presence of Shāfi'ī qāḍīs as nāẓirs of these waqfs, but also the integration of Shāfi'ī contractual norms in the mu'āmalāt registrations of cash-waqfs that made these jurists influential. When debtors registered mortgage liens on their homes or properties as collateral for the loans they took out from these waqfs, debtors frequently insisted on requiring the courts to adjudicate any disputes arising from their loans under Shāfī'ī madhhab rules. Such cases routinely appeared when the recording qāḍī was a Shāfī'ī, but also were registered under Ḥanafī qāḍīs in Jerusalem. This appears to support al-Azem's theoretical argument for inter-madhhab plurality discussed in chapter two.

An important finding that Çizakça elaborated in his review of Bursa's cash-waqfs was that the "trustees borrowed capital from their own endowments and transferred these funds to the financiers (*ṣarrāfs*) of Istanbul with a markup. Consequently, two different rates of interest prevailed in the Ottoman capital market: while the trustees of the cash endowments supplied credit with the relatively low rates to the ṣarrāf, the latter transferred these to the merchants and tax-farmers with a substantial mark up."[438] While I have not carried out a quantitative evaluation of interest rates given to waqf nāẓirs as opposed to others, in the records of Jerusalem's cash-waqfs, I have not found evidence to suggest significant loans were extended to nāẓirs from cash-waqfs that were to be used to relend at higher rates in the market. Jerusalem was of course not Bursa, and the former's small size and focus as a center of religious pilgrimage rather than trade may be the reasons for this. The cash-waqfs of Aleppo, however, may have shared similar characteristics with those of Bursa, and Wilkin's above-mentioned study indicates this, however, the fact that Aleppo's court records only begin in the early seventeenth century precludes any assessment for the sixteenth.

One of the few records of cash-waqfs I have come across from Damascus is indeed that of a mutawallī who takes a very large loan from the cash-waqf of two wealthy artisans, as follows. On 9 Shawwāl 991/October 26 1583, Muḥammad b. 'Abd Allah the Ḥanafī qāḍī presided over, Ḥaydar b. 'Abd Allāh al-Rūmī, the mutawallī of the waqf of the deceased Ilyās Ketkhudā and his brother Iskandar Ketkhudā, issued an attestation (iqrār) that he owed a loan of 412 ½ sulṭānī to this waqf, which was under the supervision of its nāẓir Muṣṭafa Shalabī b. Ḥamza.[439] The record stated that "half of this amount, 206 sulṭānī relates to the loan principal" and that the total amount of 412 ½ was to be repaid in one year's time; the

[438] Çizakça, "Cash Waqfs of Bursa, 1555-1823," 351.
[439] D-1-38-2

record further states that the remaining portion aside from the loan principal, the ribḥ that is, was for an unspecified deferred sale of a commodity purchased by the debtor, the waqf's mutawallī, from the waqf's kātib. The record was registered in the attendance and legal attestation and approval of its nāẓir, Mustafa Shalabī mentioned above. A janissary, Farrūkh b. ʻAbd Allah from the unit of the Blukbāshī Muṣṭafa was in attendance and guaranteed this mutawallī's entire debt. No collateral was mentioned as having been registered for the loan. Given that half of the debt was classified as a previously held principal amount, this seems to have been a rolling-over of a previous debt by the mutawallī. Unfortunately, the record is missing other information that would allow us to determine its exact rate of interest.

As noted in chapter one, the Ottomans instituted ḳānūnnāme regulations that capped market interest rates, referred to euphemistically as muʻāmalāt sharʻīya. Despite efforts to contain the maximum interest rate limit between 10%-15%, extorting moneylenders often pushed lending rates far above 20%. In his study of Christian-Muslim relations in Cyprus in the period 1571-1640, Ronald Jennings observed numerous cases of courts cracking down on corrupt cash-waqf administrators who were lending at rates far higher than the legal limit. Jennings notes, by way of example, that "a mutawallī of a (cash) waqf for repairing roads and bridges in Lekosa was accused of lending money to the poor at 20% or 30% interest, thereby violating the condition of the donor that only 10% interest be charged."[440] The ten percent rate of this Cypriot waqf was not incidental, and rates from the waqf charters of Syrian cash-waqfs likewise refer to prescribed interest rates, in one of two bands, either 10% or 15% per annum.

[440] Ronald Jennings, *Christians and Muslims in Ottoman Cyprus and the Mediterranean world, 1571-1640* (NYU Press, 1992), 45.

Perhaps the most famous cash-waqf of Jerusalem was that of its governor (Amīr al-Umarā') Khudāwardī Bey, also known by his sobriquet, the "wielder of two swords" (Abū Sayfayn). This waqf was incepted as a cash-waqf of 200 sulṭānī (in the form of 8,000 Shāmī paras) on 10 Muḥarram 996/11 December 1587.[441] The founder appointed the Mevlevi Darwish Abd al-Qādir Celebi to be its mutawallī and instructed him to "deal in (its capital) at eleven and a half for every ten (i.e. 15%) for every year using legal stratagems (*bi'l-ḥīla al-shar ʿīya*), and this (rate) is not to be increased or lowered, and not to take ribā; and no loan is to be undertaken without having collateral of a higher value than the loan, or a guarantor." The waqf's profit proceeds for each year, expected to be 30 sulṭānī, were to be spent on salaries of the mutawallī and to three specific dervish musicians (by role), including the player of the nāyy, at the mutawallī's lodge; any remaining money would be used to pay for olive oil fuel to light the lodge and meet its other expenses. This waqf's sijill entry is not labelled a ḥujja, and some information is missing, such as the lack of any reference to the waqf's nāẓir, who presumably would have been the founder.

Within a year of its founding, the Khudāwardī Bey waqf issued over ten loans to a variety of debtors that were recorded in the same sijill, and at some point its founder must have added substantially to its capital, for five months after its founding in Rajab 996/May 1588, this waqf issued a large 400 sulṭānī loan to the four heads of the city's Jewish community at an interest rate of 15% in the form of three rolls of broadcloth worth 60 sulṭānīs.[442] While there was no collateral taken for this loan, the Jews took an oath to "mutually sponsor and guarantee" (*mutakāfilūn mutaḍāminūn*) each other's debts on behalf

[441] J-67-64-2
[442] J-67-222-4

of the whole Jewish community of Jerusalem. The month prior, in Jumādā I 966/April 1588, Khudāwardī Bey's mutawallī had issued a 30 sulṭānī loan to the Amīr Ḥusayn b. Ḥasan, a subaşı who owned a timar, with 4.5 sulṭānī of interest (15%) of interest. This subaşı deposited "two metal shields" with the mutawallī as collateral.[443] In the same month, the waqf also gave an identical loan of 30 sulṭānī with 4.5 sulṭānī interest to a cavalry officer, Qīṭās Celebi b. Pīrī Alāy Bayk who mortgaged a home in Jerusalem as collateral.

Since the influential founder of this waqf was still in office and in Palestine in the waqf's first years, his ongoing control of the waqf must have determined its affairs, at least shortly after its inception when it gave out a huge loan to the Jewish community above. To place things in perspective, that community's annual jizya payments amounted to 84 sulṭānīs at that time, less than one-fourth the size of the loan that the community took out. Notably, Khudāwardī Bey had appointed Jerusalem's Shāfi'ī deputy qāḍī, Muḥammad b. Ḥasan, to serve as his waqf's nāẓir and he appears in most of this waqf's debt registrations including the above two. Another Shāfi'ī deputy qāḍī, Abū'l Hudā, also appears in some records as arranging loans (*mubāshara*) on behalf of the waqf's mutawallī when he was away playing music.[444] Certainly, these records indicate that the Shāfi'ī qāḍīs of Jerusalem were enmeshed in the lending activities of cash-waqfs. It is notable that in many instances, rather than using expensive jūkh (broadcloth), soap, or other commodity as a pass-through for interest, a deferred sale of *Kitāb al-minhāj* of al-Nawawī, the epitome of the Shāfi'ī madhhab, was used instead.

[443] J-67-161-3
[444] J-67-424-3 for example.

A notable feature of the Khudāwardī waqf's loans is that the majority were not taken by military officers or officials, but rather were given to a diverse group of merchants, artisans, senior and junior mendicants, and farmers. We see for instance a relatively small loan to a well-known local merchant, Abū al-Yusr al-Fākhurī, who served as guarantor (as kafīl) on a 11 sulṭānī loan to a petty trader;[445] there was also a 15 sulṭānī loan to Abū Bakr b. Ḥabīb, a butcher from Ṣafad (15% interest) who was guaranteed by his nephew[446]; and a loan of 30.5 sulṭānī to the Khawaja Ahmad b. Abi al-Khayr al-Ṭalāḥī (15% interest) with the mortgage of an olive orchard in the village of ʿAyn Kārim[447].

Significantly, in virtually all cases where loan collateral was registered under a Shāfiʿī deputy qāḍī (as in all the Khudāwardī loans above that include collateral), the assets that are mortgaged are explicitly registered under the rules of the Shāfiʿī madhhab. The mortgage of the olive orchard by the Khawāja al-Ṭalaḥī above was, for example, described in the sijill as a "legal mortgage (taken) under the legal maxim of the (Shāfiʿī) madhhab of Qāḍī Abū'l-Hudā and he has ruled on its legal validity." (*rahnan shar ʿīyyan ʿalā qāʿidat madhhab al-qāḍī Abū'l-Hudā wa ḥakam bi-ṣiḥḥatihi ḥukman shar ʿīyyan*).[448] The rules governing pledges connected to credit sales differ greatly between Ḥanafī and Shāfiʿī madhhabs. Under Ḥanafī fiqh, the ownership and right-of-use (*manfaʿa*) of a mortgaged asset must be completely alienated (*ḥabs*) from the debtor for the duration of the loan. Shāfiʿī fiqh, in contrast, allows for debtors to maintain their right to benefit from the use of their pledged assets (whether it be a home, or an orchard as above) during their loan, and only mortgage their ownership rights. The conservatism of normative Ḥanafī rules on attaching conditional

[445] J-67-315-5
[446] J-67-423-3
[447] J-67-173-7
[448] J-67-173-7

clauses to sale contracts was grounded in the fear that doing so would convolute the essence of the sale contract and pose unnecessary risk (*gharar*) to the counterparties involved.[449] Thus, for creditors, adding right-of-use stipulations to the mu'āmalāt listed in cash-waqf loan undertakings would have likely risked a sale's nullification under a strict Ḥanafī qāḍī.[450] It is not surprising, therefore, to see in the Jerusalem sijills debtors' insistence on the Shāfi'ī position and the proliferation and explication of Shafī'ī contractual norms, even when debt registrations were presided over by Ḥanafī qāḍīs. Ironically, because of this feature, the Ḥanafī inspired cash-waqf may have increased demand for Shāfi'ī jurists to mediate, oversee, and authenticate such transactions in court.

Sijill 67, which covers the 18-month period of 10 May 1587 to 20 December 1588, and in which Khudāwardī's waqf and transactions appear, has records pertaining to 27 cash-waqfs as follows:

Cash-Waqfs Recorded in Jerusalem Sijill # 67						
No.	**Cash-Waqf Name**	**Legal Acts**	**Agg. Loan Value (sult.)**	**Nāẓir**	**Interest Rate (mode)**	**Date Est.**
1	Khawaja Shams al-Din al-'Aynbūsī*	1 lawsuit		founder	15%	
2	Khudāwardī Bey	9 loans	690		15%	996/1588
3	Ḥasan Bāshā	1 loan	12		[FILL]	
4	Jār Allāh Afandī	7 loans	134		15%	

[449] Oussama Arabi, "Contract Stipulations (Shurūṭ) in Islamic Law: The Ottoman Majalla and Ibn Taymiyya," *International Journal of Middle East Studies* 30, no. 1 (February 1998): 34–37.
[450] According to al-Kāsānī, "a stipulation which is of benefit (manfa'a) to the seller or the buyer but which is neither re- quired by the [primary] contract nor appropriate to it nor customary practice, is invalid." (Arabi's translation) Arabi, 37; Abū Bakr al-Kāsānī, *Badā'i' Al-Ṣanā'i' Fī Tartīb Al-Sharā'I'* (Cairo, 1909), Vol. 5, 169.

5	‘Abdī	3 loans	18		20%	
6	Süleymān çelebī	1 loan	57		[FILL]	
7	Muhammad Bayk b. Murād	4 loans, 1 lawsuit	39		[FILL]	
8	Muhammad Bayk Nā’ib of Safad	3 loan				
9	Jamal al-Din Bin Rabi‘*	1 repayment	50		n/a	
10	Mūsā al- Dayrī*	1 repayment			n/a	972/1565
11	Rābi‘a Khātūn	4 loans	55		20%	
12	Nūr Allāh Bin Jamā‘a*	6 loans				
13	Bānū Khātūn	1 loan	100			
14	Ibn al-Mawṣilī	1 repayment	20			Before 972/1565
15	Baymāna Khātūn	22 loans, 1 muḥāsaba, 1 repayment	390		20%	
16	Ṭūrghūd Āghā	4 loans, 1 muḥāsaba, 2 lawsuit against nāẓir	150		15%	
17	Biyālā Ketkhūdā	4 loans	54		20%	
18	al-Qāḍī Sharaf al-Dīn al-‘Asaylī*	6 loans	99		20%	
19	Injībāy Khātūn	3 loans	95		20%	

20	Al-Muftī ‘Umar b. Abī al-Luṭf*	11 loans	130		15%	
21	Muḥammad Aghā al-Ṭawāshī	2 loans	40			
22	al-Usta ‘Alī al-Ḥajār	1 loan	20		20%	
23	Muslih al-Din Afandī	1 loan				
24	Mahmud Bayk	1 loan	66			
25	Yaḥya Bin Shakhātīr*	1 loan	99			
26	Fāṭima Khātūn	1 loan	12		18%	
27	Qāsim al-Anṭākī	7 loans				

* Persons from well-known Jerusalemite families

The above schedule of cash-waqfs from 996/1588 merits three general observations with respect to lending rates, the state’s supervision of cash-waqfs, and the organization of such institutions. First, with respect to interest rates, there does not appear to have been a sophisticated market driven impulse on the part of these waqfs. While they do vary, overall they tend to follow certain rate brackets: 15%, 20% or 30%. These rate brackets show consistency over time. Second, going against the assertion of al-Arna’ūṭ, the above table shows that local notables endowed cash-waqfs in significant numbers (at least in the 1580s), and that these represented about a quarter of all cash-waqfs at the time, 26% (7 of 27). Third, in the above table of 113 legal acts related to cash-waqfs, only four acts concerned litigation brought against debtors by cash-waqf nāẓirs (one of them being a waqf’s own nāẓir); this represents about 3.5% of the loans registered in this sijill (by number). This is an exceedingly small fraction, but, if this sijill is characteristic of others of the late century, then this would imply a very low default rate on such loans. It is also possible - although the sijill record is

the only source we can go by - it might be that defaults did occur more frequently and were either settled out of court. As notable is the fact that only 11% (3 of the 27 cash-waqfs) registered annual financial statements (muḥāsabāt) with the court. There is some evidence (below) that muḥāsabāt were regularly undertaken by waqf managers, but not registered in court, perhaps to avoid the legal fees associated with such registrations (rasm al-muḥāsaba), which was half a sulṭānī in the late 1500s. Additional court and witness fees would surely have also been significant for small waqfs where the annual surplus, after deducting expenses, was sometimes only a few sulṭānīs. The fact that so few cash-waqfs submitted their statements suggests that the state did not mandate the registration of muḥāsabāt. There is no mention in the sijills of any state-supervised procedure for managing these waqfs outside of the court's supervision, so it is difficult to say for certain, but it would seem plausible that the state's supervision of cash-waqfs was loose.

The loans issued by the Baymāna Khātūn waqf and the Khudāwardī waqf do not reflect a concern for maximizing the interest rates that could be obtained, rather they prioritize a consistent rate of return, that is, stability over profit maximization. This is reflected in the tables below containing sample loan data from these three cash-waqfs. The objective certainly appears to have been to ensure that these cash-waqfs were able to deliver on their charitable mission and not operate as "for profit" institutions. Connected to this apparent disinterest in maximizing rates was the general indifference to raising or lowering loan interest-rates to reflect the creditworthiness of debtors who provided very significant collateral and guarantees. These (in general) did not receive a great discount on their interest rates, in spite of the large security they provided. This also supports my observation on the "non-profit" character of the Jerusalem cash-waqfs.

Sample loans issued by the Khudāwārdī Bey Waqf[451]					
Loan Amount	**Interest amount**	**Interest rate**	**Debtor Name**	**Collateral**	**Guarantor**
15 sulṭ.	90 para	15%	Bin Ḥabīb the Butcher	none	nephew
30 sulṭ.	4.5 sulṭ.	15%	Ḥusayn the Ṣubāshī	2 shields	none
30 sulṭ	4.5 sulṭ.	15%	Al-Khawāja Ṭalāḥī	olive orchard	none
400 sulṭ.	60 sulṭ.	15%	Jews of Jerusalem	none	Com. pledge
30 sulṭ.	4.5 sulṭ.	15%	Qīṭās Celebi	mort. a "dār"	none
20 sulṭ.	3 sulṭ.	15%	ʻAlī b. Salīm al-Maṣrī	none	none
Sample loans issued by the Baymānā Khātūn Waqf[452]					
13 sulṭ.	2 sulṭ., 30 para	21%	al-Raʾīs M. Taḥrad[453]	none	nāʾib-nāẓir of waqf guart.
10 sulṭ.	2 sulṭ.	20%	Ahmad b. Ali al-Masrī	none	guarantor
10 sulṭ.	2 sulṭ.	20%	Khalil al-Haram and Hasan al-Dahān	none	Mutual surety
5 sulṭ.	1 sulṭ.	20%	Shaykh Ali	none	none

[451] J-67-424-3, 67-161-3, 173-7, 67-222-4, 67-270-2, 67-424-4
[452] J-67-133-3, 67-177-2, 67-177-3, 67-178-6, 67-177-5, 177-8, 67-256-1, 67-256-2
[453] This debt was a transfer of debts between artisans, recorded as being "the debt transferred from the ūstā ʻUmar al-ṭaqījī (hatmaker?) to the "raʾīs" Muḥammad b. Abī Bakr Taḥrad?

20 sulṭ.	4 sulṭ.	20%	al-Naqīb Ibrāhīm	mortg. of 1/6 share of dār"	none
30 sulṭ.	6 sulṭ.	20%	Muh. al-Sukkari and Yūsuf al-Bayṭār	none	Mutual surety
9 sulṭ.	73 para	20%	Ibrāhīm al-Kardūsh	dār	none
5 sulṭ.	1 sulṭ.	20%	Ḥusayn b. ʻAlī from[454] village of Abū Thawr	none	guarantor
Sample loans issued by Muftī ʻUmar b. Abī al-Luṭf Waqf[455]					
5 sulṭ.	30 para	15%	Muhammad b. Muhiy'l-Din	none	none
30 sulṭ.	4.5 sulṭ.	15%	al-Kh. Mūsā al-Dakri	none	father
20 sulṭ.	3 sulṭ.	15%	Shaykh Abd al-Qadir, deputy-nāẓir of Dome of Rock waqf	none	Two guar.: qāḍī, and mu'adhdhin of al-Aqsa
10 sulṭ.	1.5 sulṭ.	15%	Muṣṭafa b. Jānbāy al-Ghazzī al-Timarī	none	Subaşı
10 sulṭ.	1.5 sulṭ.	15%	Ibrāhīm al-Mahruqi	none	brother
5 sulṭ.	15 para	15%[456]	Shaykh Uthman b. Maḥmūd al-Asʻardī	none	none

[454] This loan is also a transfer of another pre-existing debt to the same waqf.
[455] J-67-144-8, 67-145-1, 67-144-7, 67-144-6, 67-144-4, 67-144-2.
[456] This loan of 5 sulṭānī was for six months yielding 15 para of ribḥ = 7.5% profit, and equivalent to 15% interest when annualized on a simple basis. 40 para = 1 sulṭānī at the time.

With respect to objectives, while many cash-waqfs were created to serve charitable objectives such as the recitation of the Qur'ān, paying for stipends of Sufis in lodges, or feeding the poor, others were created to support the salaries of administrators in Jerusalem's citadel or court. An accounting statement (muḥāsaba) relating to the cash-waqf of Ṭūrghūd Āghā (no. 16 in the above table), shows that his waqf distributed almost all of its profits to pay for the salaries of court employees, including the chief qāḍī, his Ḥanafī and Shāfi'ī deputies, and twelve other people. In this muḥāsaba, income attributed to the Ḥanafī deputy qāḍī Maḥmūd al-Dayrī for his services to the waqf were offset by a mu'āmala that this qāḍī owed to the waqf at the time of the sijill. The sijill states that a separate muḥāsaba was entered into between the waqf's mutawallī and the deputy qāḍī al-Dayrī to account for his loans from the waqf on the same day as the sijill's general muḥāsaba. This muḥāsaba between the deputy qāḍī and the waqf does not appear elsewhere in the sijill; presumably it was never registered. This is significant because it illustrates a common norm - most accounts of cash-waqfs were not registered in court. Notably, of the 27 cash-waqfs that transacted loans in Jerusalem in 996/1588 above, only three had muḥāsabāt recorded in the sijill. This demonstrates that the filing of such accounts with the courts was not mandated. However, as this cash-waqf's unregistered muḥāsaba with the deputy qāḍī demonstrates, while producing muḥāsabāt accounts was a part of cash-waqf operations, their infrequent appearance in the sijills indicates that the submission of these statements to courts was not necessarily a requirement. Whether qāḍīs had a separate procedure for the review and submission of muḥāsabāt to authorities is unclear, since the sijill record is all that remains.

A copy of the founding deed of the al-Dayrī waqf can be found in a sijill entry from 972/1565 which states that his waqf was established "in the amount of 150 sulṭānī" to benefit

"the daughter of his pre-deceased son and her children." Mūsā al-Dayrī was the Imām of the Dome of the Rock sanctuary, and had assigned the nāẓirship of this waqf to his nephew Jamāl al-Dīn Bin Rabī ' who continued to manage his uncle's waqf in 1588, the year during which the transactions of the above table occur.[457] In the numerous records of his activities on behalf of this waqf, Bin Rabī ', who was a well-known merchant, acted judiciously over the years, filing lawsuits against a number of debtors (including other waqfs) who owed money to al-Dayrī's waqf. At 150 sulṭānī, Mūsā al-Dayrī's cash-waqf had a large capital for its day, given the date of its establishment over two decades before the wildly inflationary years of the 1580s and 90s. What is most significant about this waqf is that it was a hybrid between a family waqf and a cash-waqf. My research has not yielded other similar cases for Jerusalem, but I am sure they existed in small numbers. As will be shown in two case studies in chapter five, Ibn Rabī', the nāẓir of al-Dayrī's waqf, imposed a strict accounting of this cash-waqf's lending activities and distributions, and the business activities of al-Dayrī's other waqf, a waqf of a soap factory that was previously owned by Mūsā al-Dayrī and endowed for the benefit of his grandchildren, and lastly, the lending that Ibn Rabī ' managed as executor of al-Dayrī's estate for the former's orphaned grandchildren. Mūsā al-Dayrī was undoubtedly very wealthy and this was not on account of his Imām position at the Dome of the Rock; he was after all listed in the sijills with honorifics that reflect his high position in the al-Dayrī family of 'ulamā notables. Indeed, the Ḥanafī deputy qāḍī of Jerusalem in 966/1588 (sijill 67), Maḥmūd al-Dayrī, appears to have been a relative of Mūsā's.

[457] Bin Rabī' had established his own cash-waqf (no. 9 in table above), although I have not been able to locate its founding deeds in the sijills.

3.3 The role of credit in conventional waqfs

The prevailing relationship between waqfs and debt is not monolithic in the authoritative founding fiqh works of the Ḥanafīs and Shāfi'īs, and there is some divergence. Overall, the madhhabs agree that waqfs cannot be established by debtors or mortgaged assets. However, there is evidence that ordinary waqfs did in fact issue market loans from time to time. What was the normative relationship between debt and conventional awqaf independent of the cash-waqf? Did the cash-waqf spur the normalization of lending by conventional family and charitable waqfs? When did the visible effects of the price-revolution become manifested in Jerusalem and Bilād al-Shām?

Masters observed that "pre-Ottoman institutions [in Aleppo], such as those of the Umayyad Mosque and Sulṭān al-Ghawrī … made extensive loans, especially to villagers, but, apparently following older practice, shied away from declaring whether or not they were charging interest. This would indicate that as far as the waqfs in Aleppo were concerned, two separate traditions coexisted at this time. On the one hand, there was the continuation of a pre-Ottoman waqf institution … which may have considered lending money without interest as a part of their charitable function, and the distinctly Ottoman practice of the cash-waqf."[458] While lending from conventional waqfs before the cash-waqf surely took place, it was likely to have been on an exceptional or irregular basis. The nāẓirs of waqfs under the Shāfi'īs generally required the permission of the waqf's founder (to have been specified in the

[458] Masters, *Origins*, 162–3.; Reinfandt notes that in these large waqf's such as al-Ghawri's, "waqf capital might have served, in not a few cases, as a highly profitable covert 'bank' providing the donor with considerable means of political power in times where money was chronically short." Lucian Reinfandt, "The Administration of Welfare Under the Mamluks," in *Court Cultures in the Muslim World: Seventh to Nineteenth Centuries*, ed. Albrecht Fuess and Peter Hartung (Routledge, 2011), 263.

waqfīya), a qāḍī, or ruler to take on loans for waqfs under their management. While legal, such loans, as al-Munāwī explains in his *Taysīr al-wuqūf* were not looked upon favorably and were usually allowed only in exceptional or pressing circumstances, to meet the capital-improvement needs of a waqf and not its operating expenses.[459] A debt to repair a waqf's building if it was at risk of falling would be acceptable if its own budget could not support such expense. However, a nāẓir would not be allowed to take a loan on the waqf's books to pay the salaries of waqf staff. Al-Munāwī elaborates that what jurists "mean by [allowing a waqf] to take a loan (*iqtirāḍ*) is indebtedness, even if it means taking one out through a deferred (usurious) sale" (*murādihim bi-l'iqtirāḍ al-istidāna wa-law bi-l-sharā' bi-nasī'a*).[460] In fact, al-Munāwī notes that many jurists liken a waqf's debt-seeking nāẓir to the debt-seeking guardian of minors, in which he is only allowed to seek it "in the case of absolute necessity, or the need to travel, and so he indebts him (the minor) as his financial trustee and he produces a deed for it."[461]

Legal treatises on waqfs also generally prohibit their establishment among insolvent debtors. The driving rationale is that debtors would naturally seek to shield their assets behind waqfs, in order to remove them from the reach of courts seeking to use confiscation and other means to redress the rights of creditors. The role of courts, and particularly the inunctions of the state through the qānūn in the Ottoman case, was vital to the protection of the public interest. The fatwās of the Şeyhülislam were issued to chief qāḍīs and distributed with regular edicts that updated qānūn. A qāḍī's failure to act according to such regulations, could therefore jeopardize his position. The Ottoman Şeyhülislam Ebu'l-s-Su'ud, for

[459] al-Munāwī, *Taysīr Al-Wuqūf 'alá Ghawāmiḍ Aḥkām Al-Wuqūf*, 137.
[460] al-Munāwī, *Taysīr Al-Wuqūf,* 138.
[461] al-Munāwī, *Taysīr Al-Wuqūf,* 322.

instance, issued many legal opinions concerning the management of debt and it was clear that these legal opinions were actual supplements to the law or code. The legal opinion in response to the following question put forward to Ebu'l-s-Su'ud, answers the person posing the question. But it also serves as an injunction to any qāḍīs considering going against his ruling :

> "Question: When the debtor Zeyd is in good health, he surreptitiously takes property from his creditors [property here implies borrowed money], and converts all his property to trust for his descendants. Is his trust valid?
>
> Answer: It is neither valid nor irrevocable. Qāḍīs are forbidden to validate and register as trust the amount of a debtor's property that is tied up in the debt."[462]

Some Mamluk jurists had parallel concerns to Ebu's-Su'ud's. Although the Mamluk sultanate did not apply a codified qānūn program, sultanic edicts (*marāsim*) on various matters to qāḍīs were common and such a ban could have been issued by the sultan. However, the legal pluralism of the Mamluk court system would have made such a combination of fatwā-cum-edict unthinkable. It is possible that all four chief qāḍīs could have been compelled to accept a sultan's view and issue a uniform legal opinion, however, adjudication would continue on a distributed basis, with litigants able to choose the qāḍī and school they desired. In this respect, the Mamluk courts were distinct from the Ottoman

[462] Colin Imber, *Ebu's-su'ud: the Islamic legal tradition*, (Stanford, Calif: Stanford University Press, 1997), 142; Paul Horster, *Zur Anwendung des Islamischen Rechts im 16. Jahrhundert*, Bonner orientalische Studien, vol. 10, (Stuttgart: W. Kohlhammer, 1935), 42.

centralized hierarchy and, ostensibly, less effective at handling a uniform application of codes.

In the case of Jerusalem, the cash-waqf does appear to have spurred lending by large family waqfs, although on a on a limited basis. There are instances of nāẓirs issuing loans from their family waqfs and taking on mortgages. However, Jerusalem's sijills in the second half of the century do not show that the lending of conventional waqfs surpassed that of cash-waqfs. As for the four large "public-waqfs," the transactions of which litter the sijills (the Ḥaramayn waqf, the Dome of the Rock waqf, the al-Aqsa mosque sanctuary waqf, and the al-Khalīl waqf), these did not engage in lending to the public. That is not to say they were debt free, however. As the sijills attest, debts were regularly registered against them or for them because of their heavily enmeshed relationship with the administration of the city, its public services and resources (particularly the Hasekī Sultān waqf), and Jerusalem's hinterland economy. I argue that because of the "debt-enmeshment" that these waqfs had between their hinterland revenue sources and the myriad charitable ends they served, they were continuously in a state of debt-giving and indebtedness, and also a regular source for corruption on the part of their nāẓirs. For the Ottoman state, and the Mamluks before them, such large waqfs were like the big-banks of the 2008 financial-crisis; they were "too big to fail" and had to be recapitalized from time to time. It was for these reasons that the supervision of these waqfs was centrally administered directly from the Sublime Porte (al-Bāb al-ʻĀlī), which, however, did not make their management any easier.

The price revolution showed its effects in the last decade of the century, although increased pace of lending was apparent in the century's penultimate decade. This coincided with administrative-tax changes that saw the increased use of avariz taxes and the breakdown

or disuse of the preceding iltizām system along with the diffusion of new groups into the janissary corps', and that classes' increased power. Also evident in the sijills is the transition to two currencies in the last quarter of the century. From around 1576, one begins to see the use of the Safavid silver coin, the Shāhānī, in wide circulation, where eight of these silver coins were used as a standard exchange for one gold sulṭānī coin. Then, in the last five years of the century, one observes a proliferation of the Mediterranean-wide Dutch and Spanish silver currency, the ghurūsh. The role of lending as a mainstay of the janissaries is widely reflected in acts from the first extant sijill of Damascus (sijill no. 1), however, it is less so in the case of Jerusalem, because of the former's role as an administrative and military center.

The above expression, "ten gold coins for eleven gold coins in every year" became the standard phrase for expressing the rate of interest to be earned. It is not clear when or whether this phrase was in regular use before the sixteenth century. However, it was certainly in use before the cash-waqf controversy. During the Ottoman qānūn reforms of 1540, the following modification to the law was made, which reduced the lawful rate of interest to 10% from the earlier rate of 15% of the qānūn of Bayezid II circa 1500: "[Persons] who make [loan] transactions in accordance with the sharī'a shall not be allowed to [take] more than eleven for every ten [pieces of money lent]."[463]

Cash-waqfs of local elites from Bilād al-Shām

The cash-waqf of Khudāwardī b. al-Shaykh Ḥusayn al-Khalwatī was established on 2 Rajab 984/ 25 September 1576 in the large amount of 400 sulṭānīs. The Khalwatī name refers

[463] Uriel Heyd and Victor Louis Ménage, *Studies in old Ottoman criminal law* (Clarendon Press, 1973), 122; Imber, Ebu' Su'ud, 50.

to the Sufi order, family name and lodge in Jerusalem.[464] This waqf should not be confused with the previously mentioned waqf of the former governor Khudāwardī, which was also established in the amount of 400 sulṭānīs. Like other cash-waqfs its profits were dedicated to charitable ends. Namely, these were to provide for the daily wage of 1 akce for each of the four Qur'ān reciters appointed "to read a complete section from the word of God" at a local shrine in the name of the waqf founder. The daily wage was "not eligible to be increased at any time," and would total 1460 akce, or 37 sulṭānī per year.[465] In addition to the cash endowed to this waqf, its founder also endowed his home. The waqf deed specified that any waqf income left after settling its dues (to the above readers) was to be applied to repair of the building endowed in the waqf and would revert, with the qāḍī's approval, to the waqf nāẓir in his lifetime and his male heirs thereafter. Upon the death of the family line, the waqf would transfer to the benefit of the Dome of the Rock waqf. While the waqf deed states that its capital was to be lent at the lawful rate of 10% (eleven for every ten sulṭānī) in legal-lending (al-muʿāmala al-sharʿīya), which was well below the 15% allowed for in Ebu'l-s-Suʿūd's fatwās, it is likely that the waqf actually would have lent at a much higher rate, in line with the market norms of 20%-30% which was the range at which most loans were given at the time of its founding.[466] At 10%, Khudāwardī's waqf's would tentatively have yielded

[464]Khudāwardī b. al-Shaykh Ḥusayn al-Khalwatī appears in a transaction from twenty years earlier, from 22 Rajab 972/ 23 February 1564-5, when he paid 300 *sulṭānī* for a large quantity of soap. Like other 'ulamā' he was heavily involved in the soap and olive oil trade of Jerusalem. J-46-166-6.

[465] Kāmil Jamīl al-' Asalī, *Wathā'iq Maqdisīyah tārīkhīyah*, vol. 2 ('Ammān: Mu'assasat 'Abd al-Ḥamīd Shūmān, 1985), 264–266. J-57-95.

[466] The market rates for loans in this period were somwhat above 20% p.a. A loan recorded a week earlier to the Khudāwardī's waqf's establishment shows two borrowers, a father and son, take a loan of 23 *sulṭānī* with 5 *sulṭānī* of interest - in the form of a sale of a green sash – for one year, an interest rate equivalent to 22%. J-57-94-8; In another loan, recorded just three days prior to the founding of Khudāwardī's waqf, another cash-waqf in Jerusalem, that of "Muṣliḥ al-Dīn the former chief-judge of Damietta" issued a loan of 30 *sulṭānī* with 5.2 *sulṭānī* of attached interest – through sale of a copper bowl. The latter's interest was 21%. J-57-100-2.

revenues of 40 sulṭānī per year, just enough to pay its Qur'ān reciters salaries, but realistically, the waqf would have been generating at least double that amount in revenues, meaning that - If managed prudently - 50%-60% of the cash-waqf's income could revert to the founder in this case.

The preceding discussion of the cash-waqf does not imply that ordinary waqfs did not engage in market lending, or that debts and their impacts on ordinary waqfs were not large. They could be. The practice of waqfs lending money was a commonplace in Syria and Egypt before the sixteenth century, however, it was never viewed independently of a given waqf's cash flows and constraints, which first prioritized the needs of its properties and services. By the arrival of Ottoman rule in the Levant, the institution of waqf was firmly established as the most important legal-economic institution in society and as the most critical agent for urbanization.[467] Economic exchange was therefore an indelible feature of the waqf system and the use of credit facilitated exchanges of various kinds and, in fact, waqfs could not live without credit. However, the lending of regular, as opposed to cash-waqfs, was qualitatively different due to the difference in which the waqf's revenues were produced and distributed. The cash flows of regular waqfs could be locked up in overdue receivables that could mushroom to five years or more. Regular waqfs were less nimble than cash-waqfs and ill-equipped for lending because, simply put, it was not their business. However, there are numerous examples of regular waqfs, engaging in a lending with their capital early in the waqf's life. This is particularly the case with waqfs that were endowed with large sums of

[467] Modern scholarship on the history of waqfs has generally located the zenith of waqf's contribution to urban development in the Ayyubid and mid-Mamluk eras (late twelfth to late fourteenth centuries). From the fifteenth centuries on, one begins to see in the case of Cairo, a crowding out, as new sultanic waqfs are increasingly forced to locate in areas adjacent to the city's *Qasaba* (the main thoroughfare); Sylvie Denoix, "A Mamluk Institution for Urbanization: The Waqf", in *The Cairo Heritage: Essays in Honor of Laila Ali Ebrahim*, ed. Doris Behrens-Abouseif (AUC Press, 2000), 195-196.

money to be invested into income generating properties to fulfill a certain function and an interim investment of these funds could occur. Below are two examples of waqf founding deeds, from two major figures of the Mamluk and Ottoman eras, whom established waqfs in Jerusalem and how fears about debts and mismanagement of their waqfs, at a waqf's inception, were active concerns for such elites.

An Ottoman copy of the founding charter of the madrasa of the Mamluk amīr Tankīz (nā'ib of Damascus from 712-741/1312-1340), which continued to operate in the Ottoman period, shows that parallel concerns were expressed by its founder with respect to the village lands that were endowed for the benefit of this large madrasa.[468] Tankīz extolls his endowment's future administrators to make use of a variety of contractual means to maximize productivity of this land for the waqf, including sharecropping (*mūzāra'a*), labor hire (?) (*mūfālaḥa*), and credit-sale contracts (*mu'āmala*). The administrator has full authority to use the waqf's cash assets to procure "oxen, tools and machinery (*ālāt*), and farm seed (*taqwiyat fallāḥ*)" to accomplish this. However, if making the land productive proves too challenging, the administrator can resort to leasing the waqf's village lands, subject to this lease not being made under one contract, and never let out for a period of more than two years, nor could properties be re-leased before the end of their respective lease periods. Other income-producing properties of the waqf, follow similar rules, such as two bathhouses that are only leasable for maximum periods of one year at a time. The waqfīya further warns future administrators to be vigilant against leasing the waqf's assets "to the bankrupt (*al-muflis*), the delinquent (*al-mutasharrid*), the idle (*al-'āṭil*), or to the itinerant (*al-mutajāwil*)",

[468] The Ottoman copy of Tankiz's Jerusalem madrasa waqf dates from 1020/1611. First published in 'Asalī, Kāmil J., *Wathā'iq Maqdisīyah Tārīkhīyah*, vol. 1, 105-123. Later reproduced in Ghūshah, Muḥammad H. M. D. *Al-awqāf Al-Islāmīyah Fī Al-Quds Al-Sharīf: Dirāsah Tārīkhīyah Muwaththaqah*. Istānbūl: IRCICA, (Markaz al-Abḥāth lil-Tārīkh wa-al-Funūn wa-al-Thaqāfah al-Islāmīyah bi-Istānbūl, 2009).

and under no circumstances should these properties be leased to someone with the intention of re-leasing the property to a person with the above qualities.[469]

The ease with which waqf income could be misappropriated was a key concern for large waqf founders. Lending out waqf proceeds could easily diminish the funds available to meet a waqf's operating and capital improvement expenses, particularly in the case of overdue debts. This was also true of imprudent waqf administrators who would allow for overdue rents to accumulate. Further allowing waqfs to lend as a form of risk-diversification risked transforming charitable waqfs into for profit financial institutions. The waqf endowment charter of the Ottoman admiral Sinān Pāsha's waqf explicitly prohibits any lending from its assets:

> "It has been stipulated that what God almighty and high has provided from rental income and crop yields (paid as rent) should [first] be put towards [paying for] building repairs and improvements (*maṣāliḥ al-marmah wal-ta ʿmīr*) in his most esteemed waqf, while abstaining from (*ghabb*) issuing sharecropping contracts (*muqāṭa ʿāt*) and from writing off the waqf's legal rights to collect tenant rents; (second) the remaining income should be used to pay for the salaries of the waqf's earlier listed employees, and (third) to what follows concerning other expenses…"[470]

[469] ʿAsalī, Kāmil J., *Wathā'iq Maqdisīyah Tārīkhīyah*, vol. 1, 119.
[470] *Wa sharaṭ an yaṣrif mimmā razaqqahū Allah al-malik al-muta ʿāla min al-rai ʿ wal-ghilāl ilā maṣāliḥ al-marmah wal-ta ʿmīr fī awqāfihū al-khatīr, ghabb adā' diyūn al-muqāṭa ʿāt wa īfā' ḥuqūq al-ajarāt, thumma yaṣraf min al-bāqī īla ma marr min al-waẓā'if wa īla ma saya'tī bayānahū min al-maṣārīf.* ʿAsalī, *Wathā'iq Maqdisīyah Tārīkhīyah*

If agricultural revenues were the driving force behind urban waqfs in Bilād al-Shām, and Jerusalem in particular, then it is agricultural credit that ensured the mutual continuity of urban waqfs and their hinterland villages.[471] Credit worked in many forms in this regard. First, the extension of credit from waqfs to peasants for the waqf's agreed share of agricultural production, was critical to peasants in the hinterland economy. Large urban waqfs also extended loans to farmers to pay for labor, equipment and transport involved with the processing, storage and transport of the crops due to them. As importantly, shortfalls in the delivery of grain and olive oil from farmers could be, and often were, converted into debts to the waqfs that they served. These debts could roll over from one year to the next, binding certain villages to those people or institutions holding title to their annual crop yields, in the form of taxes. Of course, such a credit framework could also put at risk the waqf administrator's ability to meet the basic provision of services related to its charitable mission, whether it was a school, mosque, soup kitchen, hospice or other mission. The over-extension of credit by waqfs to villages could result in the exchange (to other waqfs through istibdāl) of weaker producing agricultural properties or their lease to another waqf or investor, and this could generate a loss to the original holding waqf, even leading to its dissolution.

The Ṭāzīya school (madrasa) in Jerusalem presents such a scenario. The Mamluk amīr Ṭāz b. Ṭūghāj built the Ṭāzīya madrasa in 763/1361, is located to the west of the Ḥaram al-Sharīf sanctuary, within the city's walls near the Bab al-Silsila gate. As with

[471] Amy Singer has noted, "The lion's share of the revenues in the Sanjak of Jerusalem supported pious foundations (*vakifs*), most of them local." The arrival of Ottoman rule added new awqāf in the city that also made use of hinterland revenues and maintained the Mamluk waqfs that preceded them; Amy Singer, *Palestinian peasants and Ottoman officials: Rural administration around sixteenth-century Jerusalem*. Cambridge University Press, 1994, 25.

other waqfs, the Ṭāzīya school's nāzir would have been required to submit annual financial statements to the district's qāḍī as well as the state's nāẓir of charitable waqfs (*nāẓir al-nuẓẓār*) in the district. The nāẓir al-nuẓẓār's role was to supervise the continued operations of a district's waqf services, intervene in assisting mutawallīs when waqfs were dilapidated or struggling, and to maintain a general ledger of waqf activities under his supervision.

Under Ottoman rule, the nāẓir al-nuẓẓār's regular reporting to Istanbul about the conditions of the waqfs under his supervision was important for several reasons. First, the timar military land-tenure system, which converted agricultural production from the sultan's lands into military pay, was intertwined in Bilād al-Shām with the agricultural production and supply chains of hinterlands owned or operated by waqfs. That is, the state and private systems of economic production relied on a common distribution system; therefore, the state's knowledge of waqfs productivity under its territory would have been critical for helping it to benchmark its own revenue generating and taxation abilities. Second, the Ottomans levied taxes on market properties. Lastly, the Ottoman state actively borrowed from waqfs from the last quarter of the sixteenth century, and taxed them through their avariz taxes, to bridge shortfalls in its fiscal budgets, in order to pay for their increasingly expensive military campaigns. The state's supervision of waqfs in general would have given it unmatched intelligence about the economic condition of waqfs and which were more suited to support its borrowing needs. However, as I discuss below, the state did also use its long arm of supervision to intervene in arranging financing for waqfs that were at risk of imminent collapse. In doing so, the paternalistic nature of the Ottoman state, as purveyor of justice and social order, could result in positive outcomes with respect to how waqf nāẓirs managed their debts.

In 984/1576, the mutawallī of the Ṭāzīya madrasa submitted a muḥāsaba to Jerusalem's qāḍī for a financial reconciliation explaining how several debts of the waqf had been repaid to the Ṭāzīya madrasa in that year.[472] The sijill entry of this muḥāsaba also requests the qāḍī's approval for the application of the received funds towards a variety of payables related to the madrasa's operations and capital expenditures. The lump-sum nature of a total of 16,112 akce would have been equivalent to roughly 403 sulṭānī at the silver-gold conversion rate of the time, (forty silver akce to the sultan's gold coin - the sijill refers to the currency as the official silver currency, *qit'a fiḍīya sūlaymānīya*, in other words the akce). One must assume, however, that these different types of debts were repaid in a piecemeal fashion earlier on and applied to the madrasa's operating expenses throughout the year. While the sijill purportedly asks for the qāḍī's approval to disbursing the sums cited below towards various expenses, it is probable therefore that most of these expenditures were already settled by the time the issue was brought to court and the sijill functioned simply as a matter of record, to clear the mutawallī of financial liability (barā'at dhimma) for his management of the waqf. The following tables provide a summary of this reconciliation:

[472] Jerusalem Sijill 57, p. 62, 984/1576; 'Asalī, Kāmil J., *Wathā'iq Maqdisīyah Tārīkhīyah: Ma'a Muqaddimah Ḥawla Ba'ḍ Al-Maṣādir Al-Awwalīyah Li-Tārīkh Al-Quds*, 3 vol., (Al-Mu'asasa al-'Arabiya li-l-Dirāsāt w-al-Nashr,1983), vol. 2, 216-217.

Table 1

Repaid Debts – 984/1576	**Amounts**
Payment for grain sold on credit in 980/1572 (*maḥsūl ghilāl*).	10,920 akce
Overdue rents from the waqf's buildings (*musaqaffāt*) for the year 981/1573.	2,160 akce[473]
Repayment of debts waqf extended to peasants (*fi dhimam al-fallāḥin*) working on the waqf's farms during 979/1571.	3,032 akce
Total	**16,112 akce**

[473] The term *musaqaffāt* refers to "roofed buildings" and appears in Mamlūk-era awqāf property descriptions. Income from roofed buildings was typically restricted in waqf deeds for one to three year periods, although in practice, leases could be drawn out for much longer periods and this was widely reported in court records from early seventeenth century Cairo. For Mamluk use of the term, see Layish, Aharon. "Waqfs of Awlād al-Nās in Aleppo in the Late Mamlūk Period as Reflected in a Family Archive." *Journal of the Economic and Social History of the Orient* 51.2 (2008): 319. For Egypt, see Mūhammad 'Afīfī, "Asālīb Al-Intifā' Al-Iqtiṣādī Bī-L-Awqāf Fī Miṣr Fī Al-'aṣr Al-'uthmānī," *Annales Islamologiques*, no. 24 (1988): 104-5, 111-113.

Table 2

Waqf Expenditures– 984/1576	**Amounts**
Salaries to waqf nāzir and mutawallī (together 1,620 akce), 10 senior shaykhs (3,450 akce), and 10 orphans living at the waqf (250 akce)	5,320 akce
Salaries of 3 teachers and 21 Qur'an readers	1,500 akce
Stipends of 16 students	775 akce
Building repairs to the waqf's granary in Safad	2,891 akce
Building repairs to the Ṭāzīya madrasa structure in Jerusalem	2,092 akce
Robes (*kḥīla* ʿ) for the villagers the waqf's farms (120 for the heads, and 400 for the rest)[474]	620 akce
Court fees, nāẓir fees, and taxes	644 akce
Other administrative costs	510 akce
Discretionary reserve amount to be spent by mutawallī as required	1,760 akce
Total	**16,112**

[474] The gifting of clothing to village heads was a custom of waqfs in Palestine. In another *muḥāsaba*, similar to that provided by the Ṭāzīya waqf, the *mutawallī* of the al-Jawharīya Khānqā waqf from Muḥarram 966/December 1587, shows that in that year, the *khānqā* distributed 800 paras worth of robes (*khila* ʿ) to the village-heads of Ṭulkaram (present-day city of Ṭulkaram). It is unclear whether these were actual robes or referred simply to clothing in general. The villagers of Ṭulkaram were also allocated 220 paras of food rations (*mū'annat fallāḥīn*). J- 67-78-1.

While I have not carried out a full review of the other sijills pertaining to this waqf that are in the Jerusalem registers of surrounding years, an educated guess of this waqf's average annual operating budget can be made by extrapolating comparable salary data of pupils and teachers from other Jerusalem waqfs operating at around the same time. Among these was the very large waqf of Hasekī Sultan, Sultan Süleymān's wife, which is referred to as al-'Imāra al-'Āmira in Jerusalem, but there are also a number of large other waqfs established by the Ottoman elite, which include several cash-waqfs.[475]

The daily wages at Hasekī Sultan's soup kitchen in Jerusalem, from the record of this waqf's deed registered in 964/1557, which is a little more than a decade before the debt reconciliation of the above Ṭāzīya madrasa, ranged between two dirhams for manual laborers to eight dirhams per day for each of the kitchen's scribe (*kātib*) and director (shaykh). The endowment also employed a procuring agent (called a "*wakīl kharj*") for a wage of six dirhams per day to procure all the food and other supplies required for the kitchen and bakery's daily production. It is worth noting that the endowment's head chef received a salary of seven dirhams per day, almost as much as the kātib, procuring agent and shaykh (the procurement agent's two assistants received three dirhams each per day).[476]

By way of comparison, a waqf of a very different order, that of Süleymān Pāsha (governor of Jerusalem during year 977/1569), established during the same year as the Tāzīya madrasa, indicates that low-level wages were around one to two akce per day. In the

[475] Some of these have been published earlier by Kamil al-'Asali, and others have been published more recently by Muhammad Hashim Ghawsheh in publications by the Organization for Islamic Countries Research Center for Islamic History, Culture, and Art (IRCICA) in Istanbul. See bibliography.

[476] It is worth noting that the endowment's head chef received a salary of seven dirhams per day, almost as much as the katib, procuring agent and shaykh (the procurement agent's two assistants received three dirhams each per day). al-' Asalī, *Wathā'iq*, 1983, 1:136–37; Between the years 1552 to 1557, this soup kitchen's staff grew from thirty-seven to forty-nine employees making it one of the largest employers in Jerusalem. Singer, *Constructing Ottoman Beneficence*, 55–56.

former waqf, Süleymān Pāsha endowed an elaborately decorated Qur'ān manuscript in 983/1575 to be read daily as a blessing to his family, as well as to the deceased Sultan Süleymān.[477] The waqf deed stipulates that eleven adult and unobjectionable readers (*khālī al-ʻāriḍḍayn wa lā ṣibiyyān*) are to be employed to read the Qur'an in segments at the northern gate of the Dome of the Rock sanctuary after sunrise prayers, completing the entire Qur'an within a period of three days. Each of these Qur'an readers is to receive a daily wage of two akce, and another junior employee (specified by name) is to receive one akce per day for watering plants there between sunset and evening prayers. The waqf's founder assigns both the supervision (*naẓār*) and management (*walāya*) of this waqf to one individual, a shaykh who is the son of a well-known previous mūftī of Jerusalem.[478] The latter receives four akce per day as his remuneration for fulfilling the services of both nāzir and mutawallī. In contrast to the Hasekī Sultan waqf, the wages-levels of Süleymān Pāsha's Qur'ān waqf may appear to be slightly lower, albeit the work is different nature, the Qur'an readers above receiving a wage of two akce per day, in line with the low-level workers of Hasekī Sultan's kitchen. The nāẓir/mutawallī's pay here of four akce per day is also significantly lower than the eight akce or so per day that the director "shaykh" of the Hasekī Sultan kitchen received. However, being a ʻālim notable, the Qur'an waqf's nāẓir/mutawallī surely would have held posts in other waqfs in addition to this low-maintenance post and one also should consider that the Hasekī Sultan kitchen was operating at a generous budget, given its patron. Therefore, the four akce per month was likely a fair arrangement, particularly in view of the fact that the waqf deed calls for the Shaykh's children to inherit his position.

[477] Ghūshah, Muḥammad H. M. D. *Al-awqāf Al-Islāmīyah Fī Al-Quds Al-Sharīf: Dirāsah Tārīkhīyah Muwaththaqah*. Istānbūl: IRCICA, (Markaz al-Abḥāth lil-Tārīkh wa-al-Funūn wa-al-Thaqāfah al-Islāmīyah bi-Istānbūl, 2009), Vol 1, 506.
[478] Ghūshah, *Al-awqāf Al-Islāmīyah*, vol. 1, 507

If we were to apply the above wage scale range (two akce to eight akce per day), the hypothetical budget of the Tāzīya madrasa would be roughly twenty-five to thirty thousand akce per year, which considerably dwarfs the repaid debts of 16,112 akce.[479] The repaid debts thus represent 55% to 65% of the madrasa's annual operating budget. Excluded from this budget are ten "shaykhs" appearing in the sijill who received a combined 3,450 from the debt repayment. These individuals appear to be temporary lecturers, rather than permanent teaching staff. These individuals do not represent their own category in the sijill and their payments appear in the same line item as the payments made to the nāẓir, mutawallī, and orphans who reside at the madrasa. My above estimate also excludes the roughly 5,000 akce of capital expenditures related to the repair of the madrasa itself and its granary in Ṣafad.

The Ṭāzīya madrasa's receipt of overdue debts presents a mixed picture. While the size of the repaid debts (16,112 akce) is very considerable, representing a little over half of the school's annual budget, the portion that was used to settle in-arrears staff costs represents just 7,595 akce, a quarter to a third of the school's operating budget. This is still significant because it means that for every four months of operations, the school was falling behind by one month in paying staff salaries. The mutawallī surely would have relied on other sources of funding (possibly even taking out loans on behalf of the waqf) to fill such gaps. The fact that the subject repaid debts were several years old indicates that this was a systematic problem for this, and probably most other waqfs that depended on revenues from agricultural production. On one hand, weather, disease and a host of other problems affected the ability of

[479] I have calculated this based on the number of people at the madrasa who are presented in the sijill as permanent staff. I have applied the following daily wage rates: twenty-one Qur'an reciters each at two akce per/person/day, three teachers at three akce per/person/day, sixteen students at one akce per/person/day, one mūtawalli at three akce per day, and one nāzir at four akce per/day. The total budget based on this distribution results in an annual expense of twenty-seven thousand akce; factoring a margin for error, I estimate a total of twenty-five to thirty thousand akce.

peasants to pay back their debts. At the other end of the supply chain for grain were market brokers, merchants and tax administrators who sold the grain on behalf of waqfs. Waqfs would sell their grain on a wholesale basis, on credit. While the mutawallīs of often concerned themselves with the production and storage of grain and other agricultural-industrial production, such as olive oil and soap, a chain of market players handled the distribution of a waqf's production, with credit playing a key role in every part of the chain. Thus, it is no surprise to see that the majority of the debts in table 1 (10,920 akce out of 16,112 akce) were debts owed to the waqf for the sale of grain from four years prior. It would be a mistake, however, to claim that the Tāzīya waqf was in dire straits. This waqf's revenues must have been in excess of thirty thousand akce, in nominal terms, in order to support its annual budget that I have estimated at twenty to thirty thousand akce.

The self-assuredness of the Ṭāzīya's mutawallī is evident from the fact that he is able to set aside 1,760 akce in a discretionary reserve under his management, and to commit 2,891 akce and 2,092 akce towards building improvements in Safad and Jerusalem, respectively. It is not clear whether this commitment to renovate the waqf's buildings arose out of a bout of financial prudence and forward thinking on the part of the mutawallī, or because the mutawallī was instructed to do so by the authorities. The sijill points to the fact that such renovations are/will be carried out "in accordance to the [instructions] of the sijill defters of the qāḍīs of Safad and Jerusalem" which may imply the latter view.[480] Either way, the management of debts was never at the sole discretion of a waqf's nāzir or mutawallī, at least in theory. Rather such issues required the oversight and intervention of the courts, via the

[480] *"bi-mawjib defter mawlānā qāḍī Ṣafad … bi mawjib defter mawlānā qāḍī al-qūds al-sharīf*", ʿAsalī, *Wathā'iq,* vol. 2, 217.

direct supervision of qāḍīs, and often under the guidance of the nāẓir al-nuẓẓār. The functioning of charitable waqfs was an issue that concerned the public welfare (maṣlaḥa), and was susceptible to mismanagement and corruption.

A little over three decades later, the Ṭāzīya waqf appears again - in a recently published Qāḍī court register by IRCICA for the year 1023-1024/1623-1624.[481] In a record from this later register, dating Jumādā al-Thānī 1033/April 1624, the Ṭāzīya waqf appears to be in urgent need of repair and in an insolvent state.[482] The mutawallī of the waqf at this time testifies in court that, while he is aware of the school's urgent need of repairs, he cannot do so because of defaulting rents from houses owned by the madrasa.[483] The waqf's reserves are so depleted that it is not able to pay its teachers' salaries. In light of this, the qāḍī appoints the city's chief builder (*mi'mār bāshī*) of Jerusalem to assess the madrasa's building repairs and advise on that which is absolutely needed. The chief-builder finds many parts of the building with leaking roofs and broken floor tiles in urgent need of replacement at a total cost of twenty-four and a half silver ghurūsh (equivalent to roughly 360 akce, at a rate of 15 akce to one ghirsh during this period). In light of the waqf's financial distress, the mutawallī asks the qāḍī if it would be permissible for the waqf to borrow funds for its use and to repay those at a future date when it is able. The qāḍī grants permission to one of the residents of the madrasa, a certain Shaykh Ishāq b. Muhammad al-Qayssī, to issue a loan of twenty-four and a half ghurūsh to the Ṭāzīya waqf (*wa li-yakūn dhālika dayynan shar'īyan li-jihat al-waqf al-mazbūr*), and that this is to be a legal debt owed by the waqf.[484]

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[481] Jerusalem Sijill 107, published in: Bāyi'ah, Ibrāhīm, and Halit Eren. *Sijillāt Maḥkamat Al-Quds Al-Shar'īyah: Sijill Raqm 107*, (2013), 74, 82.
[482] Jerusalem Sijill 107, p. 507.
[483] *Laysa taḥt yadihi li-hādhā al-waqf al-mushār ilayh li-ṣarfahu fī al-'amāra bi-sabab qasr māl taqabbaḍahu min aḥad būyūt a-madrasa al-mazbūra*, Ibid., line 5.
[484] Ibid. line 18.

Here we find that in addition to its use as a school for recitation of the Qur'an and the study of fiqh, having an enrollment of 17 stipend-receiving students of various ages, the madrasa also, at this time, housed ten orphans who are individually named in the sijill. Further, this madrasa also had annual outlays (*ikhrājāt*) of 6757 akce to fund the operation of two nearby mosques that were part of the Ṭāzīya madrasa's assets.[485] These expenses were roughly a third of the waqf's annual revenues and illustrate the importance of countryside debts to the activities of urban waqfs.[486]

Similar to the Ṭāziya madrasa, the collection of revenues in the 1560s for the Hasekī Sultan complex, Jerusalem's "soup-kitchen," from the villages owned by this waqf in outlying areas of Jerusalem, resulted in significant deficits to the waqf's cash flows and impaired its ability to provide food to the poor. Some debts owed by peasants from this waqf's villages had owed collected for many years. The size of the overdue amounts and the reason for their debts is not clear from the sijills, but another source, the Mühimme Defterleri (the "Registers of Important Affairs") at the Turkish national archive contains edicts indicate at least one factor at play was the difficulty that Ottoman authorities faced in accessing and controlling these villages for tax collection. A firman from Muḥarram 972/Aug 1564 to the Beglerbegs and chief qāḍīs of Damascus and Jerusalem complains of several years of overdue debts from numerous villages surrounding Jericho, Ramla and Nablus. It seems that the Ottoman authorities struggled to maintain control over areas outside the immediate vicinity of the large cities. The firman cites that Jericho, "being held in an area held by insurgents, was exchanged for some villages belonging to the khass fiefs of the Begs of Jerusalem and Gaza." Moreover, "The

[485] Jerusalem Sijill 57, p. 62, 984/1576; 'Asalī, *Wathā'iq*, vol. 2, 217.
[486] Ibid.; 'Asalī, *Wathā'iq,* vol. 2, 76.

people of some of these villages rely on the protection of insurgents and do not come to town; thus it has been impossible to collect the waqf's revenue from them. To collect it, six Damascus Janissaries under a boluk-basi and ten men from the garrison of the fortress of Jerusalem were usually employed."[487] Tax collection and rural communal debts to urban waqfs is a primary topic of the following chapter, and as I note below, a number of other factors were behind the widely reported indebtedness of peasants, and subsequent cash-crunch of waqfs during the mid-sixteenth century.

Conclusion

In this chapter, I have shown how the introduction of the cash-waqf in Bilād al-Shām was predicated on the use of a preexisting legal instrument, the mu‘āmala. The fact that the mu‘āmala was a customary legal form in Bilād al-Shām from the Mamluk-era, as I reviewed in chapter two, helped to cement the wide popularity of the cash-waqf and allowed the Ottomans to supervise such endowments within the regulations of Ottoman Law. As such, I contend that the dozens of cash-waqfs that are recorded for Jerusalem, Aleppo, and to a lesser extent Damascus, in the sixteenth century should not be viewed as the imposition of an Ottoman variant of Ḥanafism, or as some scholars have suggested, a foreign Ottoman innovation into the Levant, but as a natural development of preexisting legal norms into a new institutional format. In effect, what I suggest is that the legal and cultural groundwork in Bilād al-Shām was already in place to support the cash-waqf.

I have argued that the popular endowment and use of cash-waqfs in Bilāḍ al-Shām was not demarcated along the lines of madhhab affiliation among local ‘ulamā’ elites. Shāfi‘ī

[487] Uriel Heyd, *Ottoman Documents on Palestine, 1552-1615; a Study of The Firman According to the Mühimme Defteri.* (Oxford: Clarendon Press;, 1960), 143–44.

and Ḥanafī qāḍīs and mutawallīs in Jerusalem routinely supervised cash-waqfs. This is significant on two accounts. First, as I reflected in chapter one, the Shāfi'īs for much, if not all of the sixteenth century, were a demographic majority and managed many of the city's important waqfs. The fact that Shāfi'īs served in this way reflects their integration into the city's Ottoman administrative apparatus and their management of cash-waqfs is notable because this was not a customary institution in Bilād al-Shām. However, the adoption of cash-waqfs by local Ḥanafī elites is not surprising, since Ḥanafism was the state sponsored madhab. The second distinguishing feature is that many loans issued by cash-waqfs were registered, with the explicit stated preference of debtors, under the jurisdiction of a Shāfi'ī qāḍī (or a Ḥanafī qāḍī on the stipulation that the loan and any future adjudication would be carried out on the basis of Shāfi'ī law). I suggest that this was done by debtors to have greater rights to use their mortgaged collateral over the loan term, a practice allowed supported by Shāfi'ī fiqh but quite restricted under Ḥanafī fiqh. Since it was not unusual for debtors to roll-over loans, the continued use of collateral, such as a mortgaged home or orchard, would have been vital. This reflected inter-madhab reliance and supports the idea that non-Ḥanafī madhabs continued to maintain their vitality under Ottoman legal system during the sixteenth century – another continuity of the Mamluk legal system.

That said, I have also showed that there is little evidence to show that the cash-waqfs from Jerusalem for this period served as sophisticated, or even effective, financial institutions (if they can be called that). Rather, I argue that they had far more in common in their management, and of course objectives, with the myriad property waqfs that had preexisted them. In this context, their presence in the region did not really disrupt the Mamluk-era legal norms concerning the endowment and management of waqfs. While some scholars have

posited that financiers in large centers, such as Bursa, used these waqfs to borrow money cheaply and relend it at much higher rates in markets, my findings for Jerusalem do not support this contention. However, as I have noted, Jerusalem should not be compared directly to larger commercial centers, and more work needs to be done on the cash-waqfs of Aleppo and Damascus before drawing any final conclusions on this front.

On the side of conventional waqfs, this chapter has shown that indebtedness, and at times lending, was a necessary part of any waqf's operations. My analysis of the Ṭāzīya waqf has illustrated how debt defaults, from hinterland villages under the waqf, could create cycles of indebtedness for the waqf itself and sometimes paralyze its operations. Rural-urban agricultural exchange was imperfect, and a variety of political and social relations also complicated the issue of rural taxation. Indeed, rural communities could become trapped in group debts to waqfs far removed from them, a topic of my next chapter.

Chapter Four – Mutual Surety

This chapter examines the popular use of guarantorship (*kafāla*) in qāḍī courts to create mutual surety ties that had the effect of placing synthetic corporate liability on groups of people. While corporate personhood and liability have no basis in Islamic law, court practices in the late medieval and early modern Levant indicate the existence of such mutual surety ties among debtors. These were recorded in courts by individuals who pledged to guarantee "their own debts and those of others" (*bi'l-aṣāla wa'l-kafāla*),[488] and to "mutually guarantee and ensure" the debts of others (*mutakāfilūn wa mutaḍāminūn*). While I refer to these corporate liability associations as "mutual surety", other scholars who have observed their use in Levantine courts, have variously labeled them as "mutual-guarantorship," "mutual accountability," and "communal guarantees".[489]

I argue that mutual surety was not simply a legal mechanism for securing the repayment of loans, but rather, that it also served as a coercive instrument that was used by powerful elites and officers of the state, to exert political-economic control over specific groups under their jurisdiction. Such ad hoc legal instruments made the consolidation of elite interests easier to manage. I discuss the uses of mutual surety across three broad organizational categories in this chapter. These mirror sub-groups of society: Jewish urban communities, crafts/trading guild members, and village communities. I examine how tax-farm beneficiaries used mutual surety registrations for loans held by villagers who farmed their lands, the perennial activity of cavalry officers, janissaries, and tax farmers. Merchants

[488] Cohen, "Communal Entities," 79.
[489] Wilkins, *Forging Urban Solidarities*, 103; Peirce, *Morality Tales*, 300; Cohen, "Communal Entities."

and urban notables, but also qāḍīs and governors, actively lent to religious communities and their institutions (Christian and Jewish waqfs) and used mutual surety to apply similar corporate liability for the financing of the *jizya* (poll) and *kharāj* (land) taxes. With respect to guild interests, I examine how mutual surety operated to both strengthen the position of lenders against groups of guild members, as well its use by guild-heads themselves to police the group-wide interests of guild members, a form of intra-group policing.

4.1 Mutual surety: a form of synthetic corporate liability

As with other early Ottoman studies from Aleppo, Bursa and Damascus, the use of mutual surety in courts reveals a flexible legal process where savvy actors could use their knowledge of the law to exert their agency as "consumers" of the law.[490] L. Peirce's study of Aintab illustrates how the practices of qāḍī courts were neither monolithic, nor subservient to local customs, notably in cases where marginalized groups were able to negotiate their interests through legal-cultural constraints.[491] However, as in our own day, the wealthiest and most politically connected figures have relied on circuitous legal devices to advance their interests. Under substantial stress, communal solidarity could sometimes fracture as individuals pushed back against the pressure of participating in mutual surety pledges. Although kafāla is a category of fiqh, it is generally restricted to one individual's obligation to another and cannot be forced upon someone.

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[490] Among others: Elyse Semerdjian, *"Off the Straight Path": Illicit Sex, Law, and Community in Ottoman Aleppo* (Syracuse, N.Y.: Syracuse University Press, 2008); Singer, *Palestinian Peasants and Ottoman Officials*; Peirce, *Morality Tales*; Boğaç A Ergene, *Local Court, Provincial Society, and Justice in the Ottoman Empire: Legal Practice and Dispute Resolution in Çankırı and Kastamonu (1652-1744)* (Leiden; Boston, Mass.: Brill, 2003).

[491] See for example the case study of "Haciye Sabah's Story: a teacher on trial" in: Peirce, *Morality Tales*, 251–75.

In view of this chapter's focus on communal interests, it is useful to define the most commonly used descriptor for community in the sijills: *ṭāi'fa* (pl. *ṭawā'if*/*ṭā'ifāt*). Despite the absence of corporate bodies in fiqh, ṭawā'if operated in much the same way as corporate associations during the sixteenth century, and the state recognized their members as having common interests, whether they were professional, religious, or social (e.g. the Christian community, ṭāi'fat al-naṣāra, or the silversmith guild, ṭāi'fat al-ṣayyāghīn). Even though legal personhood was limited to living people in Islamic law, courts applied the term ṭawā'if to connect individuals with common obligations, often to the state, such as in the case of the organization and collection of taxes. When ṭawā'if was used as a label for a specific professional activity, it carried roughly the same weight as the term "guild" in the European context and continued to be in use till the nineteenth century.[492] For the most part, guilds were also viewed as collectives by their members, each having a community head (or heads), who often carried titles such as shaykh, *ra'īs*, *mutakallim*, or *mutaḥaddith*.[493] Since these mashāyikh also entered into debts, jointly or separately, on behalf of the community, the lines separating private (individual) and "public" (communal) dealings could be contentious. Creditors who sought to demand imprisonment of members of a ṭā'ifa for jointly holding unpaid debts had the right to do so; the documentary record of this goes as far back as the Geniza period.[494] The debt triangle that connected individuals, community, and the state was

[492] Pascal Ghazaleh notes the continued use of the term *ṭāi'fa* to designate guild-equivalent associations well into nineteenth century Ottoman Egypt. Ghazaleh, Pascale, *Masters of the Trade: Crafts and Craftspeople in Cairo, 1750-1850*, vol. 22, 23 (American Univ in Cairo Press, 1999), 15–17.

[493] For instance, the leaders of Jerusalem's Jewish community in the 16th century were referred to in the sijills as "*shaykh/shuyūkh*", but also appear as "*ra'is/ru'asā*" and sometimes as "*mutakallim/mutakallimūn*"; Cohen, Amnon, *Jewish life under Islam: Jerusalem in the sixteenth century*, Harvard University Press (1984), 39. A similar term to the latter was used throughout the Mamluk period to refer to state-appointed supervisors of certain tax-paying communities, particularly groups of traders. Under the Bahri Mamluks, the state-appointed inspector of the Karimi trade held the title of *Mūtaḥaddith*; W.J. Fischel, "The Spice Trade in Mamluk Egypt", JESHO, Vol. 1, no. 2 (April 1958), 167.

[494] These sort of conflicts highlight a long-standing scholarly debate concerning communal organization and solidarity in the pre-modern Near East, with particular reference to the Jews of the Cairo *geniza*. Branching off

a contentious balancing act and compounded debts could lead to social division as much as it could be used to assert communal unity vis-à-vis the courts.[495]

Professional ṭawā'if, the crafts guilds, were required to maintain regular accounts by the courts and could be called to account in the event of financial dispute. A ṭāi'fa head (ra'īs or shaykh) might be summoned to court to attest to outstanding debts owed to his own ṭāi'fa. As an example, in 954/1547, the chief builder of Jerusalem, al-mu'allim Ḥusayn b. Tāmir, was summoned to attest that he held no debts against any member of "ṭāi'fat al-yahūd", except for a 300 silver coin debt owed by that community's head, Ya'qūb b. Falāq.[496] Such attestations were important for both communities since such communities were allowed to manage their own property endowments and inheritance affairs, subject to an administrative approval by the state. It was common for Jerusalem's Jews in the latter half of the century to manage this office (bayt māl al-yahūd), which the local qāḍī auctioned as an annual tax-farm.[497]

I contend that the legal procedure of mutual surety continued to operate with no significant change in the state's use of this method as a legal way to control specific groups, and there is some evidence to suggest that this practice was a carry-over from the Mamluk period.[498] This does not mean that all legal structures and practices remained in constant use,

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from Goitein's contention that the Jewish community functioned as a "state within a state", a number of ideas have also been advanced concerning the role of the individual vis-à-vis his community. For a historiographical review of this debate see: Eve Krakowski and Marina Rustow, "Formula as Content: Medieval Jewish Institutions, the Cairo Geniza, and the New Diplomatics," *Jewish Social Studies* 20, no. no. 2 (Winter 2014): 112-115.

[495] For an example of how this worked in Jerusalem's Jewish community, see: Cohen, "Communal Entities."

[496] J-20-4-2 Cohen, *A World Within*, Vol. 1, 69.

[497] Cohen, *A World Within*, Vol. 1, 127, 152.

[498] This does not mean that all legal structures and practices remained constant. There were major legal innovations during the second half of the century that especially impacted Jerusalem such as the *waqf-al-nuqud*. It is a major topic in chapter four of this dissertation, that which relates to the use of waqfs as vehicles for providing credit. However, group-guarantees appear in the sijills from the 1530s to the end of the sixteenth century without perceivable difference in how they were used as legal arrangements for debts.

or retained the same form. There were major breaks and transformations, as the major legal innovation of the waqf-al-nuqūd represents. However, for mutual surety – as with the case of the mu'āmala - appears to have a long historical arc; it appears in the first surviving Levantine sijills from the 1530s and is also documented in legal deeds from the Ḥaram al-Shārīf archive of the last quarter of the 1300s. The first instance of the customary practice of mutual surety I have been able to locate is from a contract for the lease of an agricultural land published by K. al-Asali from Jerusalem in 799/1394. The part concerning mutual surety has the exact same phrase "mutakāfilūn wa mutaḍāminūn" that is used in the sixteenth through nineteenth centuries. The part of the lease contract concerning mutual surety reads: "the lessees undertake to pay the rent at the end of each year, and the lessees have taken legal custody of the leased property after their review, full consideration and contractual obligation to carry out the lease conditions and have given mutual surety (mutakāfilūn wa mutaḍāminūn) with respect to fulfilling the abovementioned lease."[499]

4.2 Tax farming and the policing of peasant tax debts

During much of the sixteenth century, tax farms in Damascus and Jerusalem were sourced from state owned (Ar. amīrī/ Tr. mīrī) village lands and issued or renewed annually. Tax farming could be very profitable when there were information gaps concerning the value of crop yields, the likelihood of payment, and the cycle between when taxes were collected and when such money was paid to district authorities.[500] Credit was a central part of the

[499] al-' Asalī, *Wathā'iq*, vol. 2, 62-63.
[500] Peirce has shown how such imperfect market information often led the state to carry out periodic audits of tax-collectors in the mid-sixteenth century. Peirce, *Morality Tales*, 276–310; On the process of credit and guarantorship in tax farm purchases: Darling, *Revenue-Raising and Legitimacy*, 146–60.

process, given that tax farm payments were routinely financed. As local specialists, tax collectors had local-specific knowledge and influence that allowed them to trade in, assign and profitably discount the receivables of tax-revenues.[501] The agricultural tax system was thus an extremely complex and shifting web of tax assignments and cross-assignments.

Tax-farming was a principal avenue for acquiring wealth and a seasonal activity which allowed tax farmers to engage in other activities. Tax-farming stemmed from the trickling-down of large tax-farms assigned to military officers which could devolve to a variety of actors. Sipāhis and other military officers regularly assigned their timār allotments to tax farmers when they were deployed in warfare. There was significant crossover between tax-farming and the activities of government appointed tax collectors in that many tax-collectors also invested in the trading of tax-farms. Tax collectors' relationships with qāḍīs, waqf administrators and military officials naturally gave them a first-mover advantage in sourcing and operating attractive tax-farming investments. However, while professional tax collectors were also often involved in tax-farming, a variety of other professional actors, ranging from butchers to money-changers, also took up this activity, both by buying tax farming rights or through fixed-term appointments with salaried remuneration.

Tax collection was managed by district-level administrators (*amīns*) and local police administrators (subaşıs), but its collection on a local level was performed by local tax agents, *ʻāmils*. The latter were often salaried officials, but could also be tax-farmers.[502] ʻĀmil appointments tended to be inherited within certain elite families, perhaps similar to the way that several generations of Copts from select families dominated the tax bureaucracy of

[501] Cohen, *Jewish Life under Islam*, 141.
[502] Bakhīt, *The Ottoman Province of Damascus*, 146.

Mamluk Cairo.[503] Although the majority of the population in and around Jerusalem during the sixteenth century were Muslim, ʻāmil positions were disproportionately occupied by Christians and Jews, but especially the latter. Documenting the trading of tax farms, and the recording of debts related to this trade, took place in court, making the qāḍīs activities central to the regulation of this makeshift marketplace. Although the transfer of tax farms required the consent of a qāḍī, the actual transfer of these tax obligations was through a simple legal assignment (wakāla). The Jerusalem sijills illustrate that tax farmers regularly assigned their rights to relatives, business partners, or even to those to whom they owed debts, as in-kind settlement of obligations (discussed below). Technically speaking, when Ottoman military officers faced unpaid taxes, they could bring claims directly against individual tax debtors (the peasants) in court. However, this rarely, if ever, happened. The cost of doing so far outstripped the reward in most cases. For these reasons, tax-farming was the domain of a well-informed clique of local tax-collectors, qāḍīs, and administrators who formed the connective bureaucratic strand between the town and country. In Amy Singer's words, this relationship "rested on a triangular balance between the military-bureaucratic officials of the sanjak bey's staff, the kadi as judge of all and sundry matters for arbitration, and the peasants who produced food and agricultural revenues." [504]

When disputes with local authorities arose, the Jewish community appears to have skillfully defended its claims at the highest levels. The community succeeded in obtaining several royal decrees in response to their various appeals to Sultan Süleymān I, for instance. Several important fatwās in their favor were issued from the highest-ranking qāḍī of the land

[503] Febe Armanios, *Coptic Christianity in Ottoman Egypt* (New York: Oxford University Press, 2011), 27–28; Mūhammad ʻAfīfī, *Al-aqbāṭ fī Miṣr fī al-ʻaṣr al-ʻuthmānī* (Cairo: Al-Hayʾaẗ al-miṣriyyaẗ al-ʻāmmaẗ li-l-kitāb, 1992).
[504] Singer, *Palestinian Peasants and Ottoman Officials*, 24 and 28-31.

Şeyhülislam Ebu's-Su'ud. Copies of Ottoman royal decrees recorded in the sijills portray a sympathetic position from the sultan's court towards Jerusalem's Jewish community. For instance, in the middle of 963/1556, a Sultanic decree was addressed to the governor and qāḍī of Jerusalem that ordered an inquiry be made to investigate allegations by the Jewish community that the jizya tax being levied on them was higher than what was "prescribed by the sharia or actually authorized by the tax registers."[505] And, in another decree from 967/1560, we find the sultan ordering both the local governor and qāḍī to intervene and prevent harassment by the mutawallī of a Jerusalem endowment who was trying to raise the rent on a long-term lease of land to the Jews that was used as a cemetery – who threatened to disinter their dead if they rejected the new rent.[506]

However, it would be a mistake to interpret this partisanship as simply a sign of Sultan Süleymān's much lauded just rule imposed on corrupt local officials. As Singer illustrated in her study on peasants and administrators in rural Palestine, the sultan and the local administrators were at this time in a "tug-of-war" over local revenues. Like the Jewish community's above described petitions, the peasants of sixteenth century Palestine were active in "defending the routines established by the sultan and their own custom … a tacit alliance of purpose against the officials existed between the sultan and the peasants."[507] Interests of bureaucrats in the center were not necessarily in line with those of bureaucrats at the periphery, and it is useful, in my view, to view social-economic relations as carrying over from Mamluk-era tax customs and market procedures up to at least the mid-sixteenth century. The different and sometimes conflicting interests of regional military officials, qadis

[505] J-32-164-1
[506] J-34-91
[507] Singer, *Palestinian Peasants and Ottoman Officials*, 121.

and other ‘ulamā’ who served as administrators, and the central bureaucracy were susceptible to factionalization. At times, local rebellions and power sharing arrangements resembled those that the Mamluks engaged in with bedouin tribes and rebellious urban militias in Bilād al-Shām. Thus, it would be more profitable to view some of the disputes discussed below through the framework of the Jewish community’s navigation of factions in order to maximize control over social resources, rather than through the binary of local corruption versus central justice.

Singer has also posited that the debts of Palestinian villages were usually backed by guarantees from their village heads: “Basically, the village leader was a guarantor, a kafīl, for the rest of the village population … as a guarantor in the village, the ra’īs was liable for the payments and fines owing from ‘his group.’”[508] Moreover, Singer has illustrated how village leaders around Bethlehem in the 1560s could consolidate their interests and enter into “mutual guarantees” for debts.[509] As with debts owed to Jerusalem’s public and family waqfs, peasants who farmed the sultan’s lands, often faced indebtedness for not paying their tax or sharecropping dues; during the middle of the sixteenth century, this was often a product of labor shortages and widely reported peasant mobility.[510] The frequent records of debt defaults and imprisonment (i‘tiqāl) of peasants in the sijills from the late 1550s and early 1560s, a period of demographic expansion, suggest that administrators of Jerusalem’s major waqfs, as well as those of the sultan’s lands, were challenged when it came to policing the mobility of

[508] Singer, *Palestinian Peasants and Ottoman Officials*, 42.
[509] Singer, *Palestinian Peasants and Ottoman Officials*, 42–43.
[510] It was not uncommon with the demographic expansion in the mid-sixteenth century, to observe peasants being forced by the sultan’s ṣūbāshīs to obtain financial guarantors (sing. *kafīl*) for potential debts related to *mīrī* lands they farmed, see for instance J-46-194-4 and J-46-195-2, when the ṣūbāshī appointed by the state forced a number of villagers to obtain guarantors for their debts. In another case, from Ramaḍān 972/April 1565, the *nāẓir* of the Ḥaramayn waqf forces a periodically defaulting peasant from the village of Bayt Saqāyāh to obtain a guarantor to “ensure that he would not leave the village” and “distance himself from evil acts.” J-46-233-3.

peasants between villages and to urban centers. Farm labor during this period was in short supply, despite (or perhaps because of) the overall demographic-economic growth, destined for urban centers. This phenomenon is best illustrated in a sijill from Jerusalem in Rabī II 927/November 1564, when the village heads of the village of Burqā, on the outskirts of Nablus, appeared in Jerusalem's court to settle their tax debts of eight years to the former governor of Damascus, the Amīr Farrūkh Bāshā.[511] In addition to the mutual surety oath that these village mashāyikh took, they also promised to "abide by the law in farming their own land and to abstain from farming the lands of others."[512]

While the ḳānūnnāme of Jerusalem treated peasants' abandonment of their lands as a crime, there was a ten-year statute of limitations on this law. However, this did not prevent tax-farmers and political administrators from filing cases against peasants who had long abandoned their land, as a way to return them to their land in order to cultivate it.[513] It was not uncommon for tax-farmers, often military elites, to seek out and imprison people who had abandoned their villages many years prior, sometimes decades after some individuals had left their ancestral communities. This kind of policing apparently worsened towards the end of the century. Rafeq examined numerous records from Bilād al-Shām in the last quarter of the century and found that political turmoil was creating havoc in rural communities as sipāhis levied excessive arbitrary taxation such as the "rasm al-ra'īya" that was used to "indemnify them (sipāhis) for the money they paid to the government in lieu of military service (*māl al-badal*)."[514] While such taxes were less prevalent earlier on in the century,

[511] J-46-62-3
[512] J-46-62-4
[513] Singer, *Palestinian Peasants and Ottoman Officials*, 99–101.
[514] Rafeq, "The Syrian 'Ulamā,'" 23; Abdul Karim Rafeq, "Al-Fi'āt Al-Ijtimā'Iyya Wa-Milkiyyāt Al-Arḍ Fī Bilād Al-Shām Fi'l-Rub' Al-Akhīr Min Al-Qarn Al-Sādis 'Ashar," *Dirāsāt Tārīkhiyya*, no. 35–36 (June 1990): 111–44.

rural mobility from the mid-century made the fulfillment of this tax even more onerous on villagers, leading to a stress on the availability of agricultural labor.

While peasants from Palestinian villages were routinely brought to court and imprisoned for tax debts in mid-century, subaşıs, sipahis and other officials also were widely reported, from villager complaints in the sijills, to have pursued extrajudicial violent punishments against villagers for debts. The courts, though integrally involved, did not have complete control over tax collection, as Singer observed in a case that characteristic of the policing of rural taxation from the late 1550s: "the villagers of ʻAjjūl owed two years' taxes to Mami sipahī, the tımār holder of nearby ʻAṭṭara where they also cultivated some land. The villagers refused to pay Mami the outstanding sum. Two officials were then sent who read a letter to these villagers commanding that they come before the kadi. When they again refused, the kadi requested that ʻAli bey, tımār holder of ʻAjjūl, bring them in. ʻAli answered that 'he was unable to produce them, for they were rebellious and persistently fractious' (*mutamarridīn wa-mustamirrīn ʻala-'l-ʻiṣyān*). The matter was thus recorded, to be passed on to a higher authority, presumably, the beylerbeyi of Damascus or the sultan."[515] Entangling peasants in mutual surety obligations was, therefore, useless when villagers were recalcitrant and resisted together.

That said, the sijills also contain many acts of the imprisonment of individual peasants, who were not village leaders or heads, for defaulting on their individual tax debts to holders of tax-farms or waqf administrators. In such cases, the sijills don't usually give the back story for the peasant's debt, but simply list the peasants' name, the accusation made against him, his admission of guilt, and invariably his imprisonment. At other times, peasants

[515] Singer, *Palestinian Peasants and Ottoman Officials*, 104; J-40-9.

were jailed for owing agricultural production that had recently converted to debt, such as when two villagers, ʻAlī Abī Jābir and Salam b. Ḥaydar from the village of Ṣūrbāhir were jailed after their reconciliation of accounts with a certain Shaykh Luqmān b. al-Shaykh ʻUmar left them owing him 10 *mudd* of wheat.[516] In another, a farmer named Nāṣir b. Sulaymān from the village of Jālūd was jailed for owing 3 gharāra of wheat to the al-Khalīl (Hebron) waqf.[517] Numerous other cases of imprisonment of individual farmers involved debts similar debts owed to the Dome of the Rock waqf, the Nabī Dāwūd waqf, and the Ḥaramayn waqf in Jerusalem.[518] These cases were pressed by the administrators and other officers of large public waqfs and the peasants involved in these cases do not hold any honorific, titles (shaykh/raʻīs etc.), apparently as punitive measures that were intended to set an example. Similar portrayals are frequent in sijills 45 and 46, for the period 971-3/1563-5, and peasants were also detained in the city's prison for debts owed to merchants, even for relatively small debts of a few sulṭānī. This may reflect a period of stricter law enforcement, partly motivated by the local Ottoman authority's concern with policing the rural population.[519]

For Jerusalem, it is striking that the decades which appear to have had the greatest policing of peasant debts and imprisonment, were the 1550s and 60s, several decades before the financial hyperinflation and political instability of the late 1580s and 90s set in. The fact that peasant debts to waqfs in the mid-century could accumulate for three, five or more years was not unusual; the case of the medium-term village debts of the Ṭāzīya waqf reviewed in chapter three is normative in this regard. Yet even in the middle decades, the inflationary

[516] J-46-33-3
[517] J-46-62-1
[518] J-46-64-2, J-46-231-7, J-46-120-2, 46-176-5
[519] J-46-21-2 and J-46-22-6

period was taking its toll, not only in increases in prices of goods, but also rents. Peasants who paid fixed rents on land, rather than shared in its revenues, as had happened to the peasants farming the Ṭāzīya waqf's lands in these years, who were forced to enter into higher rental contracts, for instance.[520]

As Singer's example of rebellious peasants from the village of ʻAjjūl demonstrates above, peasants were far from powerless. Other than recalcitrance, peasants were also successful in negotiating their claims, obtaining surety from relatives or other members of their village, and contesting claims put against them in courts and winning. Sometimes, the best course of action for peasant debt defaults was to attempt amicable settlement and the very registers that are littered with debt cases and imprisonment charges against peasants also contain a significant minority of settlement registrations entered into between waqf managers, tax-farmers, and peasants. Settlements seem to have been especially attractive for administrators of family waqfs and the farmers on their lands.[521] Settlement was not the position ordinarily taken up by the amīns, whether with peasants or even the beneficiaries of waqf lands that were partly shared with the state. However, when faced with rigid administrators, beneficiaries and peasants could rely on petitioning their cases to the Imperial Council in Istanbul (the Dīvān-i Hümāyūn) and request the sultan's intercession. A record that demonstrates how land tax increases worked in such instances appears in an official decree from this period that was issued by the Dīvān-i Hümāyūn to the Governor (Beglerbeg) and Treasurer (Defterdār) of Damascus, concerning a village in Gaza, on 23 Jumādā II 976/13 December 1568:

[520] J-46-178-1
[521] J-46-110-2

"Maḥmūd, who formerly was Qāḍī of Majdal, has sent a letter to My Threshold of Felicity and has reported that one fourth of [the land of] the village named Majdal in the sanjak of Gaza is a waqf of the Two Noble Sanctuaries (*ḥaramayn-i serifeyn*) and three quarters of it are waqf [for the benefit] of the descendants [of its founder] (*vakf-i zurriyet*). The tithe ('ushr) on the [land of the] waqf of the descendants has been recorded in the new [Cadastral Register as a fixed sum (maktu') of 3,750 aspers. At present, it belongs to the hass-fiefs of the Beg of Gaza. The said sanjak-beg [as if?] there were no fixed sum, takes 20,000 aspers, [thereby] committing [an act of] inequity. When thereupon the inhabitants of the village came with a noble firman to the court they read the noble firman in the presence of the sanjak-beg. When it was said that he should not take anything beyond the fixed sum of money, the said sanjak-beg was not restrained. The inhabitants of the village and the beneficiaries of the waqf (*aṣḥāb-I vakf*) complained of oppression and said, 'If the fixed sum mentioned above were seized for the imperial domains and its equivalent granted to the above-mentioned sanjak-beg from the vacant (*dusen*) [fiefs], [this] would be most beneficial to the poor [villagers] and the Public Revenue.' I have therefore commanded that when [this firman] arrives you shall henceforth seize the fixed sum mentioned above for the [imperial domains], grant the sanjak-beg its equivalent from the vacant [fiefs], and give [him] a certificate (*tezkire*) for it."[522]

[522] Heyd, *Ottoman Documents on Palestine, 1552-1615; a Study of The Firman According to the Mühimme Defteri.*, Document #93, 145-6.

The above edict demonstrates how waqf beneficiaries appealed to the state by framing their interests under the pretext that raising taxation, when unjustified, had deleterious consequences on farmers. The striking, and unexplained, difference between this village's fixed-maqtū' tax of 3,750 akce and the cadastral survey levy of 20,000 akce was surely not due to market differences and suggests a sharp shift in taxation strategy in the region. Although from much later on, in Rabi II 1013/Sept 1604, another firman sent to the Beglerbeg of Safad ordered him to return to imposing the customary tax on the villagers of the northern Palestinian village of Tiberias (it is not clear what that custom was), because the imposition of a lump-sum (*qasm*) tax (synonmyous to maqtū') has "caused the peasants of the said waqf to scatter."[523] Irrespective of the seemingly opposite particulars of the case, the taxation directives of the center played a determining role in easing the debt pressure on peasant communities, serving as a release valve to the pressure applied by the local judiciary and political administration in generating the required tax revenues, also dictated from the center.

4.3 Mutual surety among Jerusalem's Jewish community

The Jews of Jerusalem were well integrated into the city's bureaucratic and market institutions and, save for Ottoman military or legal posts, the opportunities available to them were not markedly different than those for other subjects in Bilād al-Shām or Egypt. In the Jerusalem sijills they are represented in a variety of professions, as craftsmen, butchers, tax collectors (sing. ʿāmil), doctors and money changers. With respect to Egypt, as a comparative

[523] Heyd, *Ottoman Documents,* #92, 144-5.

benchmark, sharia court registers from the sixteenth century point to a confluence of economic and social interests that brought Copts, Jews and Muslims together. In Cairene marketplaces, traders and artisans from all three faiths shared membership in commercial partnerships, loan syndicates, and guild associations. Market traders were organized according to commercial activity or artisanal craft, rather than by religious affiliation; consequently, traders and artisans of different confessional backgrounds were often storefront neighbors and shared warehouses and workshops.[524] Shared market interests could also lead to price-fixing and monopolies. For instance, commodities wholesalers could squeeze the margins of retailers by engaging in prohibitive credit restrictions for the latter when such wholesalers wished to raise market prices.[525]

A suitable point of departure for examining the role of mutual surety in this community is by looking at the activities of Jewish tax farmers in Jerusalem. The activities of Jews in this sector were more apparent in the first half of the century, than the second. This may be attributed to the financial difficulties the community witnessed towards the end of the century.[526] Two Jewish tax collectors of significance in the 1530s and 1540s were the brothers Bayram and Yūsuf Shūʿā, who held several "senior āmil positions into the early 1550s in Jerusalem and Gaza".[527] These brothers dealt with such large amounts of taxes that they needed to obtain guarantors (kafāla) before carrying out their activities.[528] There are several examples below of Jews who traded in tax farms of villages in the districts of Gaza

[524] ʿAfīfī, *al-Aqbāṭ*, 172–77.
[525] ʿAfīfī, *al-Aqbāṭ*, 180; for comparable documentary evidence from Jerusalem, an inventory of the al-Aqsa Mosque endowment's leases of shops for the year 1003AH/1595CE in various markets of the city shows many Muslim, Jewish, and Christian names listed in the same markets without segregation, as tenants. J-77-565-569.
[526] Cohen, *Jewish Life under Islam*, 141.
[527] Cohen, *Jewish Life under Islam*, 142–45.
[528] Ibid.

and Jerusalem. Jews were also employed as tax collectors to collect taxes from Christians, specifically, in the district of Jerusalem, while Christians were not generally engaged to collect taxes from Jews. It is noteworthy, that hardly any Jews resided in Jerusalem's hinterland during mid-century.[529]

The seeking out of guarantors for tax-farming was a regular practice, irrespective of the religion to which a tax collector belonged, and a critical legal instrument in the tax-farming system. Linda Darling has shown that the state maintained high concern for the effectiveness and reliability of tax collectors during this period, as the military's entire fiscal order rested on the effectiveness of guarantors who guaranteed the ability of tax farmers to meet their commitments. This was the case whether guarantors were employed by the state or had purchased tax farm rights. Guarantors were carefully vetted and sijills regularly provided descriptions of a given guarantor's reputation and abilities, using a hierarchy of terms to denote a guarantor who was "*maldar* (wealthy), *mal edasina kadir* (able to pay the money), *yarar* (capable), *makbul* (well-esteemed).[530] However, despite such precautions defaults were inevitably a part of the process. In what follows, I will examine a case which illustrates how one 'āmil's default could implicate other members of a community of guarantors (all Jewish), even after the death of the former 'āmil.

Although he was not a merchant, Yūsuf b. Shū'a (active between 945-959/1538-1551) once held the honorific *khawāja*, a sign of his influence in powerful circles.[531] Although he was a 'āmil, a subordinate of the district amīn, Yūsuf b. Shū'a had a great deal

[529] The taḥrīr registers of 952/1545 and 967/1560 do not record any Jewish households in villages within the vicinity of Jerusalem, indicating an exclusively urban Jewish population at the time. Singer, *Palestinian Peasants and Ottoman Officials*, 31.
[530] Darling, *Revenue-Raising and Legitimacy*, 155.
[531] Cohen, *Jewish Life under Islam*, 145.

of control over the organization and administration of the tax collection that took place under his watch, involving the management of several accountants (*mustawfīs*), kātibs and crop-yield assessors (*ʿulūfjis*).[532] A number of sijills reflect that Shūʿa's dealings were very large, in the tens, and sometimes hundreds, of sulṭānīs. His transactions often involved high-ranking officials such as amīns, subaşıs, and governors.[533] Although his work as an ʿāmil, stretches back to the 1530s, this appears to have come to an end when he entered into a mutual surety arrangement with two other Jews supporting the debts of another (recently deceased) Jewish ʿāmil, named Ibrāhīm Tarānā, who collected taxes for the amīn of Gaza. The son of Ibrāhīm Tarānā, Yūsuf, who also worked as a kātib in the field of tax collection in Gaza, was implicated in 959/1552, in a case of unpaid debts that his father owed to his employer, ʿAlī Bey, the amīn of Gaza and Jerusalem (*amīn ḥawāṣil al-quds al-sharīf wa ghazza*).[534] When the case was raised in Jerusalem, the qāḍī there reviewed a deed in which the son was listed as a guarantor (kafīl) for his father, and determined this document to be valid, in spite of Yūsuf Tarānā's insistence that the deed was a misprint and he had served as his father's agent (wakīl) rather than a kafīl. [535]

This case was filed in Jerusalem's court, rather than Gaza's, presumably because of the amīn's knowledge of Tarānā's affiliation and guarantees with Jerusalem's Jews; Gaza had its own court (majlis al-sharʿ) and was a separate tax district (*liwā'*, Tr. *sanjak*) with its own local tax administration.[536] ʿAlī Bey rightly assumed that Yūsuf b. Ibrāhīm Tarānā's

[532] For descriptions of some of these administrative positions see: Darling, *Revenue-Raising and Legitimacy*, 67–75; Cohen, *Jewish Life under Islam*, 144.
[533] Cohen, *Jewish Life under Islam*, 145. In an attestation from Ramadan 948/1541, Yūsif b. Shūʿa acknowledges a debt of 6,800 *ūthmāni* (approximately 140 dinars) to the qādī of Ramla, J-Sij 14-120b.
[534] J-27-65-3
[535] J--25-287-2
[536] Lewis and Cohen, *Population and Revenue in the Towns of Palestine in the Sixteenth Century*, 12–13.

links to Jews in Jerusalem would help him settle his father's dues. The case's appearance in Jerusalem may also imply that 'Alī Bey had no luck in retrieving the funds from Ibrāhīm Tarānā's original kafīls in Gaza, because 'Alī Bey presented a copy of Yūsuf b. Ibrāhīm Tarānā's pledge that was issued in Gaza. The filing of cases outside one's jurisdiction in Palestine was not uncommon, so much so that it raised concern among the Ottoman central authorities. In the very same year as the case discussed here (959/1552), a royal order was issued from Istanbul to all qāḍīs of the empire explicitly prohibiting them from hearing cases brought to them from outside their jurisdiction (*man' qiyām al-quḍā' min al-naẓar fī al-da'āwī khārij ḥudūd aqḍīyatihim*).[537] Without a doubt, the proliferation of such cases diminished the central state's control over taxation and could immeasurably complicate the state's oversight.

On 7 Rabi al-Awwal 959/3 March 1552, the qāḍī decided to jail Yūsuf b. Ibrāhīm Tarānā at the citadel of Jerusalem until the matter could be further investigated by the regional tax department in Damascus.[538] After spending a little under two months there in jail, on 27 Rabī' al-Thānī /21 April, three Jerusalemite Jews, Yūsuf b. Shū'ā, the prominent 'āmil mentioned above, Yūsuf b. Ibrāhīm, a wealthy physician in Jerusalem and a third lesser known Jew come to Yūsuf b. Ibrāhīm Tarānā's rescue, each individually pledging to repay Ibrāhīm Tarānā's debts. Of importance here is that their personal guarantees were recorded on an individual basis and did not contain any references to a mutual surety of any sort. Rather, as becomes evident in a later sijill, they each guaranteed a specific portion of Ibrāhīm Tarānā's debt. Of note is the fact that Yūsuf b. Shū'ā's guarantee for Tarānā was itself

[537] Fāḍil Mahdī Bayāt and Halit Eren, *al-Bilād al-'arabīyaï fī al-waṯā'iq al-'uṯmānīyaï* (Istanbul: Istānbūl : IRCICA , Munaẓẓamaï al-Mu'tamar al-islāmī, Markaz al-Abḥāṯ li-al-Tārīḫ wa-al-Funūn wa-al-Ṯaqāfaï al-islāmīyaï, 2010), Vol. 2, 187.
[538] J--25-287-2

guaranteed by another ‘āmil, the even more prominent Shemtūb b. Ya‘qūb. The latter appeared after the fact, as the sijill states and undertook to pledge his additional support.[539] Shemtūb appears in several sijills as a ‘āmil and trader who, like Yūsuf b. Shū‘ā’, engaged in very large transactions.[540] Thus, at this stage in the early 1550s the use of mutual surety does not seem to have been dominant in the policing of tax collector’s debts to the state, although various layers of individual guarantorship were the norm.

A sijill from seven years earlier, in 952/1545, shows that both Shemtūb and Yūsuf b. Shū‘ā’ were indeed close associates. There, Shemtūb who was listed as the ‘amīl of Jerusalem and Gaza (*al-‘amīl bi-liwā’ ghazza wa bi-liwā’ al-quds al-sharif*) appointed Yūsuf b. Shū‘ā’ as his agent (wakīl) in “all his property related affairs, the collection of debts owed to him and the management of his payments due to others”.[541] The fact that two ‘āmils guaranteed Yūsuf b. Ibrāhīm Tarāna, the above defendant, not only points to the embeddedness of the activities and mutual liabilities of tax collectors in the tax-villages that lay between Jerusalem and Gaza, but also reveals the courts’ concern with the creditworthiness of kafīls, in line with Darling’s above noted observation, and Shū‘ā’s creditworthiness could probably be described as “makbul (well-esteemed)”. We should also recall that the debt in question was for taxes from villages that Ibrāhīm Tarānā had been responsible for, and it would have been likely that Yūsuf b. Shū‘ā’ and Shentūf b. Ya‘qūb had the experience and resources to collect taxes from these specific villages, given their

[539] J-25-360-1
[540] In early 953/1546 the jizya tax for Jerusalem’s Christian community was levied by the district head of the imperial treasury (the *amīn*), a Muslim, but managed by Shemtūb, J-Sij 18-8d. Shemtūb appears in three sijills about a decade before the above case, where he provides attestations in support of senior Ottoman officers (*sipahis*), sometimes serving as a kafil, J-17-472-3, 17-477-1, and 17-477-1.
[541] “*fī jamī umūūrahū mā [ya]ta‘llaq minnahū wa illayh [unclear word] wa-l-‘aqār wa-l-qabḍ wa-l-ṣarf … ‘an al-mablagh…*”, J-17-469-2.

network. Their standing in as guarantors, thus, was therefore more suited than the other two guarantors, one of whom was a physician. Within two days from issuing their guarantee, ʻAlī Bey and Yūsuf b. Ibrāhīm Tarānā's guarantors arrived at a settlement, and on 29 Rabi al Thani 959/23 April 1552, ʻAlī Bey attested that all tax claims charged against Yūsuf b. Tarānā for the year 957-958 had been resolved, and the prisoner was free to go.[542]

Had the case ended here, we would be left with the impression that the matter was closed, but this settlement was not lasting, since a sijill dated 26 Rabi al-Thani 960/10 April 1553, ʻAlī Bey is again in court requesting that Yūsuf b. Shuʻā and Yūsuf b. Ibrāhīm, the physician who had guaranteed Yūsuf b. Ibrāhīm Tarānā, be detained if they did not reveal the whereabouts of Yūsif b. Tarāna who apparently has gone into hiding. The court sijill states that "they (Yūsuf b. Shuʻā and Yūsuf b. Ibrāhīm) had pledged to guarantee him in body and spirit (*rūḥīyan wa badnan*) and that now, after exhausted attempts to furnish him, after they were requested and failed to do so, they [the guarantors] should be held liable for the remaining taxes … related to the amount due on 27 Rabīʻ al-Thānī 959 /21 April 1552 … in the amount of 3,805 silver coins (qitʻa)."[543] Such debt settlements were of course contingent when a further default occurred and bring to mind A. Singer's contention that "sijills do not recount the final resolution of conflicts, but only their adjudication."[544]

The above case shows that, up to the mid-sixteenth century, while Jewish tax farmers maintained professional solidarity, such ties did not extend into a corporate liability for their loans upon the Jewish community at-large when such tax farmers defaulted on their debts. In

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[542] J-25-364

[543] "*(ʻAli Bayk) qāl fi taqrir da ʻwattahhu innahuma (Yusif b. Shua and Yusif b. Ibrahim) kafallāā ʻindahū Yusif b. Ibrahim Tarana al-yahudi al-katib kafālatahu ruḥīyan wa badnan inna waṣiyah ṭalabahū minhumma bi-taḥḥḍirahū wa mata ʻajaz ʻan iṣnā ʻahū kān ʻalayyhūmā alqudām ʻannhū … li-mawjib al-māl al-wārid fi 27 rabiʻ al-thāni sannat 959…*", J-25-364, lines 3-4.

[544] Singer, *Palestinian Peasants and Ottoman Officials*, 129.

contrast, several cases of loan defaults brought against the heads of this community later in the century reveal an extensive use of mutual surety. Some of these debts were connected to financing the Jewish community's jizya obligation, which remained remarkably stable at around 84 to 90 sulṭānī (one sulṭānī for each household) for most of the latter-half of the century. This was despite several attempts by the governor and his tax-administrators to recount the community's households, since it had grown significantly in mid-century although Jewish leaders contended several times in court that it had subsequently shrunk. Nevertheless, by the mid-1580s Jerusalem's Jews were borrowing heavily to refinance or fund all sorts of unspecified community expenses, as the 400 sulṭānī loan from the Khudāwardī cash-waqf I discussed in the prior chapter suggests. This indebtedness and high spending would result in significant problems for the community, and it is here that mutual surety obligations are most evidenced in court.

The subject of the jizya, the tax levied on adult male Christians and Jews in the pre-modern era, has attracted a great deal of scholarship, but much of it has explored the connection between jizya and religious conversion.[545] Less has been written on this tax's collection in the medieval period, due to the lack of surviving state archives. The early Ottoman state treated the jizya as a special tax and generally excluded it from tax-farming (iltizām) in the sixteenth century.[546] This is in contrast to the second decade of the

[545] Felicita Tramontana, "The Poll Tax and the Decline of the Christian Presence in the Palestinian Countryside in the 17th Century," *Journal of the Economic and Social History of the Orient* 56, no. 4–5 (January 1, 2013): 631–52.

[546] Lewis and Cohen, *Population and Revenue*, 72; Cahen, Cl.; İnalcık, Halil; Hardy, P.. "Djizya." *Encyclopaedia of Islam*, Second Edition. Edited by: P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel, W.P. Heinrichs. Brill Online, 2015. Although the jizya was not tax farmed in Jerusalem, the sharia court registers of Cairo during the first third of the sixteenth century show a mixed practice. A copy of a tax-farming undertaking (*ḥujjat iltizām*) registered in Cairo's high court (al-Bab al-'Āli) in Rabī al-thāni 937/ December 1530 records the purchase of a tax farm for the collection of jizya from 207 individual cases of Christians that were three years behind in their jizya payments. See 'Afīfī, *al-Aqbāṭ,* 172–77. BA 1, 300 (937/1530),73.

seventeenth century when the Ottoman state regularly farmed out the jizya tax, this perhaps being an outcome of the reform of the tax regime as a whole in that period.[547] For much of the sixteenth century, the administration of the jizya in Bilad al-Shām was (usually but not exclusively) the mandate of qāḍīs who employed tax collectors to service it.[548] Most often, Jerusalem's jizya proceeds were applied to funding the operations of the city's major endowments, such as the Haram al-Sharif, rather than for military expenses.[549] Muḥtasibs in early Ottoman Jerusalem appear to not have been involved in jizya collection at all. As far as Jerusalem's Jews were concerned, the muḥtasib only surfaced in the sijills when he attempted to place fines on the Jewish community for market infractions by its members (silversmiths and other market actors), these arbitrary fines were referred to as *jarā'im* (designating fines rather than 'crimes' in the literal sense).[550]

Under Islamic law, the muḥtasib was responsible for collecting market (*īḥtīsāb*) taxes, as well as the jizya poll tax and the kharāj/'ushūr tax on agricultural surplus.[551] For the Mamluk period the muḥtasib manual of Ibn al-Bassām gives the following description of its collection (although it too, as prescriptive literature, may not have reflected reality then):

[547] Darling, *Revenue-Raising and Legitimacy*, 47.
[548] Jizya tax collection could take on a number of forms, depending on the type of land (e.g. khass/iltizam/private waqf) being farmed, and tax collectors could be appointed by the central government, rather than by judges. Darling, *Revenue-Raising and Legitimacy*, 160–63.
[549] This practice appears throughout the century. The earliest record is from the end of 941/1535, when a Jewish money changer paid 520 'ūthmānī silver coins (equivalent to between 10-12 gold coins at the prevalent rate of exchange, i.e., the jizya for about 10-12 individuals out of a community of around 90 tax-payers) to the preacher (khatīb) of the al-Aqṣa mosque (J-Sij 5-50d); another example appears in Ramaḍān of 959/1552, when the entire jizya tax was paid to the head of "tile repairs" of the Ḥaram al-Sharīf endowment (J-Sij 25-616f); and, also at the beginning of 982/1574, the Ḥanafī mūftī of Jerusalem acknowledged receipt of the community's poll tax for that year and that his salary would be paid from such sum (J-Sij 56-130f).
[550] For a definition of jarīma see Ed.. "D̲jarīma." *Encyclopaedia of Islam*, Second Edition. Edited by: P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel, W.P. Heinrichs. Brill Online, 2015.
[551] Cahen, et al., "D̲jizya." *Encyclopaedia of Islam*, Second Edition.

> "If the muḥtasib or his agent comes to collect the jizya, he should stand in front of the [Jew or Christian], slap him on the side of the neck, and say: 'Pay the jizya, unbeliever.' The dhimmī will take the money from his pocket and pay it with humility and submissiveness."[552]

Notwithstanding, the discrepancy between prescription and market custom, the organization of the jizya payment, as described above by the community heads (mashāyikh), rather than its payment by individuals directly to the state was likely the case in late Mamluk Syria. As would be the case with the Jews of Jerusalem in the following century, Damascene Jews appeared to have used petitions to the sultan to appeal against abuses. In Dhū'l-Ḥijja 903/August 1498, Ibn Ṭūlūn reported that a Mamluk Amīr issued a sultanic edict that instructed the city's chief qāḍīs not to chide or mistreat the city's Jews when collecting the jizya, but rather to follow 'custom.'[553]

While the above prescription involves debasement and fiscal exactness in almost equal measure, the documentary record of jizya collection in the sixteenth century, as in previous centuries, reflects far more pragmatism. While the jizya was an individual obligation, its collection was invariably communal. Payment of the jizya by Jews and Christians of medieval Mamluk Cairo, for instance, was often coordinated and funded by

[552] Reproduced from Kristen Stilt, *Islamic Law in Action: Authority, Discretion, and Everyday Experiences in Mamluk Egypt* (Oxford; New York: Oxford University Press, 2011), 122. Variations on this prescriptions appear in in leading medieval *hisba* manuals by al-Shayzari, Ibn al-Ukhuwwa, and Ibn Bassām. Save for in times of crisis or defeat, the normative experience of Jews with respect to paying their jizya dues was that it was paid like any other tax, and prescriptions for their debasement as Bernard Lewis noted "belong more to the history of mentalities than of institutions", marking a significant gap between prescriptions for treatment of minorities and their real experience: Bernard Lewis, *The Jews of Islam* (Princeton University Press, 2014), 16; Jizya tax levies and collection in Jerusalem does not appear to have been markedly different from that of the Mamluk period in terms of procedure. The community had a state-appointed jizya tax collector (*'amil*) whose duty it was to collect the tax at the end of every fiscal year and submit its proceeds to the treasurer (*amīn*) in Jerusalem, who would send these proceeds up to Damascus for forwarding to the central authorities in Istanbul.
[553] Ibn Ṭūlūn, *Mufākahat*, 1998, 161.

wealthy community leaders, even though it was levied individually.[554] During periods of economic strain, the jizya and kharāj (land) taxes – were financed or even rolled over into the future. As mentioned, in the case of Jerusalem's Jews, although the community grew rapidly over the course of the sixteenth century, the number of tax-paying khanes remained remarkably stable.[555] This may have been because this tax was paid annually by the Jewish heads to the city's qāḍī in a fixed lump-sum, a customary practice. When debates arose questioning this sum, it was in response to accusations that the community's household members differed from those in the cadastral (taḥrīr) registers. However, unless compelled to by Istanbul, qāḍīs in Istanbul seemed to stick to the customary figure and practice. In a similar vein, Singer has shown that the amount of 'ushur taxes paid by peasants in Jerusalem's hinterland often differed from those prescribed in the taḥrīr defters, since such taxes were customarily paid as a percentage of the crop yield, rather than as fixed lump-sums as the taḥrīr defters suggest.[556] In dealing with how the community financed its jizya obligations, the state realized that obtaining all the jizya dues that it levied on this community was unrealistic. For later centuries, population registers and sijills records show that the number of tax-paying households was much lower than the surveyed number of taxable households.[557]

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[554] El-Leithy, Tamer, "Coptic Culture and Conversion in Medieval Cairo : 1293-1524 A.D." (Princeton University, 2005), 45–46.

[555] By way of comparison, Bakhit's analysis of the taḥrīr defters related to Sidon during the sixteenth century reveals a similar pattern. The Jewish quarter in that city maintained a near constant size of around 25 *khane* throughout the century, with the exception of a decade during mid-century when the population briefly jumped to 36 *khane*. This is in contrast to the Muslim population which had a five-fold increase over the same period. M.A. Bakhit, "Sidon in Mamluk and Early Ottoman Times," The Journal of Ottoman Studies, III (1982): 59.

[556] Singer, *Palestinian Peasants and Ottoman Officials*, 67–68.

[557] For the eighteenth century, Oded Piri contends that the jizya tax probably represented Jerusalem's largest tax, however for the sixteenth and seventeenth centuries this was clearly not the case as there are several larger taxes levied on the community, discussed below; Oded Peri, "The Muslim Waqf and the jizya in late eighteenth-century Jerusalem", in ed. Gilbar, *Ottoman Palestine, 1800-1914*, 291.

Unlike the jizya tax, the kharāj tax appears to have been farmed out by qāḍīs to the head(s) of the Jewish community.[558] In 964/1557, the subaşı of Jerusalem confirmed receipt of this tax, in the amount of 88 sūltānīs from a Jew who had leased this revenue.[559] Eight years earlier a sijill points to the chief night magistrate of Jerusalem (the *'ases bashi*) acknowledging his receipt of 33 gold coins from the Jewish community head Yūsuf b. Falāq (active 945-958/1538-1558), relating to a debt that Falāq latter owed to the military commander of the area, the subaşı, also on account of the community's kharāj tax.[560]

Just as with the case of Ibrāhīm b. Tarāna above, the communal debt taking of the city's Jews in the 1530s to the 1550s appears to not have relied on mutual surety pledges of the sort found later in the century. In this earlier period the community's borrowing was done in a simpler fashion; almost all make community members would appear in person in court to take on a debt (unlike in the last decades when two or three communal heads would figuratively represent their members), without all giving mutual surety for each other's obligations equally. Rather, what did happen was that the community's leaders would individually guarantee the group's liability. The earliest example of this is a debt recorded in a sijill from Rabī' I 940/October 1533, in which 22 Jewish men appeared in court to personally borrow 16,000 silver coins (*ḥalabīya siyaqāt*) from a Muslim silversmith, Fatḥ al-Dīn al-Ṣā'igh. Although the names of the 22 individuals were written out in the sijill, it was

[558] The issue of tax collection is highly circumscribed by local conditions and customs. For Cairo, for instance 'Afīfī provides numerous examples of the tax-farming of the jizya tax to Copts. The fact that it wasn't farmed out in Jerusalem does not preclude that it was elsewhere in Bilād al-Shām. 'Afīfī illustrated that the taxes of Coptic Christians in outlying parts of Cairo and Alexandria, the earliest being the purchase of an iltizam for the collection of jizya taxes for the Christians of the South-East ("*al-wajh al-qiblī*") quadrant (?) of Cairo in 937/1530 for 165,000 silver *niṣfs*. 'Afīfī also notes the overwhelming presence of Copts in all offices of the jizya tax department, the *Dīwān al-Jawāli*, of the local government administration. 'Afīfī, *al-Aqbāṭ*, 19; Bāb al-'Ālī, 1:12-54.
[559] J-33-486-1
[560] J-25-115-3

rather the guarantee provided by two other Jews, Mūsā b. Ḥayyīm and Faraj-Allah al-Jawjarī (presumably the community's leaders), for the 22 borrowers that facilitated the loan.[561] This is significant, because in the event of a default, it would have been these two guarantors who would have been left with the liability of the loan, and probably not the borrowers themselves.

Five years on, in Rajab 945 / December 1538, a similar pattern was recorded when Falāq, the head of the community (listed as in the sijill as *shaykh ṭā'ifat al-yahūd*), appeared in court in with eight other Jews to guarantee (kafāla) to repay all debts outstanding to the police superintendent (subaşı) of the district of Jerusalem owed by the Jews of the city.[562] Again, here is the same dynamic of a few senior members guaranteeing the debts of the many, and doing so in their individual capacities. The two formulas *mutaḍāminūn wa mutakāfilūn* and *bi'l aṣāla wa'l-kafāla* that are seen in later years are not recorded in this first half of the century among the debts taken by Jews in the city. There is no description of the specific obligation to which said debt relates. However, given that the last recorded tax payment of the community was from four years earlier (941/1535), it is likely that this undertaking was connected to overdue taxes.[563] Supporting evidence from other communal debt is found in a sijill from earlier in that same year, in which Falāq appears in court to answer for non-payment of 'ushr tax connected to the community's lease of Jewish cemetery land from a Muslim endowment.[564] The Jewish community must surely also have undergone greater scrutiny in 945/1538, the year in which a major taḥrīr survey was carried out for

[561] J-3-273-2
[562] J-10-170-1; The earliest record of Falaq is from 1533, when his name appears in a tax record of Jews who paid the jizya for that year, J-3-149-2.
[563] Jumada'l Akhir 941 / December 1534, J-4-526-3
[564] Ramaḍān, 944 / February, 1538; J-5-374-6

Jerusalem, Safad and Gaza. Indeed, there is a smooth record of jizya payments for the six years between 952/1546 and the last year of Falāq's leadership of the Jewish community in 958/1551, with the exception of 954/1548 when the community faced accusations from the Imperial Treasury of under-reporting their population size. After an investigation, the treasury officials assess that there were five more Jewish households than those for which jizya was collected over the past five years, and consequently, the community was assessed an additional 25 sūlṭānis.[565]

The evidence for the community's financing of its jizya tax obligation is implicit. In 952/1545 and 954/1547, Falāq paid the jizya of 85 sūlṭānis in the first month of each year, Mūharram.[566] The subsequent two years saw delays, no doubt connected to the Imperial Treasury's investigation of the community's size in 954/1547 which determined, in the last month of that year (Dhū'l-Ḥijja) that the community had been underrepresented by five households. Falāq paid 25 sulṭānī gold coins for these additional five households who had escaped the jizya tax during the past five years, in the last week of that same month, at the end of 954/1547.[567] Then in 955/1548, the tax was for ninety households. As with the prior year, it was also settled in the last week of the year 955/1548. It appears that Falāq waited until the last minute to settle these dues, before facing possible penalties. The timing of these payments suggests that communal taxes only became delinquent after a year from when they were due and Falāq's annual payments took place at the eleventh hour. In Ṣafar 956/1549, Falāq and another community leader, Mūsā b. Shulāl, appeared in court to record a partial repayment of a debt to a notable, Shaikh Zain-l-dīn b. al-Ḥāj 'Alī al-Mardīnī, in the amount

[565] J-20-167-8
[566] J-16-148-1; J-18-634-4
[567] J-20-167/8; The last third of Dhū'l Ḥijjah 954/1547

of sixty sūlṭānis out of an original debt of eighty coins.[568] Eight months on, and in the same year, this creditor attested to the loan's repayment by Fulāq, Mūsā b. Shulāl, and Yaḥyā al-dayyān (the Rabbi) on behalf of the Jewish community. Clearly, this debt, for which we don't have an initial record, was issued before Ṣafar 956/1549 and was likely used to settle the shortfall in jizya payments from the prior year.[569] Clearly, by the mid-century mark, the financing of this community's taxes was becoming more routine and treated as a corporate obligation, in figurative terms. Legally, however, it was still the responsibility of the community heads who would guarantee these loans on behalf of their community's members.

In the last two decades of the sixteenth century, this routinized activity came to have deleterious effects when such loans began to involve mutual surety undertakings that assigned equal liability for the community's debts to each of its members. Under the community head, Shamīla b. Jūkār (active 977-997/1570-1589), disagreements about the division and responsibility of jizya debts among the community members came to a head. The conflict between individual versus group responsibility for such debts led to the intervention of the city's qāḍī. Some qāḍīs ruled that it was the communal responsibility of Jewish elites to support their economically weaker brethren - even though the tax burden was, in legal terms, levied individually. Shamīla b. Jūkār, the sesame oil dealer (*al-sayrajānī*), was a member of the Jūkār family, a prominent family in Jerusalem's Jewish community, and relatives of Shamīla held various important market and administrative posts.[570] In late 977/1570, he paid the jizya tax on behalf of the community, and two years later, he filed a complaint against five Jews of his community for owing him thirty ṣūltānīs

[568] J-21-542-2
[569] J-22-440-2
[570] A record from Sha'ban 979 / January 1572 shows him described as the sesame oil dealer, J-54-436-2. Cohen, *Jewish Life under Islam*, 40.

on account of their portions of the jizya tax debt; they admitted to only owing eighteen sūlṭānīs and the qāḍī provides them a grace period to provide proof.[571] In 982/1575, Shamīla brought another case against two other Jews who denied having owed him two gold coins on their behalf, again for tax dues. The qāḍī then ruled in his favor and ordered them to pay. These examples point to the centralized nature of taxation and that deficits caused the Jewish heads to borrow in order to make up for deficits. By the end of Shamīla's tenure, at the beginning of 997/1589, financial difficulties were creating serious fissures within the community and disputes between the wealthier members of the community over how to split the cost of burgeoning community debts, providing a subsidy to weaker members of the community. On 22 Safar 997/9 January 1589, Jerusalem's chief-qāḍī required Shamīla to appear in court and pledge to treat all Jews equally, irrespective of whether they were "rich or poor" with respect to the assignment of communal taxes and other impositions – clearly Jewish elites had become bitter about shouldering the responsibility of the community's mushrooming accounts.[572]

It was seven months earlier, in Rajab 996/May 1588, that 21 Jews (the community elites among them, including Shamīla) undertook the above-mentioned mutual surety loan of 400 sulṭānī to the cash-waqf of Khudāwardī Bey.[573] This debt, which carried an associated interest of 15% (60 sulṭānī) was due within a year's time, and moreover the sijill suggests that it was a rolling-over of the principal from the prior year, since the waqf's mutawallī acknowledges having received payment for "the prior year's profit". The Jewish debtors undertook to enter into "mutual surety in this obligation, in both their personal assets as well

[571] J-54-436-2
[572] J-69-82-1.
[573] J-67-222-4; On Bey Khudawirdi, see Amnon Cohen, *Economic Life in Ottoman Jerusalem* (Cambridge University Press, 2002), 51.

as liabilities, having each given their expressed permission and recognized each other's (joint-liability)" (*wa-hum mutaḍāminūn mutakāfilūn fī dhālik fī mālihim wa-dhimmatihim b'idhin kull minhum l'il-ākhar*). Significantly, this debt record does not mention that these individuals belong to the Jewish "ṭā'ifa." Perhaps this explains the conjoining of their interests through the explicit annunciation of their "mutual surety for each other's assets and liabilities".

It was not long after this period, about five years later, that the community had to rely on donations from Jews abroad to maintain Jewish institutions in the city and, indeed, to prevent the confiscation of Jewish assets from over-indebtedness. A sijill from the end of 1002/1596 shows that a wealthy Istanbul rabbi who engaged in cloth trading, donated 20,000 silver coins to Jewish cloth merchants in Jerusalem as charity for the community there.[574] A sijill from a year later, in 1003/1597 revealed that the payment of interest on an existing debt of 300 sulṭānīs to the "Shaykh al-Tujjār" of Jerusalem by the Jewish community had to be guaranteed by an expanded mutual surety by other Jews of the area because of their risk of default, and that the interest at this time amounted to 27% (80 gold coins for the year), almost double the rate they had paid to the Khudāwardī waqf seven years earlier.[575]

The use of mutual surety had become increasingly used by both powerful creditors, as well as the Jewish community, that it began impoverishing its once wealthy elites. A court deposition of an imprisoned Jewish debtor from Rajab 1008/January 1600 shows how the community's self-policing and coercive tactics worked to perpetuate this, since it was not only the insistence of creditors that was responsible for mutual surety. After a Jewish man

[574] J-76-201-2
[575] J-76-206-3

was imprisoned on charges brought against him by creditors, he provided testimony to the qāḍī pleading his bankruptcy. In jail, he was interrogated for lengthy period, and it appears that it was the qāḍī's intention that Isḥāq's deposition be used as evidence to indict or crackdown on Jewish elites who abused the mutual-pledge system. In his testimony, this debtor was quoted as saying "they (a group of Jewish leaders) take upon themselves and others debts by writing pledges in the names of others without their permission or physical presence [in court] and this is how [I] became heavily indebted and imprisoned."[576] Subsequently, and in the same proceedings, the qāḍī requested that the Jews he named be brought to the court for questioning, upon which they agreed that "it was their custom to enter into debts [as a group] and for the names of debtors to be written down without their presence."[577] In the end, the sijill shows that Isḥāq pleaded with the qāḍī noting that he said he "had spent everything that he had left on repaying these debts, and did not have access to any of his wife's money, and that after his bankruptcy was proved, he divorced his wife while still in jail;" presumably because he no longer had the means to support a household.[578] The context of this deposition suggests that his affirmation of having divorced his wife also serves to severe any responsibility for liability on her part. This deposition was taken as a matter of record and the end of the sijill states "for future reference when needed" (*yūrja ʿ ilayh waqt al-ḥājja*).

[576] J-79-471-2, lines 6-8.
[577] Ibid.
[578] J-79-471-2, lines 13-14.

4.4 Mutual surety and guilds

The sijill evidence of guild loans backed by mutual surety undertakings is limited to Jerusalem, and if the data from Jerusalem is indicative of wider trends, it would seem to me that mutual surety was adopted by individuals from different guilds who came together to take loans in their own name, not in the name of their respective guilds, or even among members of the same guild. This limitation may have been due to restriction placed upon guild indebtedness by qāḍīs; however, I have not found any explicit evidence of this. Guild members relied on cash-waqfs especially. Given the scant information on borrower backgrounds in the sijills, I have assumed an artisan's guild status based on the professional affiliation in debtors' last names. In Rabīʿ II 966/March 1588, the Baymānā Khātūn waqf of Jerusalem issued joint loans to artisans such as the loan of 10 sulṭānīs to Khalīl al-Haram and Ḥasan al-Dahhān, or the 30 sulṭānīs this waqf lent to Muḥammad al-Sukkarī and Yūsuf al-Bayṭār; both loans were at 20% interest.[579] These groups of individuals issued oaths of mutual surety for their loans. That is not to ignore the prevalence of intra-guild loans also, which were common. From the same sijill, there is the debt of Ḥasan b. Darwīsh al-Qahwajī (the coffee-house owner/worker) was owed three sulṭanīs by the head of his guild ʿAlī b. Aḥmad b. Abī al-Faḍl; this debt, in the form of a muʿāmala, had interest in the form of a sale of three coffee cups (*fanājīn*).[580] This latter debt is representative of most debts between

[579] J-67-177-3, J-67-177-8

[580] J-67-293-4, Many of the muʿāmalāt between members of the same guild involved small amounts. N. Hanna has recently shown that the physical property of guilds in cairo, such as copper bowls, could acquire their own status as "guild waqf." It would be interesting to consider how these guild assets could be mortgaged, in my above example I have considered that the fanājīn are simply a subterfuge for interest and are hypothetical, however, they could have indeed existed, and been part and parcel of this artisan's work. See Hanna, "Guild Waqf: Between Religious Law and Common Law."

guild-members, and probably the majority of debts recorded in the Jerusalem courts, that often did not exceed ten sulṭānīs.

As with the case of the Jewish community's use of mutual surety, qāḍīs were also keen to police the recording and settlement of commercial debts undertaken by guilds and groups of traders. Because qāḍīs in sixteenth-century Jerusalem and Damascus were responsible for the financial oversight and accounting (*istiftā'*) of district treasuries and their tax-farms, as with the jizya tax, the settlement of guilds' debts and the maintenance of healthy markets was vital to their broader tax regime. Like religious communities, guilds fell under the rubric of "ṭā'ifāt." Guilds' reporting of debts owed to them was routine and of vital economic importance to the judiciary. For example, the butcher's guild was relied upon for the provision of a city's meat, as Cohen has amply shown.[581] This interest in the affairs of guilds remained fairly constant by the courts over the course of the century, and frequently merged with the activities of the muḥtasib, who reported to the chief qāḍī. An inventory of debts and credit-sales from the butcher's guild in 948/1541, for instance, showed an inventory of the guild's general account, effectively their payables and receivables for that year, which show a number of personal debts owed by the guild's members individually, and on behalf of the guild as a whole.[582] However, nowhere in this statement is a reference to mutual surety, and the guild-wide debts are related to its on-going operation. When guild heads were summoned by qāḍīs to attest about the debts owed to their guild by other "ṭā'ifāt," as in a case from 954/1547, when the chief builder of Jerusalem was summoned by the chief qāḍī to issue a deposition concerning all outstanding debts by the city's Jewish

[581] Amnon Cohen, *The Guilds of Ottoman Jerusalem* (Brill Boston, MA, 2001), 17; Cohen, *Economic Life in Ottoman Jerusalem*, 11–60.
[582] J-13-251

community to his guild, the purpose was typically associated with gathering evidence for a larger investigation. Given the above discussion on the Jewish community's propensity for financing their jizya taxes, the city's qāḍīs often had to investigate the liabilities of this community before allowing them to pile-on increasing debts.[583] As the century progressed, it became apparent that this form of supervision was either slipping, or that qāḍīs simply loosened their grip on the political-economic regulation of the city.

The patterns of supervision of guilds in the Jerusalem and Damascus sijjilāt are largely in line with the findings of studies on Bursa and Damascus, for the seventeenth and eighteenth centuries, by Gerber and Rafeq. Indeed, the wide-ranging depositions that were required of guilds sought various objectives, from policing guild-members whose activities fell out of line with the guild's rules; to recording financial statements and agreements, to serving as a public record of the qāḍī's own policing of guilds by the state.[584] Both Gerber and Rafeq also found that the activities of guilds were, moreover, important for fulfilling tax-collecting functions that were outsourced to them (from the seventeenth century), the collection of the state's "yamak" (assistant guild) army tax.[585] To a degree, the qāḍīs' ordinances to guilds on prices, taxation and their duties, bypassed the muḥtasib's supervision which dealt more on the functioning of markets themselves; guild-leaders were often

[583] J-20-4-2; The butchers guild was required to make similar attestations of debts and accounts; see J-13-250-3 and 13-251; The attestation by the butcher's guild does not infer that the butchers guild excluded Jews. There are many references to Jewish and Christian members of the butchers guild, and Jews headed this guild on several occasions. Cohen, *The Guilds of Ottoman Jerusalem*, 17–22.
[584] Gerber, *State, Society, and Law in Islam*, 122–25.
[585] Gerber, 118–19; Abdul-Karim Rafeq, *The Law-Court Registers of Damascus, with Special Reference to Craft-Corporations during the First Half of the Eighteenth Century.* (Paris: Editions du Centre National de la Recherche Scientifique, 1976), 141–59.

required by qāḍīs to issue personal guarantees for one anothers' actions (*kafāla bi'l-nafs*) in carrying out their professional duties.[586]

Conclusion

During the Mamluk period, mutual surety was used as a legal mechanism to secure loans, as the appearance of the formula "*mutakāfilūn wa mutaḍāminūn*" in agricultural leases preserved in the Ḥaram al-Sharīf archive from 1390s Jerusalem suggests. However, it is impossible to evaluate the extent to which mutual surety arrangements were used, nor which groups of society they affected the most, in Mamluk times. The widespread appearance of mutual surety during the early Ottoman period, not only in Bilād al-Shām, but also in South Anatolia, does indicate some measure of continuity of this legal custom in the broader Levant. In the case of Jerusalem, I have shown how the use of mutual surety was not restricted to specific communities according to confessional, professional, or other affiliation. Rather, it was used as a way to bind common debtor obligations to create a synthetic corporate liability. I have chosen to frame my discussion of mutual surety around three separate communal categories: hinterland peasants, the urban Jewish community, and urban guilds.

Debtors often adopted mutual surety when they lacked sufficient collateral to obtain loans as individuals, such as when guild members borrowed; however, for tax-paying communities, it was political pressure that drove their use of mutual surety. The debts undertaken by Jerusalem's Jewish community in the late-sixteenth century took place under

[586] Cohen, *The Guilds of Ottoman Jerusalem*, 17.

the direction of the city's qāḍīs and governors and such lending appears to have been a long-standing legal custom. Sijill complaints by some imprisoned debtor Jews at the end of the century suggest that this was very much the case. Similarly, the peasants of rural communities were considered to have mutual liability, often focused in the village leaders, who were assumed (or forced) to take oaths of mutual surety for the tax debts owed to the state. Yet, as I have argued above, the use of mutual surety, whether entered into willingly or forced upon debtor groups, was an ineffective means of ensuring repayment. Peasant debts could pile up for years, and increased cajoling or imprisonment by the authorities, in the middle years of the century, appear to have done little to improve the recovery of these debts.

With respect to historical change, it is notable that the frequency of mutual surety claims in the court records increases over the century. When Ibrāhīm b. Tarānā, a Jewish tax-collector from 1540s Jerusalem engaged in a variety of borrowing (himself being a senior member of the Jewish community), the guarantees he entered into stressed individual guarantees, rather than communal ones, although mutual surety was not uncommon in his day. By the 1580s and 90s, though, mutual surety arrangements had become so widespread that it became difficult for Jerusalem's Jews, and the city's qāḍīs, to distinguish between individual and group indemnity among the Jewish community's members. This shift reflects two realities. On the one hand, the community's increasing dependence on debt was used to finance its obligations in a period of high inflation, that of the so-called price revolution. On the other, it is a reflection of how market lenders readily accepted increasing levels of risk by lending to this community, and this may have likely been due to the state's implicit promotion of mutual surety.

In my next chapter, I turn to a rather different credit structure, the practice of lending from orphan estates to provide for the care of orphans, a practice that was heavily imbued with socio-religious significance. Like mutual surety, lending from orphan estates also built on long standing Mamluk-era traditions.

Chapter Five – Orphan Estate Lending

Scholars of the premodern Near East have tended to study the history of orphans with the poor and other vulnerable members of society such as widows, mendicants, the destitute and the sick.[587] This categorization was also shared by Muslim jurists. Strictly speaking, orphans are defined in Islam as any children whose fathers have died – irrespective of social or economic standing. Indeed, the Qur'ān is explicit about placing orphans alongside those who are "needy, travelers and beggars."[588] In response to an ethical mandate to care for orphans and the poor, rulers and elites in the pre-industrial Near East constructed myriad waqfs for housing, feeding and schooling orphans. By studying waqf deeds, chronicles and court records, historians have, in the past two decades, begun to examine how patronage, labor, and institutional resources came together to alleviate the material conditions of weaker members of society.[589] Much of this scholarship has focused on resources and labor, such as revealing the operations of soup kitchens, schools and Sufi lodges. However, there are few studies of the role of economic exchange as a means for providing for the social welfare of orphans. This is especially important since orphans inherited the social-economic status, and often titles and professions, of their fathers, which could be far removed from the conditions

[587] Singer, *Constructing Ottoman Beneficence*, 19, 64, 81; Mark R Cohen, *Poverty and Charity in the Jewish Community of Medieval Egypt* (Princeton: Princeton University Press, 2005), 88, 148, 186.
[588] "Truly righteous are those who believe in God and the Last Day … and give away some of their wealth to … to their relatives, orphans, the needy, travelers and beggars.." Qur'ān 2:177,; For similar expressions of this topos see verses 2:83, 4:8, 76:8, 107:2-3.
[589] Nazan Maksudyan, *Orphans and Destitute Children in the Late Ottoman Empire*, 2014; Singer, *Palestinian Peasants and Ottoman Officials*; Singer, *Constructing Ottoman Beneficence*; Amy Singer, "Serving up Charity: The Ottoman Public Kitchen," *The Journal of Interdisciplinary History* 35, no. 3 (2005): 481–500; Sabra, *Poverty and Charity in Medieval Islam*; Michael David Bonner et al., eds., *Poverty and Charity in Middle Eastern Contexts* (Albany: State University of New York Press, 2003); Mahmoud Yazbak, "Muslim Orphans and the Sharīʿa in Ottoman Palestine According to Sijill Records," *Journal of the Economic and Social History of the Orient* 44, no. 2 (2001): 123–40; Cohen, *Poverty and Charity in the Jewish Community of Medieval Egypt*.

of material poverty. In this chapter, I evaluate the practice of what I refer to below as orphan credit, that is, the practice of lending out orphans' inheritances, by executors of estates as a method to preserve and grow the capital bequeathed to orphans, and to provide for the latters' care.[590]

A key objective of this chapter is to investigate how orphan credit practices were defined and applied in the Mamluk and early Ottoman periods in and outside of courts, by looking at the record of such lending activity in both the legal literature as well as court records from the fourteenth through sixteenth-centuries. I trace the historical roots and development of this practice, from vague references of its use in Abbasid Baghdad, to its formulation as an institutionalized court-managed practice in Mamluk Cairo, and ultimately as a court-supervised (though not managed) activity in the sixteenth-century Ottoman Levant. As will be discussed below, this form of customary lending continued to be recorded in sharia courts until the late Tanzimat period in Bilād al-Shām, in the second half of the nineteenth-century.

The most common way in which orphan credit was transacted was through mu'āmalāt (sing. mu'āmala), this being the informal term used in the legal literature and court records to refer to loans that used legal subterfuges to avert the association of ribā. Mu'āmalāt were the popular instruments for orphan credit during both Mamluk and Ottoman eras, although, their exact formulation differed somewhat between the two periods. While Mamluk-era shurūṭ texts (manuals of legal formularies) rarely mention mu'āmalāt, we know of their popularity – as far as orphan credit was concerned – from the Mamluk-era fatwā compilations (legal

[590] I deploy the term orphan(s) in this chapter to refer to fatherless children, irrespective of the mother's survival, since the duty to provide for material support is the father's.

responsa) and encyclopedias of Taqī al-Dīn ʿAlī b. ʿAbd al-Kāfī al-Subkī (d. 756/1355) and Shihāb ad-Dīn Aḥmad al-Nuwayrī (733/1333). Ottoman shurūṭ, on the other hand, present numerous examples of how muʿāmalāt were applied in court in the sixteenth century, and these are testified to with examples from court records that I also present in this chapter, as well as a popular jurist manual by Darwish Muḥammad al-Bursawī (d. 937/1530) . Legal literature from later jurists in Bilād al-Shām, such as those from the seventeenth-century fatwās of Khayr ad-Dīn al-Ramlī (d. 1081/1670), seem to reinforce a legal support for the use of muʿāmalāt, as not only a legitimate subterfuge for orphan credit, but a prerequisite for preventing the abrogation of such loans.

Notwithstanding the abovementioned continuity of muʿāmalāt, a secondary finding of this chapter is that that the Ottoman merger of the muftī and qāḍī posts resulted in a loosening, rather than consolidation, of the state's supervisory role over muʿāmalāt for the management of orphan credit. The line separating rulings from legal opinions under the Ottomans was thin, and at times, appeared to be conflated in courts to jurists who had a Mamluk era legal lineage, such as the Egyptian qāḍī Ibn Nujaym (d. 970/1563). On the one hand, this allowed the Shaykh al-Islam to issue rulings-cum-fatwās that could delineate good versus bad practice to provincial qāḍīs. However, on the other, it did create anxiety for some jurists, such as Ibn Nujaym who composed a treatise critiquing the common practice of qāḍīs issuing rulings on court proceedings for which there was no dispute or claim. As an example, with respect to orphan credit, I present a court case from 998/1588 Jerusalem that reflects Ibn Nujaym's concern and illustrates the nominal control that Ottoman qāḍīs had over the actual management of orphan capital. With respect to the Ottoman period, I contend that the consolidation of the judiciary under a Shaykh al-Islām, the development of an Ottoman

canon and legal academies, and a common legal circuit that all qāḍīs had to traverse to attain promotion – naturally suppressed the possibility, let alone desire, for chief qāḍīs' engagement in independent legal reasoning. The high turnover of qāḍīs in the provinces (judicial posting were for 1-3 years) further facilitated this trend and contributed to a reification of regional customary legal practices in court; these would tend to place the power to control orphan credit in the hands of orphans' relatives and executors, with little direct management of the loans issued on behalf of orphans – in spite of their regular registrations in court.

A third point I raise concerning the late-Mamluk/early Ottoman loosening, is that the centralization of the Ottoman judiciary's power resulted in a less structured local bureaucracy with respect the management of orphan capital. Under the Mamluks, the administration of orphan capital (at least in the fourteenth and early fifteenth centuries) was directly supervised by an Orphan's Bureau headed by a director of orphan affairs (Nāẓir al-aytām), and a separate but related function of a specialized state depository, the mawdi' al-ḥukm. The latter institution took on physical custody of inherited orphan estates and managed them on their behalf. It had its own supervisor, the Amīn al-ḥukm, who was often – but not always – a qāḍī. I have found no evidence for the continuity of these offices in the later fifteenth or sixteenth centuries, and their survival as functions of state offices under a different name is not apparent from court records or legal manuals. I suggest that, as in the late Mamluk period, the management of orphan estates under the Ottomans was subsumed under the general responsibilities of qāḍīs. Overall, the lending of orphan capital witnessed a continuity of legal-customary practice from the Mamluk period. The religious-social imperative connected to the protection of orphans imposed a quasi-legal mandate on the state for supervising, if not regulating credit from orphan estates. Ottoman and Mamluk judiciaries

vested in qāḍīs the power to determine inheritance rights, estate disposition proceedings, and to appoint executors of orphans' estates as part of supervising probate courts.

This chapter begins with a review of fiqh discourses on the merits and risks of investing orphan capital in loans, and in the process, discusses some views on the problematic issue of ribā. I analyze the discursive elements of this juristic literature concerning the demarcation of licit gain from ribā, which is sometimes expressed by its informal and euphemistic synonym: fā'ida. This is followed by an analysis of the historical record of institutional practice for orphan credit in the Mamluk period, and the transition to Ottoman rule. Here, I study institutions, such as the aforementioned mawdi' al-ḥukm, and discuss the problems that accompanied management of orphan credit. I also consider prescriptive writings on judicial procedure and assess what muftīs and qāḍīs would have used as guidebooks when considering the supervision of orphan estates (e.g., appointing or removing guardians). This is paired with a discussion of the Ottoman muftī-qāḍī nexus and its effects on judicial autonomy and decision making, and legal reasoning with respect to the management of mu'āmalāt. Lastly, I present a series of court records that offer portraits of the characteristic types of activities that connected guardians, qāḍīs, and orphans in orphan capital. Most notable among these are muḥāsabāt, financial statements of accounts, of loans issued on behalf of orphans that were reviewed and produced for the benefit of the courts.

5.1 The Mu'āmalāt of Orphan Lending

In his evaluation of nineteenth-century sijill (court register) records from Jerusalem, Mahmoud Yazbak observed that the practice of qāḍī court-managed orphan estates during the period was coming under increased pressure to reform. In seeking to rapidly strengthen and

recentralize the Ottoman state, the Ottoman Tanzimat reforms put into effect, in 1851, an "Administration of Orphan Funds" (*niẓārat amwāl al-aytām*) and an Orphan's Treasury (*ṣundūq al-aytām*) in Jerusalem. These new institutions "were intended to limit the spheres of action of the sharī'a court" and had several effects.[591] First, these measures would limit the power of qāḍīs and associated elites who had personally benefitted from lending out monies from orphans' estates in the interim between when legatee inheritances were escrowed by qāḍī courts and when the debts of their deceased fathers were fully settled. The new regulations also stated that "each orphan will have a detailed account which will contain his fund's investments and accrued profits." This was intended to minimize the potential for financial abuses by nefarious trustees. While these measures were well-intentioned, the new laws ironically created opportunities for the same elites who, were shareholders in new banking and mercantile ventures that stood to benefit from the rerouted investment of orphan capital into new Ottoman state bonds and other savings schemes. Thus, the effect of such reforms was the introduction of new forms of institutional abuse and commercial exploitation. Yazbak's rare study is a critical contribution towards understanding the institutionalization of new forms of orphan credit practices in the modern period, such processes standing in stark contrast to the activities of Ottoman qāḍī courts. This may inadvertently give one the impression of qāḍī courts as sites for the perpetuation of timeless customary laws and practices. As with numerous other legal practices, orphan credit, via mu'āmalāt, was indeed manifested in a broad historical continuity. However, this was of course historically contingent, on political-economic stability, the legal institutional character of the time, and the social-economic dynamics of different periods. Greater or lesser

[591] Yazbak, "Muslim Orphans and the Sharī'a in Ottoman Palestine According to Sijill Records," 135.

institutionalization took various forms, had different impacts, and as with Yazbak's assertion for nineteenth-century Palestine, did not necessarily lead to better results for the orphans in question.[592]

Indeed, during the long Mamluk period (1250-1517) chronicles and documentary evidence of the institutional management of orphan estates through the mawdi' al-ḥukm are thin and suggest that this office had its heyday in the mid to late fourteenth century; its existence into the fifteenth century is not recorded and it may have waned or vanished altogether as a state institution in the turbulent last years of Mamluk rule. This is not to suggest that the state was completely removed from the affairs of orphans, as will be discussed below. For instance, there is a record of a Damascene notable holding the position of Nāẓir al-aytām ("administrator of orphan affairs") as late as 1510. Evidence from a private narrative source, the diary of Shahāb ad-Dīn Aḥmad Ibn Ṭawq suggests that, by the end of the fifteenth century, issuing loans from orphan estates was mediated by qāḍīs, albeit out of courts. Ibn Ṭawq's notarial record of this transaction may indicate that that this was an extra-judicial activity that was not formally supervised by the state. His diary records the following:

> [On the tenth of Rabi'ī al-Ākhir 905/14 November 1499][593]
> "Today, I was witness to the wife of Shaykh Aḥmad al-Arbadī
> from Qūbaybāt (a suburb of Damascus). She was dark, short

[592] To the best of my knowledge, the only other study to have directly engaged with this topic is: Ronald C. Jennings, "Women in Early 17th Century Ottoman Judicial Records: The Sharia Court of Anatolian Kayseri," *Journal of the Economic and Social History of the Orient* 18, no. 1 (1975): 53–114.

[593] For a review of this work and a background on Ibn Tawq, see Li Guo's review in MSR,; Li Guo, Mamluk Studies Review (University of Chicago, 2008), 210. For a detailed review of this work as a source for social and urban history see: Torsten Wollina, "Ibn Ṭawq's Ta'līq: An Ego Document for Mamlūk Studies," in *Ubi Sumus? Quo Vademus?: Mamluk Studies – State of the Art*, ed. Stephan Conermann (V&R unipress ; Bonn University Press, 2013), 337–58.

> and large. Zayn ad-Dīn ʻAbd al-Qādir, the merchant, attended with two witnesses and delivered to her fifty-six ashrafī dinars that had been deposited with him. Shaikh Aḥmad's wife then paid this money to a dark-skinned woman in peasant clothing. I was informed that the latter was the mother of Shaikh Ahmad's nephew, this amount being part of the boy's inheritance. Shaikh Aḥmad's wife wrote a receipt for delivering this payment. The boy's mother attested that she received twelve ashrafī dinars on a prior date, making the total sum, to date, sixty-eight dinars. The boy's mother then absolved ʻAbd al-Qādir the merchant's liability for this deposit (*wadīʻa*). Of the total collected by the widow twenty-four ashrafī were paid by Shaikh Ahmad's wife, and the remaining forty-four ashrafī were transferred to Najm ad-Dīn the qāḍī, who was present, to loan out on behalf of the widow's orphaned son, for a year on interest (*li-yū ʻāmal fīhā li'l-walad ilā sana bi'l-fā'ida*)."[594]

On one level, Ibn Ṭawq's above entry suggests that such activities were performed informally outside of courts, since there is no reference to a court (or location). Alternatively, and in view of the qāḍī's presence in the above record, and his receipt of the money to be invested in a muʻāmala, I am inclined to think that this was indeed part of this qāḍī's responsibility, and seems to be a process that was mediated by the qāḍī's own service of investing the orphans' estate in loans. The apparently informal nature of this judicial

[594] Ibn Ṭawq, *Taʻlīq*, 1766.

arrangement, having taken place probably in someone's home, may not have been unusual in the Mamluk era, and perhaps even was characteristic of qāḍīs' work in the early Ottoman era.

For the early seventeenth century later, Gerguis has hypothesized that many of the activities of Ottoman qāḍīs that were registered in sijills were actually performed outside of court and later inserted into the court record. He observed that qāḍīs' personal signature stamps (ʻalāmāt) appeared simultaneously across multiple sijills from different courts of Cairo concurrently (sometimes on the same day). Given the distances between courts, the only plausible answer, he suggests, is that chief qāḍīs and their deputies recorded oaths, depositions and other forms of sijills outside of court at personal residences.[595] This may have very well been the case in Ibn Ṭawq's record. Also complicating matters is that the period between the two long reigns of Sulṭān Qāytbāy (r. 1468-1496) and Sulṭān al-Ghawrī (1501-1517) was a tumultuous interregnum when four sultans vied for power. This did destabilize the judicial order in Damascus at the turn of the sixteenth century, and may have altered the procedural aspects of qāḍīs' work.[596] That said, Ibn Ṭawq's record is characteristic of his record keeping during other periods of relative peace in Damascus, his diary covering an unusually long period – 885-908/1480-1502.

Ibn Ṭawq's above use of the term "benefit," "fāyda" (fā'ida) refers to interest, in surprisingly the same way that it would be used today as a synonym for ribā. Had Ibn Ṭawq recorded this transaction in a court sijill, he would rather have used the word "profit" ribḥ to express the interest taken as legitimate profit. However, it is worth noting that the taking of explicit interest, although disguised as profit in muʻāmalāt for orphans, would have been

[595] Guirguis, "Manhaj Al-Dirāsāt Al-Wathā'qiyya Wa Wāqiʻ Al-Baḥth Fī Miṣr," 272–74.
[596] Winter, "The Judiciary of Late Mamluk and Early Ottoman Damascus."

more tolerated when undertaken to protect the assets of orphans than perhaps any other group in society. Indirectly, the Qur'ān's recognition of remunerative rights for guardians of orphans may promote such lending: "Let not the rich guardian touch the property of the orphan ward; and let him who is poor use no more than a fair proportion of it for his own advantage" (Q 4:6), the term "poor" here referring to the guardians or executors tasked with care of orphans. As I detailed in my review of al-Subkī's fatwās on mu'āmalāt above, in the early Mamluk era the practice of using mu'āmalāt to invest the estates of orphans was already institutionalized. It may seem ironic that the paragon of moral conduct, the qāḍī, is tasked with investing an heir's inheritance in interest-bearing loans, yet, it was common practice for qāḍīs to do so by the early fourteenth century, if not earlier.

In support of Ebu'l-s-Su'ūd's earlier mentioned disparagement of exchanges that relied upon assets of orphans, Ottoman judicial policy was keenly attuned to the need for active supervision of executor creditors who abused their mandates. In al-Bursawī's *biḍā'at al-qāḍī* we find a formulary labelled "The form (*ṣūrat*) of recording the removal of an executor after his betrayal (of trust) has been exposed" that is states the correct form for registering such a mu'āmala:

> Fulān (so and so) and fulān witnessed, in the adjudication presided over by qāḍī fulān … that the legal executor of fulān's estate, whose father fulān b. fulān is deceased … purchased, from the estate of the aforementioned heir, a piece of red cloth for three hundred dirhams, paying less than what it's worth (*rābiḥ aqal min qīmatihi*). Then (the executor) immediately sold it for four hundred dirhams and obtained for himself the profit… the witness testimony

has been accepted … the qāḍī rescinded his executorship and appointed fulān b. fulān to be legal executor of the minor…[597]

5.2 Institutions Regulating Orphan Credit

The references to mu'āmalāt and a dīwān al-aytām (the "bureau of orphans") in al-Subkī's legal responsa are detailed enough to suggest that a sophisticated bureaucracy was engaged in the management of orphan capital, especially when combined with other evidence of the mawdi' al-ḥukm, which refers to a depository where orphan estates were stored. In al-Subkī's day, the dīwān al-aytām had direct custody of orphans' capital. Al-Subkī relates a case of an executor who was entrusted to invest 9,000 dirhams on behalf of an orphan; the executor was paid this sum directly "from the dīwān al-aytām."[598] This bureau appeared to have centrally administered the affairs of orphan inheritances across the sultanate. Al-Maqrīzī relates that, in Dhu'l-Hijja 746/ September 1363, Taqī Dīn al-Subkī had the chief qāḍī of Jerusalem indicted and removed from his post after presenting evidence that he was selling orphaned Muslim children to "Christians" (Frankish/Byzantine slave traders?).[599] Indeed, al-Subkī's position as head of this institution in Cairo, as well as in Damascus later in his life, required him to not only supervise the activities of debtors who operated the accounts of orphan estates but also ensure that monies held for orphans were kept separate from the

[597] al-Bursawī, *Biḍā'at Al-Qāḍī*, fol. 47a.
[598] al-Subkī, *Fatāwā*, vols. 1, 347.
[599] al-Maqrīzī, *al-Sulūk li-ma'rifat duwal al-mulūk*, vol. 4, 19.

state's own funds. In an episode from two-years prior, al-Maqrīzī narrates that al-Subkī, along with other heads of government bureaus and institutions in Damascus, was forced to surrender money in the treasury of orphans to the amīr Quṭlūbughā al-Fakhrī who was extorting funds from the city's waqfs and elites.[600]

As A. Sabra observed, amīrs and rulers drew on the Mawdi' al-Ḥukm's funds to meet their military expenses; in 791/1389 and 796/1394, the Amīr Mintāsh and Sulṭān Barqūq, respectively, withdrew over a million dirhams from this fund. Mintāsh used these funds for defending Cairo from Barqūq's insurrection, and the later used this fund for meeting the expenses of a military campaign.[601] This depository was established during the short reign of Sultan Lājīn (r. 1297-99) and it operated at least until the reign of Sultan Barqūq (d. 801/1399), the entire span of the fourteenth century.[602] The administrative practice of managing orphan estates, though, predated the establishment of this institution and can be traced to Sultan Baybars' rule (d. 676/1277).[603] Although the mawdi' al-ḥukm was used as a sinking fund for military campaigns, money withdrawn from this fund was not easily removed, and was considered a debt to this depository when it was. The funds borrowed by Barqūq were eventually repaid. However, it appears that this fund and its associated buildings fell into disuse after Tamerlane's campaign in Syria, according to al-Maqrīzī. Sabra

[600] Maqrizi, *Sulūk*, vol. 3, 349
[601] Sabra, *Poverty and Charity in Medieval Islam*, 62–63.
[602] Ibid.
[603] Sabra observed, "it appears that some sort of judicial control over the property of orphans existed previously. The position of amānat al-ḥukm existed as early as the reign of al-Ẓāhir Baybars." Sabra, *Poverty and Charity in Medieval Islam*, 62, note 221; Muḥammad ibn 'Abd al-Raḥim Ibn al-Furāt, *Tārīkh Ibn Al-Furāt*, ed. Qusṭanṭīn Zurayq (Beirut: al-Maṭba'ah al-Amīrkānīyah, 1936), viii, 39; Abū al-Maḥāsin Yūsuf Ibn Taghrībirdī, *Al-Manhal Al-Ṣāfī Wa-Al-Mustawfá Ba'da Al-Wāfī*, ed. Muḥammad Muḥammad Amīn (Cairo: al-Hay'ah al-Miṣrīyah al-'Āmmah lil-Kitāb, 1984), vol. 3, 467.

suggests that by the late eighth/fourteenth century, the "exigencies of wartime and the corruption of the judiciary led to the destruction of this institution."[604]

Before the Mamluk era, the mawdi' al-ḥukm and its related supervisor (*amīn al-ḥukm*) had a long history, likely having its genesis in the Abbasid era.[605] The title amīn al-ḥukm, which could loosely be translated as the "fiduciary of the courts", is quite broad, but nevertheless implies the judiciary's care for orphans. Escovitz found evidence that the post was often a stepping stone to other judicial appointments, noting that "this post (the Amīn al-Ḥukm) was concerned with accounting and investing the funds and endowments reserved for orphans."[606] Sabra, citing Ibn al-Furāt, observed that the "depository was in the hands of a qāḍī, known as the amīn al-ḥukm, who reported to the chief Shāfi'ī qāḍī."[607] The Egyptian historian, encyclopedist, bureaucrat and contemporary of al-Subkī, Shihāb ad-Dīn Aḥmad al-Nuwayrī, defined the holder of this post as "the superintendent of orphans appointed by the ruler" (*wa hūwa al-nāẓir 'ala'l-aytām min qibal al-ḥākim*) in his *Nihāyat al-arab fī funūn al-adab*.[608] Legal formularies from the fourteenth century refer to the conjoining of judicial authority and the fiduciary care of orphans. Al-Nuwayrī refers to acts that the Amīn al-Ḥukm recorded in court when selling property on behalf of orphans (from one orphan's estate to that of another):

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[604] Sabra, *Poverty and Charity in Medieval Islam*, 63.
[605] For Abbasid period, see: Claude Cahen, "Amīn", *Encyclopaedia of Islam, Second Edition*, Edited by: P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel, W.P. Heinrichs; Émile Tyan, *Histoire de l'organisation judiciaire en pays d'Islam,* (Leiden: E.J. Brill, 1960), I, 384.
[606] Escovitz, *Qāḍī al-Qudāt*, 191
[607] Sabra, *Poverty and Charity in Medieval Islam*, 62; Ibn al-Furāt, *Tārīkh Ibn Al-Furāt*, 16.
[608] Shihāb al-Dīn Aḥmad ibn 'Abd al-Wahhāb al-Nuwayrī, *Nihāyat al-arab fī funūn al-adab* (Cairo: Dār al-kutub al-miṣriyyaẗ, 1938), Vol. 9, 49.

"This is what was purchased by fulān from qāḍī so and so, the amīn al-ḥukm al-'azīz in such and such jurisdiction, the seller of the below-mentioned property to fulān, the minor by the court."[609]

Other formularies presented by al-Nuwayrī suggest that the amīn al-ḥukm also catered to other inheritance cases more broadly, and that this post was not restricted to the management of orphans' capital. For instance, Al-Nuwayrī presents a formulary used for a widow seeking in-kind repayment (in property) of her deferred ṣadāq from her deceased husband's estate following the latter's death. This formulary involved a sale of property from "al-Ḥukm al-'Azīz", which indicates that the mawdī' al-ḥukm was also the custodian of property escheated by the treasury (the *bayt al-māl*), as the state would become a partner with the widow in the deceased husband's assets if he had no children. Here the amīn al-ḥukm serves as the state's executor.[610] In her Study of Six Iqrārs from al-Quds, Huda Lutfi located and translated one such example from Jerusalem of a widow who obtained payment from her deceased husband estate's property, aside from her legal inheritance from him, in settling a ṣadāq debt owed to her by her husband. Lutfi noted that the structure of this iqrār closely followed the formulary given by Al-Nuwayrī.[611] In another interesting example, al-Nuwayrī presented a formulary in which the amīn al-ḥukm was required to approve the marriages of minors under the state's supervision (men and women alike), whereby the state became their legal guardian (*walī*). However, the assets of these young adults would remain under the mawdi' al-ḥukm, even after marriage, until their legal majority was established in court.[612]

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[609] al-Nuwayrī, *Nihāyat al-arab*, vol. 9, 49.
[610] al-Nuwayrī, *Nihāyat al-arab*, vol. 9, 57-60.
[611] Huda Lutfi, "A Study of Six Fourteenth Century Iqrārs From Al-Quds Relating To Muslim Women," *Journal of the Economic and Social History of the Orient* 26, no. 3 (1983): 269–72.
[612] al-Nuwayrī, *Nihāyat al-arab*, vol. 9, 121-122.

Qāḍīs' management of orphan properties undoubtedly left room for abuses, and legal proscriptions or warnings against the personal trading of orphan property by qāḍīs and others under the authority of qāḍīs, such as the terminally ill, are common in medieval judicial literature. However, the ambivalence of such restrictions sometimes cannot be avoided, given that qāḍīs were mandated to regulate trading of such properties in order to provide for the maintenance of orphans. In his famous work, *al-Ashbāh wa'l-naẓā'ir*, the Egyptian Ḥanafī jurist Ibn Nujaym (d. 970/1563), adopted a view that was put forth much earlier by the Anatolian jurist Badr al-Dīn Maḥmūd b. Qāḍī Simāwna (d. 1416?), who had studied in Cairo:

> "As for the qāḍī, if he purchases the property (lit. māl) of an orphan for himself, from himself [assumes here that the qāḍī is also the orphan's executor], or from an executor, this has been addressed in *Jāmiʿ al-fuṣulayn* as such: it is forbidden for a qāḍī to sell his own property to an orphan, and the opposite also holds true. However, what he (the qāḍī) purchases from an executor, or that which he sells to an orphan via an executor is permitted, even if the executor is appointed by the qāḍī (*wa law-waṣīyan min jihat al-qāḍī*)."[613]

The Amīn al-Ḥukm duties also overlapped with those of the Nāẓir al-aytām, who appears to have been a supervisor tasked with the welfare of orphans under the state's charge, assessing legal guardianship, determining their maintenance requirements, and having authority over allowing them to enter marriages (as noted above). Al-Subkī's references to the nāẓir al-aytām implied the same functions that were attributed to the amīn al-ḥukm,

[613] Zayn al-Dīn ibn Ibrāhīm Ibn Nujaym, *al- Ashbāh wa-'n-naẓā'ir 'alā maḏhab Abī-Ḥanīfa an-Nu'man* (Beirut: Dār al-Kutub al-'Ilmīya, 1999), 199.

suggesting these two labels may have referred to the same post. Yet, documentary evidence from late fourteenth- century Jerusalem, below, indicates that these were two distinct posts, serving overlapping but different functions. Such an administrative overlap should not be surprising, and was characteristic of these functions. For instance, al-Qalqashandī's foundational administrative text, *Ṣubḥ al-aʿshā fī ṣināʿat al-inshāʾ*, mentions that the mawdiʿ al-aytām of Alexandria came under that city's nāẓir al-awqaf, also indicating proximity between the supervision of waqfs and aytām.[614] And, as with other posts, such positions were heritable; Taqī ad-Dīn al-Subkī's son, Bahā' ad-Dīn al-Subkī inherited the office of nāẓir al-aytām from his father and continued to hold this post even after losing the chief qāḍīship that he had also inherited.[615]

As alluded to by al-Qalqashandī, the trading of orphan-inherited properties was an active arena for investment, taxation and collusion for some qāḍīs because of their proximity to the Mawdiʿ al-Ḥukm. As an amīr, the future Sulṭān Qalā'ūn reportedly purchased properties from an amīn al-ḥukm, Ibn Makhlūf, whom he would later appoint as the chief Mālikī qāḍī and Nāẓir al-khizāna al-sulṭānīya.[616] A few decades later, under the unrelenting tax raids of the infamous al-Nashw, the tax collector whom Sulṭān al-Nāṣir Muḥammad appointed as his nāẓir al-khāṣṣ in 733/1333[617], a spotlight was shone on the purchase and sale of orphan properties held by the mawdiʿ al-ḥukm on their behalf. In 739/1339, al-Nashw chided the chief Shāfiʿī qāḍī of Cairo for ignoring an edict (*marsūm*) that taxed the sale of

[614] al-Qalqashandī, *Ṣubḥ al-aʿshā*, vol. 11, 407.
[615] Escovitz, *Qāḍī al-quḍāt*, 191.
[616] Escovitz, *Qāḍī al-quḍāt*, 49; Also, in later years, citing al-Nuwayri's *Nihāyat al-arab fī funūn al-adab*, Escovitz states that "the Mālikī chief judge, Zayn al-Dīn Ibn Makhlūf, had been an *amīn al-ḥukm*, an official who helped administer a *mawdaʿ al-ḥukm* on behalf of orphans and others." Escovitz, *Qāḍī al-quḍāt*, 210.
[617] Amalia Levanoni, *A Turning Point in Mamluk History: The Third Reign of Al-Nāṣir Muḥammad Ibn Qalāwūn (1310-1341)* (Leiden; New York: E.J. Brill, 1995), 73–80.

properties that were purchased with funds from the mawdi‘ al-ḥukm, for orphans, by the amīn al-ḥukm. The qāḍī in question refused to entertain the possibility of taxing orphaned property and ignored al-Nashw. Al-Nashw turned this episode into a political scandal by accusing the amīn al-ḥukm of throwing the edict on the ground and disrespecting the sultan (since the sultān's name and insignia were on the edict). Sulṭān Nāṣir Muḥammad summoned the amīn al-ḥukm and ordered that he be beaten and forced to pay the tax for this purchase.[618]

Although we cannot be certain of how extensive the state's management of orphan inheritances was in the Circassian period, because of the patchy historical record for this office, the historian Ibn Ṭūlūn provided a short biography for ‘Abd al-Rahman b. Ibrāhīm al-Dasūqī (d. 927/1521), an ‘ālim who took up a deputy qāḍīship in Damascus in 916/1510. At the time, these authors report that al- Dasūqī was the nāẓir al-aytām in Damascus.[619] However, there is no trace of either the mawdi‘ al-ḥukm or the amīn al-ḥukm in Ibn Ṭawq's diary, the biographical, legal or chronicle sources, and this supports the dominant view of scholars such as Sabra regarding its disappearance by the fifteenth century.

The amīn al-ḥukm's activities as recorded in court deeds from the Ḥaram al-Sharīf archive of Jerusalem illustrate how this figure was similar to, yet different from, the nāẓir al-aytām. The activities of holders of these offices appear concurrently in this archive.[620] The numerous court quittances of money owed and paid to the children of Burhān ad-Dīn Ibrāhīm b. Rizq Allāh al-Nāṣirī, a mendicant and Qur'ān-ḥadīth reciter who lived at the Salāḥīya khānqāh in Jerusalem, shed light on this. Although Burhān ad-Dīn was active as a reciter in

[618] Escovitz, *The Office of qâḌî Al-Quḍât in Cairo under the Baḥrî Mamlûks*, 156; al-Maqrīzī, *al-Sulūk li-ma‘rifat duwal al-mulūk*, Vol. 3, 199, 251.
[619] Ibn Ṭūlūn, *Mufākahat*, 1962, vol. 1, p. 366; Naǧmaddīn al- al-Ghazzī, *Al-Kawākib as-Sā'ira Bi-a'yān Al-Mi'a Al-'āshira*, ed. Jibrā'īl S. Jabbūr (Beirut: American Pr., 1945), vol. 1, p. 226.
[620] Little, *Catalogue*.

Jerusalem for two decades during the middle of the seventh/fourteenth century, he only established professional tenure and some social standing in the early 780s/1380s, when court deeds began attaching the title "Shaykh" to his name and several amīrs and naẓirs of waqfs in Jerusalem patronized him with posts as a teacher and Qur'ān reciter.[621] This contrasts to a decade earlier, when court documents show that he had trouble finding steady employment.[622] In a hyperbolic petition for tenure he submitted to the chief qāḍī of Jerusalem in 781/1380, Burhān ad-Dīn complains of having performed ḥadīth recitation for twenty years without pay.[623] In his last years, and a few years before his death in Dhū'l-Qa'da 789/November 1387, Burhān ad-Dīn was able to buy a house, begin construction on another, and purchase a slave for one of his two wives at the time (By this point, he had already divorced two other wives). [624] Burhān ad-Dīn left behind Shīrīn bt. 'Abd Allāh, the mother of his two sons Mūḥammad and 'Alī, and an unnamed wife who was the mother of his other son Maḥmūd (Maḥmūd is referred to as Kamāl in most of the records pertaining to him – probably short for Kamāl al-Dīn). [625]

[621] Little, *Catalogue*, 17, 26, 32, 307.
[622] In 770/1368, Burhān al-Dīn submitted a petition to Jerusalem's chief judge requesting "a stipend of a raṭl of bread a day from al-Ribāṭ al-Manṣūrī in exchange for recitations and prayers." Little, *Catalogue*, 39.
[623] The petition stated that "he has no position in Jerusalem to support himself and his family and that he has recited ḥadīth for twenty years without pay, (and) requets confirmation of the salary of twenty dirhams (per month) to recite hadith on Fridays."" Little, *Catalogue*, 38.
[624] A record from 782/1381 shows that Burhān al-Dīn divorced a former wife, Fātima al-Khalīlīya and that the latter had no claim against him except her ṣadāq. A later court registered receipt records that he paid her father support for his son from her. Little, *Catalogue*, 208, 215; In Ṣafar 784/April 1382, Būrhān al-Dīn divorced another wife, Qaratamur bt. 'Amr, and also owed her ṣadāq. Little, *Catalogue*, 220.
[625] In 780/1379, Burhan al-Din purchased a "dar" for 825 dirhams from the Bayt al-Mal. Little, *Catalogue*, 278; In Jumada 788/July 1386, A court attestation is registered by Burhān ad-Dīn's future neighbor in which the latter gives Burhān al-Dīn permission to build the home using a part of his wall. Ibid., 232; In Rajab 784/September 1382, Burhān ad-Dīn's wife Shīrīn purchases a Takrūrī slave girl for 489 dirhams. Little, *Catalogue*, 291; A probate court inventory of sales from the auction of Burhān ad-Dīn's assets is recorded on 14 Dhū'l-Qa'da/26 November 1387 and the first maintenance payments issued to his children by the Amīn al-Ḥukm take place a week earlier. Little, *Catalogue*, 369.

At least 12 legal deeds from the Ḥaram archive pertain to the management of Burhān ad-Dīn's estate by agents of the state on behalf of his children for about a year, from his death in Dhū' al-Qa'da 789/November 1387 to Ramaḍān 790/September 1388. These records show how the management of debts owed to Burhān ad-Dīn's was a complex task to manage. Even though he was not wealthy elite, the court's disbursements to his heirs indicate that executors were abiding by a testament he must have left, since some of his children received larger shares of debt repayments than others. The same applied to their maintenance payments, which were not equally divided among his sons. Further, the deeds relating to this figure indicate that his estate was managed by two amīn al-ḥukms and a careful study of the deeds indicates that there was a transition in this post. Four deeds indicate that a certain Shams al-Dīn Muḥammad b. Shihāb ad-Dīn Aḥmad al-Ḥisbānī occupied this position for at least four consecutive months, from Dhū' al-Qa'da 789/Nov 1387 to 22 Safar 790/March 1388.[626] Al-Ḥisbānī then presumably stepped down and his post was taken over by another jurist, Shams ad-Dīn Muḥammad b. Jamāl ad-Dīn b. 'Abd Allāh al-Adhra'ī who is listed as the amīn al-ḥukm in May and June of the same year.[627] Significantly, the deeds these Shāfi'ī deputy judges produced in connection with the orphans' maintenance appear to have conformed to those in al-Suyūṭī's manual for judges, *Jawāhir al-ʿuqūd*.[628]

In an article on the interplay between judicial rulings (*aḥkām*) and judicial certifications (*thubūt*) from the Ḥaram archive, Christian Muller reproduces a court record

[626] Little, *Catalogue*, 190, 196, 200–201, 247.
[627] Little, *Catalogue*, 196, 198, 208.
[628] Little notes that the *nafaqāt* award deeds issued by the Nai'b al-Hukm were in line with the "formularies for maintenance recommended by al-Asuyṭī." Little, *Catalogue*, 330.

from 795/1393 (unedited but translated by him) that clarifies aspects of how orphan estates in Jerusalem were transmitted:

> "On 5 Ramaḍān 795, testimony was given at the Shāfi'ī court in Jerusalem [confirming] that Jamāl al-Dīn 'Abd Allāh, guardian of the estate of his late brother, had presented a judicial decree (*marsūm*) issued and certified in Damascus concerning the bequest of his brother. He asked the *qāḍī* Abū 'l-Rūḥ to place the property of his brother's children under his control, in accordance with the bequest and Damascene decree. This being in the orphan's interest, the *qāḍī* Abū 'l-Rūḥ gave his written permission in the month of Rajab, but asked for a court certificate of the deceased's legal competence (*ahlīya*) and [financial?] situation (*ḥāl*). In response to this request, the claimant produced a *maḥḍar*, issued by the former *qāḍī* of Jerusalem, Taqī 'l-Dīn, which was then certified by Abū 'l-Rūḥ. Thereupon the *qāḍī* ordered the delivery of the orphan's money and debt certificates (*masāṭir shar'īya*), which had been kept by the deputy qāḍī (*khalīfat al-ḥukm*), to the claimant. The document specifies that the guardian, 'Abd Allāh, had in fact received everything, and it then lists the names of all debtors and the amount of the debts."[629]

The above record confirms what we know, that qāḍīs exercised enormous power and discretion over the testamentary and probate process, not only in vetting the suitability of executors, but also in assessing the legal validity of debts issued by creditors before their deaths. Had the deceased creditor above been proven legally incompetent, the management

[629] Document no. 709, not edited. Christian Müller, "Settling Litigation without Judgment: The Importance of a 'Hukm in Qāḍī' Cases of Mamlūk Jerusalem," *Dispensing Justice in Islam : Qadis and Their Judgements*, 2012, 62; cf. Little, *Catalogue*, 269.

of debts owed to him may have compelled a qāḍī to keep them under the state's control. Given the aforementioned evidence of an amīn al-ḥukm in Jerusalem at this time, the person referred to as "khalīfat al-ḥukm," which Muller translates as "deputy judge" may have also referred to the amīn al-ḥukm position discussed above.

Turning to the nāẓir al-aytām position, and its relationship to the amīn al-ḥukm, two further deeds of disbursements to orphans from the Ḥaram archive list al-Adhraʿī (above) as being Jerusalem's "nāẓir al-aytām" (Ṣafar 790/February 1388) and wakīl al-aytām (Rajab 790/March 1388).[630] These posts predate al-Adhraʿī's taking up of the amīn al-aytām position by a few months. This suggests that the nāẓir al-aytām and amīn al-aytām positions were not held jointly. It is also notable that when, as a nāẓir al-aytām and wakīl al-aytām, al-Adhraʿī issued payments to orphans, they were recorded as legal depositions in much the same way that he would record them later as amīn al-ḥukm for payments to Burhān ad-Dīn's orphaned children. Since both the nāẓir al-aytām and amīn al-aytām managed payments to orphans, in apparently the same way, we cannot point to this as a mark of difference. Notably, a third deed, from Ramaḍān 789/ October 1387, when al-Adhraʿī was the nāẓir al-aytām, he is shown as paying out 485 dirhams to Fāṭima al-Ḥamawīya, the widow of a wealthy merchant, as four months of maintenance payments from the estate of her deceased husband for her children.[631] In this record, al-Adhraʿī's is only referred to as the "agent of her husband's estate" (*al-mutakallim ʿala tarikat zawjihā*), or rather the executor. One may conjecture that the nāẓir al-aytām's role was to manage orphan capital that was not physically held by the mawdiʿ al-ḥukm, but, rather, perhaps as tarikāt managed under separate testamentary custody

[630] Little, *Catalogue*, 197–98, 218.
[631] Ibid., 200; For a study on Fāṭima al-Hamawīya and her husband's records see: Donald P. Little, "Documents Related to the Estates of a Merchant and His Wife in Late Fourteenth- Century Jerusalem," *Mamluk Studies Review*, no. 1998 (n.d.): 93–193.

with the courts. The nāẓir al-aytām's role, therefore, may have fulfilled an intermediary function that interacted with the courts, but was not necessarily their representative as the amīn al-ḥukm was.

Further documentary support for the above assertion is limited, although in at least one case, there is a reference to a depository (the mawdīʿ al-ḥukm?) and heirs. A legal deposition from Jumādā 797/April 1395 records that a certain Ḥ/Jajak? bt. ʿAbd Allāh, the widow of an itinerant merchant from Mosul (al-Mawṣilī at-Tājir as-Saffār), acknowledged receiving - as the guardian of her children - a large sum of 500 Egyptian dinars, five gold florins, and other currencies from what Donald Little translated as the "depository of the Shāfiʿī Court in Jerusalem."[632] Little did not provide the Arabic term, and I have been unable to access the original, yet it would be reasonable to assume that the "depository" he refers to is none other than the mawdiʿ al-ḥukm.

If the main difference between the nāẓir al-ḥukm and the amīn al-ḥukm was one of judicial-administrative latitude, that is, only the latter had legal authority to assess disputes, issue directives (e.g., maintenance payments), legalize the registration of debts to orphans, and so on, then it would be fair to assume that the fulfillment of these duties would have been taken over by the chief qāḍī and his deputies in the late Mamluk period, when the amīn al-ḥukm office disappeared. The non-survival of Mamluk court records from the fourteenth and fifteenth centuries precludes taking an absolute position on this. However, the lack of any mention of an amīn al-ḥukm in the earliest qāḍī court records dealing with orphan issues from Ottoman Jerusalem and Damascus (based on my limited review) should lead us to consider that this was indeed the case. Further, the extensive regulation of orphan lending

[632] Little, *Catalogue*, 217.

that was carried out by Ottoman era qāḍīs should, I contend, be viewed as symptomatic of a historical continuity of judicial practice from the late Mamluk era, rather than a break from it – in general terms.[633] Indeed, with respect to institutional organization, the Ottoman sixteenth century could be viewed as an extension of the de-institutionalization of such functions, given the consolidation of powers in the office of the chief qāḍī and the wide discretion given to such qāḍīs to manage local economic affairs (e.g. tax collection, tax-farming, supervision of muḥtasib's etc.) on behalf of the sulṭān and these could have significant political/military impact (e.g., avāriz taxes and settling military disputes). Indeed, if we are to consider a historical break, it would be the institutional break-down of the late fourteenth to early fifteenth century.

5.3 Views on Mu'āmalāt from Qāḍīs and Court Procedure

Under Islamic law, the activities of guardians (sing. walī) of orphans are divided into two roles: the estate executor (sing. waṣī) whose duty it is to manage the assets of minors assigned to him or her, and the care-taking guardian (sing. nāẓir), responsible for their care. Unless otherwise noted, references to the "waṣī" in sijills relate to the former function, although it was possible that both positions could be held by the same person, but this usually would have been noted in records. The language of judicial manuals, as well as sijills, reflects an awareness and concern for promoting the welfare of orphans by rooting out malfeasance when detected.

[633] I have also found no references to the *amīn al-ḥukm* or *mawdī' al-ḥukm* in any of the Ottoman era legal manuals or fatwa collections referred to in this chapter.

Sixteenth century Ottoman courts generally adopted a standard view on how the inheritance of minors should be handled. The assets of minors were subject to the legal interdiction (*ḥajr*) of their walī, usually the father or grandfather in their lifetimes, or the designated wasī near or upon their death, usually a close relative or a trustworthy caretaker appointed by the qāḍī. The classification of ḥajr was also placed on those who were deemed to be insane, irresponsible, spendthrifts, the bankrupt, slaves, and those with a mortal illness that could have impaired their thinking. The fear that insolvent debtors could easily abscond with the property of the senile, or dispose of it without settling their debts, was put forward as a rationale for interdicting the assets of those at risk. With respect to achieving adulthood, the transition from minority status (*qaṣr*) to majority status (*rushd*), and the removal of interdiction, was a subject that is discussed frequently in fiqh works because while physical maturity may have been reached and attested, claims could be made against the mental maturity of a new adult and this person's ability to responsibly manage their own money.

The relationship between majority and financial independence was also a point of debate among adherents of the Ḥanafī school of law. At a most basic level, Abū Ḥanīfa "denied that the irresponsible person who was of age was subject to ḥajr; Abū Yūsuf and Shaybānī held that he was." [634] The charge often levied in this category was that an orphan was still mentally incompetent (*sāfih*) even though physically mature; being a spendthrift and mentally immature were personal qualities that required vetting, usually by a qāḍī. Depending on the circumstances, young adults were therefore allowed to achieve a hybrid form of majority. They were allowed full recognition as adults to undertake certain legal acts,

[634] J. Schacht, "Ḥaḏjr", *Encyclopaedia of Islam, Second Edition*, Ed. P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel, W.P. Heinrichs.

such as the ability to enter into marriages (as in al-Nuwayrī's aforementioned formulary) but not others, such as buying or selling their own property.

While Ḥanafī qāḍīs had wide discretion in determining the maturity of minors, they did not have retroactive powers to reconsider their judgement based on the minor's actions. This is something that Shāfi'ī qāḍīs could apparently do. Shāfi'ī qāḍīs could reverse their recognition of majority and return control of an orphan's assets to their former waṣī if the orphan in question (who had achieved mental maturity) was shown to have become a spendthrift following majority.[635] In practical terms, and in courts, both Mamluk and Ottoman jurists were allowed considerable discretion when determining orphans' transition to adulthood, and this depended on the particulars of the case.

Nevertheless, most 'ulamā of the sixteenth-century (perhaps without exception) emphasized that it was qāḍīs who should typically control the funds of orphans. This was the view of the Gazan Ḥanafī jurist, and student of Ibn Nujaym, Muḥammad al-Tumurtāshī (939-1004/1531-1596),[636] who elaborated such in his advice manual for qāḍīs, entitled The Principles of Jurists and Judges (*al-Aḥkām fī-mā yata'allaq bi'l-quḍāt wa'l-ḥukkām*). According to al-Tumurtāshī, when a qāḍī served as an executor, it was his duty to have total control over the respective orphan's inherited estate (*tarika*), in question in order to prevent mismanagement of the orphan's assets. For al-Tumurtāshī, instances where a qāḍī had

[635] E. Chaumont and R. Shaham, "Yatīm", *Encyclopaedia of Islam, Second Edition*, Ed. P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel, W.P. Heinrichs.

[636] Known by the name "al-Khaṭīb al-Tumurtāshī" (939-1004/1531-1596), his Allepan biographer al-Muḥibbī (d. 1111/1699) related that al-Tumurtāshī was the preeminent faqīh of his day in Gaza where he was born and settled again after spending time receiving instruction from leading scholars in Cairo. Among others, he was a student of Ibn Nujaym and the chief judge of Cairo, "Alī Ibn al-Ḥanā"ī. According to al- Muḥibbī, al-Tumurtāshī's commentaries were also widely read and used as reference works by later Damascene jurists, such as the muftī of Damascus "Alā"l-Dīn al-Ḥaṣkafī (1012-1082), although it doesn't seem that he held any appointments. Muḥammad Amīn ibn Faḍl Allāh Al-Muḥibbī, *Khulāṣat al-athar fī a'yān al-qarn al-ḥādī 'ashar* (Miṣr: al-Maṭba'ah al-Wahbīyah, 1867), vol. 4, 19.

executorship but not control of the orphan's estate were undesirable, due to the fact that such an estate would likely have involved the interests of other family members, and would have opened room for conflicts of interests to play out.[637]

Al-Subkī was also concerned about the excessive drain on returns that fees could have on orphan capital, given that muʿāmalāt were sometimes arranged through financial brokers (*mubāshirūn*). Al-Subkī's opinion on this is preserved in a compilation work on waqfs arranged by the Shāfiʿī Egyptian scholar ʿAbd al-Rūʾūf al-Manāwī (d. 1031/1621), entitled *Kitāb taysīr al-wūqūf ʿala ghawāmiḍ aḥkām al-wūqūf*.[638] It seems that such mubāshirūn were retained by the Orphan's Bureau to arrange lending with creditworthy borrowers.[639] In his own fatāwā, al-Subkī notes that the mubāshirīn were retained to provide services to waqfs and individuals on a salaried basis and that, at times, the salaries of the mubāshirīn were so exorbitant that they could "consume three quarters of a waqf's assets".[640]

5.4 Case Studies

Early Ottoman Sijills from Damascus, Aleppo, and particularly Jerusalem, contain many records of loans given out on behalf of orphans by their executors. These records range across social groups, from hundreds of dinārs by the children of the elite to those of a few dirhams by orphans from modest backgrounds. Typically, the information that is recorded is

[637] Muḥammad al-Tumurtāshī, *Al-Aḥkām Fī-Mā-Yataʿ Laq Bi'l-Quḍāt*, (Copied in AH 1044), King Saud University Library Manuscript Collection, fol. 20.
[638] An Azharī scholar, al-Munāwī was is recorded by al-Muḥibbī as having studied, among others, under ʿAbd al-Wahhāb al-Shaʿrānī and al-Ramlī. al-Munāwī, *Taysīr Al-Wuqūf ʿalá Ghawāmiḍ Aḥkām Al-Wuqūf*, 6 For al-Subkī's opinion, ibid. pg. 488. .
[639] The term is also used to refer to any number of financial officials.
[640] Al-Subki, *Fatāwā*, vol. 2, 157. Al-Subki also discusses their similar involvement in waqf's endowed as sadaqat, and the control of entire endowed villages. Al-Subki, *Fatāwā*, vol. 2, 137

sparse, listing the names of the orphans whose money was lent out, the amounts and durations of the loans, the persons lending such monies on their behalf, and the names of the borrowers involved. Many records refer to the person who is arranging the loan as the "mubāshir," literally the "introducer" of the lender to the borrower. In most cases, the mubāshirs are the executors of the orphan's estate, however the term is also used elsewhere in the sijills to indicate an activity that may have been required court vetting or approval. At times, loans are arranged or introduced by qāḍīs. The normative term used to describe a loan undertaking in the sijills is *tartīb* (lit. "arranging"), and a record of a loan would usually begin with "*tarattab li-fulān bi-mubāsharat fulān*." In some cases, no record is left of who introduced the borrower to the lender, and it is simply recorded as "*tarattab li-fulān*."

Cases filed by orphan creditors (by their executors) against debtors who defaulted on repayment of their principal are not uncommon; however, cases specifically concerning disagreements over interest, are less so. This may imply that lenders avoided the explicit recording of interest as a way to have more discretion in the event of a dispute. While creditors and borrowers surely entered extra-judicial debt contracts, such agreements were subordinate – as evidence – to what was registered in court sijills, unless the former were registered as ḥujjas in court sijills. As will be discussed in the below cases, in instances where interest is noted, it is described as an amount relative to the loan principal and referred to as ribḥ rather than fā'ida.

The mu'āmala form in al-Busrawī's manual occasionally appears in orphan-related sijills. However, more often, the mu'āmala only includes reference to the loan principal without referring to the due interest. The reason why references to interest rates or amounts are sometimes included and sometimes excluded is puzzling. Perhaps, given the court's tacit

support of a normative market interest rate, loans that were transacted above such rate would have come under scrutiny, thus prompting borrowers and lenders to exclude them. It is also possible that the court itself did not require a recording of interest rates, or may have excluded mention of interest unless explicitly requested to do so by the parties to the loan. One possibility is that the latter practice would have given qāḍīs greater discretion in determining what constituted a reasonable interest amount in the event of a dispute.

As with other financial activity, of waqfs and tax-collectors for example, the activities of executors were supervised by qāḍīs, and occasionally financial statements of accounts muḥāsabāt were requested by qāḍīs.[641] Muḥāsabāt usually involved a laborious review of the various ḥujjas and other records that constituted such accounts from past periods, and the court charged a rasm al-muḥāsaba fee for registering and reviewing such statements,.[642] In muḥāsabāt concerning orphans, executors and guardians were required to declare funds that they borrowed from the capital of orphans under their management. Additionally, it was not unusual for executors to leave instructions concerning how the orphan's capital was to be invested in loans. In at least one case from Jerusalem, below, fathers chose to invest funds dedicated to their children's welfare in cash-waqfs to be invested in mu'āmalāt. Such debt

[641] From those that I have reviewed, the accounting aspects of these *muḥāsabāt* appear similar to those issued for other activities such as waqfs, tax-farms and business partnerships. They provide a simple ledger of credits and debits from the account, but not a full accounting. *Muḥāsabāt* also do not appear to have been issued in a regularized manner, rather they were issued when the situation called for an accounting to be performed, such as during the distribution of profits in a partnership, a major costly repair of a waqf building, or in the case of orphans, the settlement of accounts between executors and guardians.

[642] Information from the sijills indicates that this fee ranged from half a *ṣulṭānī* to one *ṣulṭānī,* or the equivalent of 20-50 Damascene paras in this period. *Muḥāsaba* accounts usually were a balance sheet reconciliation of assets to liabilities, for a given institution or financial account under the supervision of the court. In many cases *muḥasabāt* were submitted to judges with expressed requests for permission to distribute salaries to employees from revenues, or to repay outstanding to expenses – such as loans. Since most institutions were *awqāf*, most *muḥāsabāt* related to *awqāf*. See for example the *muḥāsaba* of al-hamam al-'ain (J-Sij 67-197-1), *muḥāsabat* waqf al-marstān, Jerusalem's hospital (J-Sij 67-197-2), *muḥāsabat maḥsul* al-ribāt al-mansuri (J-Sij 67-211-1).

registrations in court may have been a strategy to alienate certain assets for specific children and separate them from the assets of other legal heirs upon death.

A case of this sort of mu'āmala has survived from a ḥujja of an iqrār that was recorded in Jerusalem on 7 Rajab 971/20 February 1564. It details the repayment of a 29 sulṭānī loan to the executor of the heirs of a former Ḥanafī Imām of the Dome of the Rock sanctuary, Mūsā al-Dayrī, a member of a well-known Jerusalemite family of qāḍīs from Mamluk times. The executor is a merchant named Sa'd ad-Dīn Bin Rabī' (Bin Rabī' is the family name) and he was chosen (*al-waṣī al-mukhtār*) to be an executor during al-Dayrī's lifetime.[643] The abovementioned 29 sulṭānī debt had been loaned (tarattab bi'mubāsharat al-waṣī) by the executor to a local 'ālim, Shaykh Abī al-Hudā al-Ghazzī (perhaps from the eponymous family of Damascene jurists) and his uncle. Upon attesting the repayment of this sum, the sijill also records that the above executor credited 6 of this 29 sulṭānī debt to Mūsā's four children, while the remaining 23 sulṭānī were credited to a cash-waqf that Mūsā had set up for the benefit of his two grandsons, children of his pre-deceased son, Kamāl al-Dīn.[644] This ḥujja records that this distribution of these amounts was being carried out in accordance with Mūsā's stated instructions during his lifetime, as recorded in a previous sijill (that the executor presumably brought a copy of with him to court).[645] Further, in this ḥujja, the executor acknowledged that he agreed to relinquish 1 sulṭānī from the amount originally due to the orphans, since the executor had recalled the loan three months before it's intended maturity. The total originally owed to the orphans was 30 sulṭānī. Even though there is no

[643] Yazbak contends that the title al-waṣīī al-mukhtār refers to the trustee delegated by the legator before death. Yazbak, "Muslim Orphans and the Sharīʿa in Ottoman Palestine According to Sijill Records," 128–1289.
[644] "*Min qabl al-māl al-mawqūf min qabl al-shaikh Mūsa al-mushār īlayh 'ala waladayy waladahū al-marḥūm al-shaikh Kamāl al-Dīn."* J-Sij 45-151-7
[645] J-Sij 45-151-7, lines 5 and 6.

mention of profit/interest in this case, it is implied that this amount was comprised of an original principal of 26 sulṭānī, with a planned interest of 4 sulṭānī (1 sulṭānī x 4 quarters / 26 ≈ 17%). Only 3 sulṭānī of the interest was realized.

The above case not only illustrates that Mūsā al-Dayrī's cash-waqf (which was profiled in chapter three), following his death, was used to fund his grandchildren's estate, but that money advanced by this cash-waqf was pooled and invested alongside other loans pertaining to his own children. This was despite the fact that his cash-waqf was established for the charitable purpose of paying for Qur'ān reciters at the Dome of the Rock sanctuary waqf, and not established from the outset as a family waqf.[646] While it was the executor's job to prudently segregate these accounts, he had to do so while relying on specific instructions recorded in a court-registered will, reflecting the court-mediated nature of executorship. Significantly, Mūsā's cash-waqf, without the benefit of any additional information, appears to have been endowed for the private benefit of his grandchildren, and not for charitable ends as cash-waqfs ordinarily were designed to be.

The above record also illustrates the time value of money. As with other types of loans, the normative loan period – on which interest was calculated – was one year. While loans for shorter periods were common, appearing regularly in the sijills, profit/interest was always calculated on an annualized basis, and then expressed in shorter periods, if required. The concept of a time value for money was alive and well in the executor's explicit

[646] Waqfs are of two types: those founded with the objective of funding a public charitable objective (waqf khayrī) and those endowed for family beneficiaries (waqf dhirrī/ahlī), so-called family waqfs. Upon the termination of heirs in family waqfs, the endowment proceeds eventually are applied towards a charitable purpose. To my knowledge, none of the cash-waqfs founded in Jerusalem were established as family waqfs. For a dated, but still useful definition of the waqf, see: Heffening, "Waḳf," *Encyclopaedia of Islam, First Edition (1913-1936)*.

acknowledgement and acceptance of foregoing an extra 1 sulṭānī of profit for retiring a loan early, three months before its maturity date.

A ḥujja of another muḥāsaba from a few days later recorded that Mūsā's above executor, Sa'd ad-Dīn Bin Rabī', also managed, in his capacity as both waṣī and nāẓir, a soap factory waqf that was endowed by Mūsā al-Dayrī. This record is a muḥāsaba of the revenues and expenses related to al-Dayrī's factory, and the distribution of shares related to al-Dayrī's wife and heirs, which at the time of the record had a soap inventory worth 525 sulṭānīs.[647] This soap factory waqf (it was held as waqf) was still in operation twenty-years later in 996/1588, when a 199 sulṭānī sale on credit of soap was recorded as being owed to another merchant who was acting as the agent of Fatima Khātūn, the daughter of Mūsā al-Dayrī, and presumably the waqf's nāẓir at this later date.[648] Fatima Khātūn was one of Mūsā's four orphaned children recorded in the record from twenty four years earlier, 971/1564, and even at that earlier time, although she was classified as an "orphan," she was also referred to in the sijill as an adult and appeared as being married (her husband's name is noted).

The fact that Sa'd ad-Dīn Bin Rabī' had been collecting loans on her and her siblings' behalf when she was an adult – under her nominal status as an orphan – prompts us to consider the category of "orphan" broadly, and is an example that shows that fiqh prescriptions, regarding sifh and majority that I discussed earlier in this chapter, were applied in courts. Such a record also shows how relationships between "executors" and "orphans" were multi-layered ties of kinship, which were built on market relations and social-status. As

[647] J-Sij 45-154-5
[648] J-Sij 67-409-1

the muḥāsabāt and executor-familial relationships of al-Dayrī show, such associations very often outlasted the lives of their founders.

When qāḍīs borrowed from orphan estates, they also registered their activities in courts. In a court registered ḥujja from Sha‘bān 971/April 1564, a Shāfi‘ī qāḍī in Jerusalem presided over an attestation given by a Ḥanafī Jerusalemite qāḍī, Muḥammad b. Aḥmad Ibn al-Muhandis (the record shows that this debtor's father was also a noted local qāḍī and ‘ālim). The debtor qāḍī represented that he owed 105 sulṭānī to a Tripolitan merchant, Aḥmad b. Muḥammad al-Aṣfar, which he had borrowed two years prior, before the creditor's death. He now owed this sum to his heirs. This ḥujja, was requested by the waṣī of this merchant's children as part of his itemized estate inventory and states that the father/elder qāḍī guaranteed the younger's debt. A previous court ḥujja was presented by the debtor qāḍī to the heir's waṣī in court, as evidence of this pre-mortem debt. The debtor qāḍī was obliged to settle his debt immediately.[649] In another record, dating from Dhu'l-Hijja 996/October 1588, a Shāfi‘ī qāḍī presided over a debt claim presented by the children of a former (deceased) qāḍī against their cousins, the heirs of the latter's brother. In this case, the heirs on both sides are minors represented by agents and waṣīs. The deceased qāḍī had lent his brother a sum of twenty-eight sultanīs, against which the brother had provided collateral of three-fourths of a share he owned in a family farm. After establishing the veracity of the debt in question, the qāḍī ordered that ownership shares in the farm be sold to repay the outstanding debt.[650]

[649] J-Sij 45-180-5
[650] J-Sij 67-56-2

These accounts also display the occasional friction between executors and guardians. I present below three such statements from Jerusalem's court sijill 67, during 995-996/1587-8. The frequent references within these muḥāsabāt to previous court produced legal copies of deeds (ḥujjas) indicates an active part on the court for mediating and monitoring their activities, although as I argue below, this was carried out with broad oversight. The presence of such accounts also demonstrates the care taken – even if nominally so – to recognize the segregation of an executor's accounts, his own loans and business dealings, from those of orphans under his or her care. There does not appear to have been a gender segregation of roles and women frequently appear as both executors and guardian roles in the sijills. Muḥāsabāt records also reflect a judicial authority that gave little discretion to either guardians or executors for undertaking important decisions on behalf of orphans under their management without the consultation and approval of the courts. Periodic disbursements, for instance, of maintenance payments for the feeding and clothing of orphans appear to have required a qāḍī's approval, even if these were granted retroactively.

Muḥāsabāt of orphan-related mu'āmalāt are diverse and can be quite complex. Despite their variety, however, they share a common structure with three parts. The first part of the muḥāsaba introduces the parties to the financial accounting, typically the executor and guardian, with a phrasing such as "this muḥāsaba has been issued between so and so, the waṣī for the orphans of .. and so and so the nāẓir.." This first section includes reference of the family relationship between these figures to the orphans in question, if one existed, as well as a mention of any additional figures who may have been party to the muḥāsaba. These would have included, for instance, as special witnesses or property evaluators brought by either party to testify. The second part of the muḥāsaba, the body, always begins with a

statement of the original sum of capital inherited by the orphans at the time of their father's death. Then it proceeds to list all the recorded mu'āmalāt that have been undertaken on their behalf since then, or to note previous ḥujjās or muḥāsabāt in this regard. This middle section may be brief or lengthy; sometimes dates of ḥujjas of mu'āmalāt are included, and at other times simply the amounts are recorded. Profits are not always specified for each transaction, and sometimes appear as a lump sum for the period in question, sometimes several years. Notably, reference to the term mu'āmala in muḥāsabāt is sometimes used to mean all the capital under management that is invested in loans, or to particular single loans. For example, in the first muḥāsaba reviewed below, the body section states that of the orphan's capital, "81 sulṭānīs are maintained in the form of a mu'āmala," and then the record proceeds to list the various mu'āmalāt that are represented by this amount. The third and concluding portion of muḥāsabāt serves as an attestation record of the total maintenance payments made by the executor to the guardian for feeding and clothing the orphans, since the inception of the orphan's capital under his or her management, to the date that the muḥāsaba in question was recorded in court. In this final section, the guardian absolves the executor for any liability, that is any overdue amounts pertaining to payments owed to the orphans. On the executor's part, in this last portion, he or she must declare any loans that they have personally drawn on from the orphan capital, if any are outstanding. The oaths of witnesses are recorded in this section, as are any observations or rulings issued by the presiding qāḍī.

In what follows, I review three muḥāsabāt that reflect how diverse such statements can be and the role of courts in supervising the activities of executors and guardians. The first muḥāsaba reviewed below dates from 5 Rabī' al-Thānī 996/27 May 1588, and relates to the management of mu'āmala capital on behalf of two orphans, a sister and brother, who, in

addition to the capital bequeathed to them by their father, have inherited capital from an older sibling whose death shortly followed his father's. The record is explicit in following the letter of the law with respect to the distribution of this inheritance between the siblings, where the brother's share is double that of his sister. It is not clear whether this applies to the entire capital or just to the portion inherited from their deceased brother. The executor in this case appears to be court appointed, even though he is the orphans' uncle. He is referred to as the court-appointed executor, al-waṣī al-shar'ī, and not the one personally appointed by the deceased, al-waṣī al-mukhtār, as was the case in Mūsā al-Dayrī's earlier discussed record above. Following is the muḥāsaba transcript:[651]

> The reason for this sijill, enacted in Jerusalem's qāḍī court, [2] in the presence of the undersigned qāḍī Ilyās Afandī, is the issuance of a statement of accounts (muḥāsaba) between, on the one hand, the Khawāja Shams ad-Dīn b. Khawāja Ibrāhīm, the Kātib al-Zayt and legal executor (waṣī) of [3] his paternal niece and nephew, the minors Mūsā and 'Ā'isha, who are the children of 'Abd al-Nabī and, on the other, Ibrāhīm b. al-Ḥāj Muḥammad Shakhātīr, the orphans' maternal uncle and guardian (nāẓir). [4] The amount that remains from the original principal (*aṣl māl al-yatīmayn*) bequeathed to the orphans from their abovementioned father and from their brother Karīm al-Dīn, who also passed away after his father died, is 81 sulṭānī kept in the form of a mu'āmala of Damascene paras (akces)(qita' shāmīya). (5) Two thirds of this belongs to Mūsā and a third to 'Ā'isha, after their

[651] J-sij 67-126-3. See Fig. 2 at the end of this chapter for Arabic transcriptions of the reviewed *muḥāsabāt*.

mother, Ṣālḥa, took her inheritance share from Karīm ad-Dīn in the amount of 7 sulṭānīs; she has arranged (*rattabat*) for this money to be lent out to a group of borrowers introduced (*bi mubāsharat*) by (6) the children's abovementioned guardian, as has been recorded in the previous court sijill. This was represented by [a mu'āmala of] 10 sulṭānī to 'Alī b. 'Askar with a profit (ribḥ) of 2 sulṭānī; of 10 sulṭānīs to the children (awlād, read: orphans) of al-Muharbash from Silwān with a profit of 2 sulṭānīs; (7) 30 sulṭānīs to Mikhā'īl b. Khalīl al-Qindulaft for a profit of 6 sulṭānīs; 15 sulṭānīs to the above referenced Ibrāhīm b. al-Ḥāj Muḥammad for a profit of 3 sulṭānīs; (8) 3 sulṭānīs to Shaykh Maḥmūd b. al-Ḍāfī for a profit of 30 para; and 10 sulṭānīs to Munā b. Mas'ūd al- Qindulaft for a profit of 2 sulṭānīs. The last recorded expense related to the children's clothing was 70 paras. (9) The expenses of two ḥujjas and a maḥḍar ta'bīn at the time of receipt of the orphans funds from Ibn Abī Sulaymān were 50 paras. All this relates to the above transactions, and is being managed and held by the children's executor. (10) No amounts are overdue. The two parties have jointly absolved *(taṣādaqā*) each other of liability and attested that these are the facts. This has been recorded and published (*sajjal wa taḥarrar*) on 5 Rabī' al-Thānī 996.

The executor in this case was a merchant. Merchants, not surprisingly often served as executors. The rationale for appointing merchants as executors was straightforward, since they would have had access to professional and market resources to secure loans with

qualified debtors, pursue debts and arrange for the sale of merchandise – possibly connected to an estate – as necessary, in fulfilling their duties. For their services, such executors could expect compensation; however, no reference is made to that expense in the above muḥāsaba. Rather, the only expenses noted concern the children's maintenance and some legal costs at the time of their inheritance. This may have been because the above executor was not an outsider, but rather the paternal uncle of the orphans. Ironically, he is not the one arranging the loans. Rather, as the sijill states, it was the orphan's mother who "arranged (*rattabat*) for this money to be lent out to a group of borrowers introduced (*bi-mubāsharat*)" by her brother, the executor. The executor would have been held liable for managing the servicing of these loans, although he would not have been personally liable for their repayment. Nevertheless, the court required – for good order – that the guardian and mother announce the roles they played in arranging these loans. Court practice, thus, provided some flexibility to families for managing the loans of their heirs, although, the reporting of such activities to qāḍīs was always required.

This muḥāsaba lists the names and interest collected on each of the mu'āmalāt listed above, perhaps because the loans were arranged by the guardian, rather than by the executor, a reversal of roles. This is the only muḥāsaba, from the dozen or so muḥāsabāt of orphans I have reviewed from Jerusalem sijills, which lists the names of borrowers and their profit rates (although this is a common feature of muḥāsabāt of cash-waqfs). Notably, all the loans issued above were exactly at the rate of 20%, indicating the court's acceptance of this level as a normative rate for such loans. The intimate family relationship between the executor and guardian, the orphan's grandmother and maternal uncle respectively, was not unusual.

In a second muḥāsaba, dated 1 Rajab 996/27 May 1588, we see how such intimate family management could lead to tensions between related guardians and executors, or alternatively, could be a source of suspected collusion or abuse which would necessitate a court muḥāsaba to remove doubt of wrongdoing. [652] This muḥāsaba makes reference to four prior ḥujjas of muʿāmalāt and other arrangements to invest the capital of the orphans in question (including a receipt, an earlier court report, *taqrīr*, and two loan registrations):

> The reason for this sijill, enacted in Jerusalem's qāḍī court, [2] in the presence of the undersigned qāḍī Ilyās Afandī, is the issuance of a statement of accounts (muḥāsaba) between, on the one hand, Ḥusayn b. ʿAlī b. Fawwāz, (3) the legal executor for the orphaned children of his brother Ḥasan, whose children are Aḥmad, Muḥammad, and Ibrāhīm, all of whom being minors, and, on the other, his mother al-Ḥurma Ḥamīda, (4) the (legally) competent woman, legal guardian and paternal grandmother of the abovementioned orphans who are in her custody (*fī ḥaḍānatihā*), daughter of Muḥammad b. ʿUmar al-Nāṣirī. (5) She is in attendance with her witnesses, who have been vetted as reliable witnesses by the court, and her son al-Ḥāj Ṣalāḥ al-Dīn b. al-Ḥāj Aḥmad b. Fawwāz, (6) and Ibrāhīm b. Khalīl b. Dukhān who have confirmed her identity and have confirmed the amount of capital bequeathed to the above orphans by their father and that the amount of profit (7) accrued to this capital over five years and three months,

[652] J-Sij 67-228-3

starting from 1 Dhū'l-Qa'da 989 and up to the end of Muḥarram 994, was as follows: (8) The principal of 83.5 sulṭānī was invested in a mu'āmala as reflected in a ḥujja dated 16 Rabī' I 990, (9) and the total profit for the above period was 67 sulṭānī resulting in a combined total mu'āmala capital of 150.5 sulṭānī [at Muḥarram 994]. (10) The amount [to be] spent on maintenance and clothing for the orphans over a period of 6 years and seven and a half months, (11) was recorded [projected] in a ḥujja of a court report (taqrīr) dated 15 Shawwāl 989 was [forecast as] 150 sulṭānī. (12) A ḥujja produced under qāḍī Maḥmūd Afandī, dated at the end of Rabī' I 994 showed that the recorded mu'āmala was [had reached] 150 sulṭānī. (13) 59 sulṭānī was paid to the orphans today, per a ḥujja produced today and (14) 46 sulṭānī continues to be held as a mu'āmala for the benefit of the orphans, and this is attested (*i'tirāf*) by the abovementioned guardian. (15) 20 para is outstanding as a loan owed by the abovementioned executor to the orphans. (16) A financial account reconciliation has been produced (*ṣadarat muḥāsaba*) to reflect this. (17) In so doing, the executor's liability to the orphans for all amounts managed by him is cleared (*al-barā'a al-shar'īya*), save for his above-mentioned loan. (18) The executor swore on oath that he has paid the above amounts that have been spent on the orphans and he [and the guardian] entered into a legal settlement (*taṣādaqā 'ala dhālik*) to reflect this. (19) The witnesses [of al-Ḥurma Ḥamīda] informed the qāḍī of their correct

> understanding of this, and other witnesses were also called upon and attested their understanding of the facts. (20) A succinctly-stated, legal ruling was hence issued, having fulfilled its conditions and requisite foundation.[653]

The above muḥāsaba illustrates the creative use of ḥujjas. At first reading, the muḥāsaba does not appear to present any objectionable aspects, although it is difficult to follow. The most noteworthy part of this document is arguably its last line, which states that the presiding qāḍī had issued a "succinctly stated legal ruling" concerning what appears to have been a deposition. While I have translated the phrase *taṣādaqā ʿala dhālik* (line 18) as a "legal settlement" between the executor and guardian, it may very well have simply been an acknowledgement by the two parties of their acceptance of the financial reconciliation of accounts, as would have been the case in records of business partnerships, and does not necessarily imply a conflict. This record therefore brings to mind Ibn Nujaym's acerbic criticism of the practice of his day, of qāḍīs issuing rulings without the "presentation of a case (daʿwa) or dispute (khuṣūma)" since this muḥāsaba presented neither dispute nor litigation.

I suggest that the ruling above is fictive in the traditional sense (it does not rule over the claims of one party over another) but that it was a legitimizing method by which executors and guardians could use for glossing over minor legal/financial discrepancies or missing documentation to support their reporting of orphan lending to courts. The qāḍī's ruling, and the witness testimony, would have removed traces of impropriety given the qāḍī's

[653] The last part of this record that reads: *thubūtan shar ʿiyyan wa-ḥukam b'mawjibihī ḥukman shar ʿiyyan masbūk fīhi mustawfīyan sharā'iṭ al-sharīʿa wa-wājibātihī al-mar ʿiyya*. J-Sij 67-228-3

supervisory position over orphan estates. While we have no way of knowing what financial evidence was provided to the qāḍī for his review, there are a number of supporting ḥujjas and iqrārs mentioned in this case, and these do show that there was an underlying logic that the executor and guardian were trying to justify. Apparently, there must have been significant time gaps, of at least two years in reporting the affairs of their accounts, and this muḥāsaba seems to be trying to set the record straight.

This muḥāsaba (dated 1 Rajab 996) recounts that six and a half years earlier, in a ḥujja from Dhū'l-Qa'da 989 (line 7), the executor had been anticipating a pro forma profit of 67 sulṭānī to be earned on the inherited orphan capital of 83.5 sulṭānī over a period of four years and three months, resulting in an aggregate capital of 150 sulṭānī by Muḥarram 994. Indeed, a ḥujja dated Rabī' I 994 showed that this result had been produced and exceeded by a half-sulṭānī (line8-9). Also, in this muḥāsaba, the executor relied on a court issued report, taqrīr, from Shawwāl 989 (line 11), to estimate that the total amount (pro forma) to be spent on maintenance and clothing for the subject orphans over a period of six years, seven and a half months should be 150 sulṭānī. This latter period of six years, seven and a half months corresponds to Jumādā II, 997, a full six months after the date of the subject muḥāsaba itself, 1 Rajab 996. The executor thus used a court taqrīr, that likely stipulated the monthly maintenance allowance, from seven years earlier, likely issued immediately following the death of the father, to project a nominal plan to justify the accumulation of 150 sulṭānī worth of orphan's maintenance expenses by 997, in order to match it up to the mu'āmala capital that had achieved two years earlier, in 994. This muḥāsaba is not, therefore, an accounting of what happened, but rather a plan to smoothen out the income and expense projections related

to the subject orphan capital, to show what should have happened. For a review of this analysis, see Figure 2.

A ḥujja was produced on the date of this muḥāsaba that acknowledged a 59 sulṭānī distribution by the executor to the guardian, leaving 46 sulṭānī remaining in muʻāmala capital (lines 13-14). There is also a minor 20 para loan that the executor acknowledges to the orphans (line 15). What does this mean for the earlier mentioned 150 sulṭānī capital?

I offer two possibilities. First, it may have been that the 150 sulṭānī capital built up until mid-994 was severely eroded by losses between 994 to the date of the muḥāsaba in 996, such that only 105 sulṭānī was remaining left (59+46 sulṭānī). Although there is no mention of past distributions to the orphans, there is also no mention of past losses which is very strange, although this possibility may have explained the qāḍī's "ruling." The date of this sijill is 996/1588, and the 150 sulṭānī capital recorded in 994/1586, a year after the Ottoman state's currency devaluation. This may have had a major destabilizing effect on the loans in Jerusalem during that year, or shortly after. My cursory review of other loans in the same sijill though does not indicate reports of huge losses from a few years prior or extensive records of bankruptcies, although this is a subject for future research.

The second, and more probable likelihood, in my opinion, is that parts of the prior mentioned 150 sulṭānī capital had been already been distributed before 994. Because both the interest income and maintenance expenses were proforma projections, this 150 sulṭānī may never have existed as a single amount. Rather, the executor and guardian would have been drawing, as necessary, from the muʻāmala capital to pay for the orphan's expenses on an as-needed basis, and re-investing the remaining funds. The financial reconciliation presented to the court would have been performed periodically to show that the orphan capital's balance

sheet was healthy, rather than, to reflect actual accounting. If this latter hypothesis is correct, then the return on investment for the orphans was rather large indeed. I have calculated that the simple annual rate of return achieved between 990-994 was 22%, and that had this money been re-invested, the return for 994-996 would have been 32%, given the total amounts that were listed in this muḥāsaba over seven and a half years.

The third muḥāsaba from 15 Jumādā I 996/27 May 1588 presents a rather different story from the previous muḥāsabāt discussed above.[654] Here, we find the case of a muʿāmala capital of a soap merchant's daughter. Her paternal uncle served as her executor while her maternal uncle was her guardian. While having the same three-part structure of other muḥāsabāt, this muḥāsaba is concerned with giving an inventory of the various loans given out on behalf of the orphaned girl, and the respective amount of profit earned on each loan. Moreover, this record details that the executor kept two balance sheets, one for muʿāmalāt entered into in Egyptian paras (*qitʿa miṣrīya*), and another one or those in Damascene paras (*darāhim shāmīya*), since much of the muʿāmala capital was concerned with a sale on credit of the orphan's inheritance of a quantity of soap, its sale in Egypt on credit, and the subsequent reinvestment of that sum in Egyptian muʿāmalāt. The investment of Damascene paras related to the investment of cash from her father's estate locally, in Jerusalem or Damascus. The muḥāsaba record follows:

> The reason for this sijill, enacted in Jerusalem's qāḍī court, [2] in the presence of the undersigned qāḍī Ilyās Afandī, is the issuance of a statement of accounts (muḥāsaba) between, on the one hand, Khawāja ʿAbd al-Qādir son of (3) the deceased Khawāja Muḥammad al-Dimashqī, and executor (al-waṣī) for Fatima, his orphaned niece and daughter of his deceased brother Aḥmad al-Dimashqī, and on the other, the orphan's maternal uncle and guardian (nāẓir) al-Zaynī Maḥmūd son of the deceased Muḥammad b. Shirwīn. (4) The original principal (aṣl māl) related [bequeathed] to the orphan in the form of

[654] J-Sij 67-176-1

the value of her soap (lit. *min thaman ṣābūnahā*) and her share of gold specie delivered from Egypt by Mūsā b. Marʿī (5) is 223 sulṭānī and 25 silver Egyptian para [being the value of her soap that was sold in Egypt]. (6) The value of her assets that were disposed in Jerusalem is 64 sulṭānī and 29 para, all in the form of Damascene para. The total profit accrued to [the deceased] Khawaja Muḥammad from registered muʿāmalat (7) for an entire year, starting on 3 Rabīʿ II 994, was 22 sulṭānī in gold and 15 Egyptian para. (8) As for the profit of dirhams [Damascene para?] that arose from this muʿāmala, these were 8 sulṭānī in gold and 10 [Damascene] para. The profit that was produced in the second year [of the muʿāmala], being the year 995, was 24.5 sulṭānī in gold. (9) The total principal and profit arising from these two years is 278.75 sulṭānī in gold. (10) The total sum of the muʿāmala of Damascene para is 64 sulṭānī and 29 para. (11) The amount deducted for the orphan's maintenance and clothing for 2 years, 2 months and 21 days, (12) from 1 Rabī II 994 to 11 Jumādā II of that year, was 3 paras per day; (13) and from 12 Jumādā II 994 to the present day has been 4 Eastern/Damascene para (sharqīya) per day. The total of this [expenditure] expressed in gold is 30.75 sulṭānīs in gold [sic.]. (14) The amount spent to date on legal documentation (ḥujjas), taxes (ʿushur), the executor expenses, the guardian's expenses, and other minor expenses is 7 sulṭānīs in gold. At the time her estate came into effect (*waqt khulāṣ al-māl*) 8 sulṭānīs in gold was spent from the

> inheritance of her father's nephew [i.e., the orphan's cousin], to cover court trial expenses (*rasm da ʿwā*), *maḥḍar ta'bīn* (funerary deposition?), the copying of several legal documents (ḥujjas) that had to do with recording an increase in the estate, recording the payment of maintenance, and for registering a settlement of accounts (muḥāsaba); (16) the sum of these expenses was 43.75 sulṭānīs in gold. The remaining capital held on behalf of the orphan to-date is (17) 233 sulṭānīs in gold and, in Damascene para, an amount equivalent to 64 sulṭānīs in gold and 29 para. (18) This sum is (hereby) lent out through legal subterfuge (*bi'l ḥīla al-shar ʿīya*) for a period of one year from today's date. Let this be a statement of fact. Recorded and published (*sajjal wa taḥarrar*) on 15 Jumādā I 996.

As with the case of Mūsā al-Dayrī's earlier mentioned estate, the muʿāmala capital of the abovementioned orphan Fāṭima is also large, being close to three hundred sulṭānī, and reflects the vital importance of industrial soap production and its regional trade to Jerusalem's economy in this (and earlier) periods. As al-Dayrī's records suggested, soap-manufacturing businesses were often inherited and operated on behalf of orphans by their executors, and this may have been the case for Fāṭima here, but I have not searched for her father's factory in the sijjilāt to know for sure. What is certain is that her father's agent, Mūsā b. Marʿī, sold an inventory of soap in Egypt and delivered to her executor a little over 233 sulṭānī in income. The entire record not only points to the bifurcation between Egyptian and Shāmī currencies, but also to the meticulous care used to record the value of gold specie versus silver specie. Again, given the date of this earlier soap trade, having taken place in

994/1585-6 which coincides with the major akce/para devaluation of the same year which devalued it by about 100%, this attention to maintaining a bifurcated record between gold and silver would have been vital. Given the precarious state of the silver currency at the time, it was gold – as this record shows – that was the more important and stable currency of account for maintaining these mu'āmalāt of orphans.

Fāṭima's record authenticates the legal validity of the underlying transactions in explicitly stating that the mu'āmalāṭ were performed legally, "through legal stratagems" (*bi'l ḥīla al-shar'īya)* (line 18). Given the numerous legal deeds presented in court during this muḥāsaba, I would think that Fāṭima's executor presented copies of each mu'āmala contract that was transacted to support this statement of fact. Attesting that the mu'āmalāt were performed under accepted ḥīla norms would have absolved the executor from the charge of benefitting from ribā in the various loans, soap credit-sales, and currency exchanges that underpinned this balance sheet. Such attestations of engaging in *mu'āmalāt bi'l ḥīla al-shar'īya* are not uncommon in the sijills. While these contracts do conceal interest taking, such statements should be viewed – I suggest – as reinforcing mechanisms for ensuring compliance with legal standards. This would have had the same effect, perhaps, as how accounting firms today must issue and present company audits within specific legal and accounting standards. The reference to the ḥīla al-shar'īya in this muḥāsaba also corresponds to al-Ramlī's view on ribā and mu'āmalāt that appears in his above mentioned fatwā.

Conclusion

The material reviewed in this chapter illustrates how credit was central to the welfare of orphans in both Mamluk and Ottoman contexts. Up till the beginning of the fifteenth century, orphans benefitted from a dedicated depository and bureau for managing the investment of their inheritances in loans. The disappearance of this institution in the later period does not necessarily imply that orphans were worse off. We do not possess historical proof about how effective the orphan bureaus were in Mamluk times; if al-Subkī's skepticism is a measure for mu'āmalāt, it is a pessimistic one. However, what we know for certain is that loans generated by orphans continued to be recorded in courts, as they had been before. The emphasis on legal subterfuges was used for mu'āmalāt issued from orphan capital, in much the same way as they were for loans given by other social groups or institutions, such as the cash-waqf. And, although a legal, religious, and social imperative for protecting orphan capital was certainly at work, the state's actual supervision of the management of mu'āmalāt by executors and guardians does not appear to have been sophisticated or regimented. The sijill records suggest that the court vital role with respect to orphan capital was, I suggest, largely notarial. That is, that the primary use of courts – from the perspective of guardians and executors – was as a venue for registering the debts issued (and taken) by orphans under their management, but not necessarily as a site for adjudication. This view is my impression given the exceedingly scant records of cases filed against absconding debtors by executors. Settling out of court may have been the order of the day; this is something that needs more investigation.

What is clear, however, is that executors and guardians in sixteenth century Jerusalem did carry out the investment of these loans with a fair degree of autonomy. Even in the case

of a judge issuing a "ruling" on a muḥāsaba (the second translated muḥāsaba above), the presentation of an ideal situation, by presenting a pro-forma picture of the cash inflows and outflows, leads one to consider that the court's knowledge of the actual credit transactions that underpinned mu'āmalāt was quite limited, and perhaps even non-existent in some cases. In contrast, executors and guardians benefitted and used, to a significant extent, the courts notarial capacity for producing all manner of ḥujja and depositions related to their activities. The limited oversight of courts surely must have also been promoted by the relatively short duration of judicial appointments, which typically lasted no longer than two-years during the second half of the sixteenth-century, giving judges very little stake in investing resources to effectively supervise these activities. This would have been even more pronounced during the rampant political and economic instability of the last quarter of the century.

From the long-term lens, what becomes evident when tying together the views of legal treatises, manuals and responsa, is the overwhelming resilience of legal customs, which at times went counter to normative fiqh rules. Take for instance Ibn Nujaym's criticism of judges issuing rulings without the presence of disputes, or the use of cloth sales as a ḥīlā to disguise interest. Indeed, even in the discursive aspects of judicial prescriptive literature concerning the demarcation of licit gain (ribḥ) from ribā, jurists sometimes slip and use the informal and euphemism fā'ida when referring to ribā, indicating a customary window-dressing of ribā.

Chapter Six – Gender, Social Status, and Credit

This chapter studies how the transacting of debts by women, in and outside of courts, was differentiated on the basis of social status and access to legal forums. While male agents served as facilitating intermediaries for elite women's credit activities in markets and courts, this was usually not so for non-elite women. More often, men negotiated the interests of women household members. This does not mean that the intercession of men should be viewed as an extension of men's control over women's capital, or that it was necessarily a constraint on women's agency. Rather, I take note of Petry's assertion that understanding the autonomy of elite women must be addressed within "the context of their partnership with spouses, immediate families, and extended lineages."[655] Power relations were negotiated, and elite women's ownership and management of significant capital cannot be ignored in the process.

This chapter emphasizes the activities of elite women due to the greater depth of information available about them in the late medieval and early modern narrative sources. Notwithstanding the advantages held by elite women, the muted presence of non-elite women in the court records may suggest that their economic activities were mostly informal. The same reasons that compelled women elites to use the courts, namely, access to male intermediaries, and the ability to retain witnesses, notaries, specialists, and pay court fees, were largely out of reach to non-elites and this would have, I suggest, limit non-elite use of the courts beyond for the simple registration of debts through attestations (iqrār). Often debt

[655] Carl F. Petry, "Class Solidarity versus Gender Gain : Women as Custodians of Property in Later Medieval Egypt," in *Women in Middle Eastern History : Shifting Boundaries in Sex and Gender* (New Haven: Yale University Press, 1991), 343.

cases filed by non-elite women in court suggest that these complaints were never registered in court to begin with. While this was sometimes the case with elite women, it appears more so with non-elites, perhaps because of the abovementioned structural barriers. Other court cases involving non-elite women were those relating to defaulting female debtors, who were usually referred to as "brokers" (*dallālat*). In one case, reviewed below, this meant temporary imprisonment and bankruptcy.

6.1 Public Spaces, Markets and Occupations

Scholarship on women in the premodern Middle East has focused on the particularly modern issues of women's agency in marriage, social mobility, and access to professional opportunities. Assessing the contours of the scholarship on women and public spaces will assist us to interpret the activities of female lenders. For instance, did restrictions on women's movements outside the home lead women towards lending to other women, rather than to men in markets? Or, were women's lending activities to other women more due to household and professional networks, rather than the constrictions of public spaces?

Leslie Peirce contended that female honor was principally framed in a woman's marriageability, and then, after marriage, in her ability to maintain her reputation as an honorable wife (i.e., one that did not mix with non-related women and spent most of her time at home attending to her children and housework). Women's public interaction with male non-relatives casted shame on young women by eroding their marriageability, and, for the

state, threatened the socially reproductive capacities of families.[656] Young women and married women in their prime, were especially vulnerable to this sort of honor effacement, as they had the greatest potential for building and maintaining households. On the other hand, the presence of older women in public places (those past their reproductive years), did not challenge the integrity of households in the same way, and, as a result, such women enjoyed far greater freedom of movement than the former group. Young girls also shared the same benefit. Thus, the promotion of domesticity and the policing of young women's movement outside the home, a principal issue of Ottoman ḳānūnnāmes and edicts on women, placed heavy penalties on promiscuity and adultery. For the Ottoman state, proscribing women's movements and activities was directly connected to protecting their reproductive capacities as wives who would maintain socially and economically productive households.[657]

As Huda Lutfi noted, in her study of gender and sexuality in the fourteenth century prescriptive text of the Egyptian jurist Muḥammad Ibn al-Ḥājj (d. 736-7/1336) *al-Madkhal ila tanmīyat al-aʿmāl bi taḥsīn al-niyyāt* (An introduction to the development of deeds through the improvement of intentions), by the Egyptian jurist Muhammad Ibn al-Ḥājj, "Muslim prescriptive literature viewed the female body primarily as the repository of male sexual pleasure, and hence a source of fitna (temptation) that should be concealed."[658] However, framing women's sexual power as a threat to the Muslim social order was a product of much earlier legal commentaries and exegesis, that reified this notion in the legal

[656] Leslie P. Peirce, "Seniority, Sexuality, and Social Order: The Vocabulary of Gender in Early Modern Ottoman Society," in *Women in the Ottoman Empire: Middle Eastern Women in the Early Modern Era*, Ottoman Empire and Its Heritage 10 (Leiden: Brill, 1997), 184–87.
[657] Leslie P. Peirce, "Seniority, Sexuality, and Social Order: The Vocabulary of Gender in Early Modern Ottoman Society," 190–91.
[658] Huda Lutfi, "Manners and Customs of Fourteenth-Century Cairene Women : Female Anarchy versus Male Sharí Order in Muslim Prescriptive Treatises," in *Women in Middle Eastern History : Shifting Boundaries in Sex and Gender*, ed. Nikki R Keddie and Beth Baron (New Haven: Yale University Press, 1991), 109.

literature of ninth and tenth century Iraq.[659] Ibn al-Ḥājj's diatribe illustrates that the wide presence of women in public space was very far removed from his ideal. Ibn al-Hājj bemoaned this, especially during popular religious festivals when "they mingle with men, and on feast days you find the mosque crowded with women."[660] Ibn al-Ḥājj's view held a utilitarian emphasis on maintaining *adāb al-khurūj* (manners of conduct outside the home) because the mixing of the sexes would not only subvert men's status authority over women, but also breakdown the institution of marriage and society as a whole.[661] He was particularly distressed at the religious instruction received by women when they established bonds with popular preachers. "These (Sufi) orders established covenants of fraternity between men and women without disapproving or hiding it … they went so far as to tolerate women sitting close to men, claiming that they were the spiritual children of the shaykh, and once women became the spiritual sisters of men they did not need to veil themselves from them."[662]

Ibn al-Ḥājj's logic circumscribed women's activities outside the home to necessity. Since women were a source of fitna, in Ibn al-Ḥājj's view, it was the duty of men to guard themselves from women's licentiousness. The honorable shopkeeper should "be careful when a woman comes to buy something … (he should) look at her behavior, for if she was one of those women dressed up in delicate clothes, exposing her wrists, or some of her adornments and speaking in a tender and soft voice, he should leave the selling transaction and give her his back until she leaves the shop."[663] Ibn al-Ḥājj was, therefore, not entirely

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[659] Leila Ahmed, *Women and Gender in Islam: Historical Roots of a Modern Debate* (New Haven: Yale University Press, 1992); Kecia Ali, *Marriage and Slavery in Early Islam* (Cambridge, Mass.: Harvard University Press, 2010).
[660] Huda Lutfi, "Manners and Customs of Fourteenth-Century Cairene Women : Female Anarchy versus Male Sharí Order in Muslim Prescriptive Treatises," 115.
[661] Huda Lutfi, "Manners and Customs," 103.
[662] Huda Lutfi, "Manners and Customs," 116.
[663] Huda Lutfi, "Manners and Customs," 103.

against the presence of women in public spaces, but rather, against the indignities that could accompany interactions between the sexes. As difficult as this was for shopkeepers, the task would have been harder for Cairene husbands, who Ibn al-Ḥājj admonished for allowing male peddlers to come to their homes to sell wares or produce, and in the process, develop friendships with women of their household.

The representation of the market as a corrupting place, where the mixing of the sexes could promote the potential for social depravity was an old trope. The Andalusian philosopher Ibn Ḥazm (d. 456/1064) observed that "women plying a trade or profession … (gave) them ready access to people (and they) are popular with lovers – the lady broker, the coiffeuse, the professional mourner, the singer, the soothsayer, the school mistress, the errand-girl, the spinner, the weaver and the like."[664] In his view, the various professional elements of women's market activities are conveniently collapsed into one, the prism of adultery. Ibn Bassam's ḥisba manual, *Nihāyat al-rutba fī ṭalab al-ḥisba* is explicit about preventing unrelated men and women from interacting in any seclusion. If an unrelated man and woman were found meeting in seclusion (*khalwa*), it is the duty of the Muḥtasib to interrogate them.[665] Notwithstanding polemical works of the fourteenth and fifteenth centuries, jurists in both earlier and later periods expressed ambivalence regarding popular customs and seemed to often turn a blind eye to the results of women's ubiquitous presence in public spaces. Two contemporary examples of apprehension, but muted resignation, can

[664] 'Alī ibn Aḥmad Ibn Ḥazm and A. J Arberry, *The Ring of the Dove: A Treatise on the Art and Practice of Arab Love* (London: Luzac, 1953), 74; Cited in: Shatzmiller, *Labour in the Medieval Islamic World*, 350; Ibn Hazm's views towards the socially corrupting role of women in markets is mirrored by similar descriptions in hisba manuals. See Shatzmiller, *Labour in the Medieval Islamic World*, 357–58.
[665] Ibn Bassam, *Nihāyat al-rutba,* 20.

be viewed in the works of the Damascene historian ʻAlāʾ al-Dīn ʻAlī al-Buṣrawī (842-905/1438-1500) and the Egyptian jurist Shihāb al-Dīn Aḥmad al-Ramlī (d. 957/1550).

In contrast to the religious and social constraints that women faced in navigating through public commercial space, as workers and traders, women's relationships with courts could be expressed as being largely on par with men's. Women's legal rights to inheritance, and their equal legal rights (vis-à-vis those of free Muslim men) to own and trade in property created a situation that was contradictory to the patriarchal public legal order that jurists sought to preserve. This order sought to, on the one hand, segregate the sexes, publicly maintaining a normative Muslim social ideal, where women's domesticity was equated to social stability. On the other, jurists sought to provide women full access for representing their legal rights in courts, on a myriad range of issues spanning from divorce and child custody to the adjudication of trading disputes. Maya Shatzmiller has argued that the abovementioned asymmetry between women's banishment from markets and simultaneous support of their legal rights in court should be viewed as a "reflection of the desire to remove women from bread winning occupations;" essentially, women's economic empowerment presented a threat to men's control over their households.

The historian al-Buṣrawī was a Damascene Shāfiʻī deputy qāḍī, who also wrote two shurūḥ works and the historical chronicle discussed here, illustrated the different contentions at play in the minds of jurists when it came to the issue of women's movement outside the home.[666] He referred to these episodes as "events" (*waqāiʻ*) or framed as responsa with commentary. The following episode demonstrates the multiplicity of views on the subject:

[666] ʻAlāʾ al-Dīn ʻAlī b. Yūsif al-Buṣrawī (842-905/1438-1500) was a Damascene shāfʻī vice-judge who wrote two shurūḥ works and the historical chronicle discussed here, which appeared as a supplement (dhayl) to the biographical dictionary (in manuscript form) of Ibrāhīm b. ʻUmar al-Baqāʻī (d. 885/1480), "Unwān al-zamān fī

"Our shaykh Ibn Qāḍī Shuhba (d. 851/1447) was asked about a man who said to his wife: 'If you leave home without my permission, consider yourself divorced. The wife asked her husband for permission to leave the house and he responded by laughing. Taking his laughter as indicating her husband's approval, the wife proceeded to leave the house. Ibn Qāḍī Shuhba noted that this resembles another case presented to the jurist Bulqīnī, in which a man took an oath, on pain of divorce, towards his wife if she were to visit the bathhouse without his explicit permission. The wife was subsequently approached by a man who falsely told her that her husband had granted her permission to visit the bathhouse. She proceeded to do so unwittingly, thinking that she was acting under her husband's authority. Ibn Qādī Shuhba argues that the wife's action in the second case is licit because her action was based on the assumed and explicit verbal instruction of her husband (whereas the first case is implied). Moreover, the wife did not go to the bathhouse with the intention of spiting her husband (*lam takhraj mūrāghimatan lahu*)[which adds legitimacy to her action]. I responded that (the legality) of it then depends wholly on what is assumed by the wife. If a wife then assumes that her husband's permission has been

tarājim al-shuyūkh w"l-aqrān. The editor of al-Buṣrawī's supplement, Akram Ḥūsayn al-'Ilbī, named it "tārīkh al-Buṣrawī," and identified it as such by cross-referencing large excerpts of it that were directly copied and attributed as being from al-Buṣrawī by Shams al-Dīn Muḥammad ibn ʿAlī Ibn Ṭūlūn (d. 952/1546) in his Mufākahat al-Khillān fī Ḥawādith al-Zamān. 'Alī ibn Yūsuf Buṣrawī and Akram Ḥasan 'Ulabī, *Tārīkh al-Buṣrawī : ṣafaḥāt majhūlah min tārīkh Dimashq fī 'Aṣr al-Mamālīk, min sanat 871 H li-ghāyat 904 H* (Damascus: Dār al-Ma'mūn lil-Turāth, 1988), 18–21.

granted, even if falsely communicated by someone else, does it represent a legally valid authority (of the husband)?"[667]

Another view on the matter is that of al-Ramlī, whose fatwās were preserved by his son, Muhammad b. Ahmad al-Ramlī (d. 1004/1595), and published in the margin of Ibn Ḥajar al-Haytamī's *al-Fatāwā al-kubrā*.[668] When al-Ramlī is approached with the following query: "Are women required to veil their faces in front of strangers, or not, as ruled in the works *ʿibārat al-irshād* and *al-rawḍ*? Qāḍī ʿAyāḍ has stated that this is the generally agreed upon view of the ʿulamā'" Al-Ramlī answers:

> "Women are required to veil their faces in front of any stranger (non-related male) as was authenticated (*ṣaḥaḥū*) in the minhāj[669]; the strength of its argument in the small commentary precludes its evaluation in any other way.[670] (In contrast to Qāḍī ʿAyāḍ) It is generally understood by Muslims that women are prohibited from leaving the home with their faces uncovered (*al-khurūj sāfirātin*). This was also noted in (al-Nawawī's work) the *Rawḍa*[671], which reinforces this understanding. Al-Bulqīnī evaluated and issued opinions on this issue in line with this interpretation of the minhāj, and he was partial to this in his teaching/training (*wa jazzam bihī fī tadrībihī*). Al-Adhraʿī, said this was

[667] Al-Buṣrawī, *Tārīkh*, 53–54.
[668] Aaron Zysow, "Al- Ramlī," ed. P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel, W.P. Heinrichs, *Encyclopaedia of Islam*, 2 (Online: BRILL, 2016); Abū al-ʿAbbās Aḥmad b. Muḥammad Ibn Ḥağar al-Haytamī and Muḥammad b. Aḥmad al-Ramlī, *al-Fatāwī al-kubrā al-fiqhiyya* (al-Qāhira, 1891).
[669] This refers to the classic Shāfiʿī fiqh reference work of al-Nawawī (d. 676/1277), *Minhāj al-ṭālibīn wa-ʿumdat al-muftiyīn*.

[670] "Small commentary" most likely refers to al-Ramlī's own commentary of the *Minhāj*. See Zysow, "al-Ramlī".
[671] Refers to another work of al-Nawawī, *Rawḍat al-ṭālibīn wa ʿūmdat al-muftiyyīn*, an abridgement of al-Rifāʿī's *al-fatḥ al-ʿazīz bi sharḥ al-ʿazīz*.

determined by the majority practice (*inahū ikhtiār al-jumhūr*). Some people have not viewed these two positions of the shaykhs (Al-Bulqīnī and Al-Adhraʿī) as representing the same view."[672]

How were the above fears about women's dangerous presence in public space manifested? Ibn Ṭawq relates an incident from Shawwāl 889/ November 1484 where women congregated in large numbers to pray at the Umayyad Mosque and the mosque of Manjak, with the urging on of a popular 'ālim/preacher named al-Najmī (?), Ibn Ṭawq notes that their attendance increased in occasions when the Prophet's sīra (biography) was recited. Men and women mingled after these sermons, to Ibn Ṭawq's shock and disdain.[673] In contrast to his outward traditionalism, though, Ibn Ṭawq himself had direct dealings with women outside of his household and some took place in private settings. Ibn Ṭawq took loans from a professional female moneylender and also managed the collection of rents and alimony payments for several women who were not related to him. Ibn Ṭawq also regularly met women who had retained his services in the company of professional male notaries and witnesses. Proscriptions against the public mixing of the sexes were not strictly observed, and this was complicated by fiqh's non-discriminatory prescriptions on the financial and property dealings of men and women. There was no restriction or distinction between business partners or property owners on the basis of gender. Indeed, as far back as the early medieval period, ḥisba manuals refer to female weavers and embroiderers who congregated

[672] Abū al-'Abbās Aḥmad b. Muḥammad Ibn Ḥaǧar al-Haytamī and Muḥammad b. Aḥmad al-Ramlī, *Fatāwī*, vols. 3, 169–170.
[673] Ibn Ṭawq comments that such "obscene incidents" had been on the increase (*zādat al-ashyā' al-fāḥisha*). Ibn Ṭawq, *Taʿlīq*, 395. Ten years later, in Rabi al-Akhir 896/March 1491, further evidence of such long term anxieties comes from Ibn Ṭulūn who reported that women's presence during Friday prayers led to official sanctions by the Hajib in Damascus who prohibited bystander women, Jews and Christians from sitting in and listening to the Friday sermons at the Umayyad mosque, the 'Umari mosque and various zawiyas. Ibn Tulun, *Mūfākihat al-Khillān*, vol 1, 114.

in front of fabric shops doors or by the river bank, or entrances to mosques and bathhouses.[674] Even though jurists were anxious about women's public activities, they simultaneously recognized the needs of working women who needed to access markets. "Widows and divorcees in their waiting period retained the right to leave their homes during the day in order to purchase raw material or sell … At night these women were also allowed to go to neighbors' houses to spin together and chat."[675]

During the early Ottoman period, neither the sharīʿa nor Ottoman ḳānūnnāmes barred women from transacting in property or goods in a patriarchal marketplace. In both Mamluk and early Ottoman contexts, the commercial activities of women were gendered. A supporting factor was women's general exclusion from market guilds.[676] This exclusion affected women's ability to inhabit shop space in markets, because most storefronts were allocated to members of guilds. Stores leased by guild-members would typically pass down to their sons, if guild members. While women could inherit the leases of such stores from their fathers, they could not operate these businesses without being members of guilds themselves, from which they were excluded. Thus, women's primary benefit would have come from the sub-leasing of such property.[677] This may be a contributing factor to the lack of evidence pointing to women's activities in market workshops or stores and leads me to

[674] Shatzmiller, *Labour in the Medieval Islamic World*, 359.
[675] Rapoport, Yossef, "Women and Gender in Mamluk Society: An Overview," *Mamluk Studies Review* 11, no. 2 (2007): 24ʿAbd al-Karīm ibn Muḥammad al-Rāfiʿī, Al-ʿAzīz Sharḥ al-Wajīz, ed. ʿAlī Muḥammad Muʿawwaḍ and ʿĀdil Aḥmad ʿAbd al-Mawjūd (Beirut, 1997), 9:510; al-Subkī, *Fatāwā*, 2:314–20.
[676] In her study of women and artisanal work in eighteenth and nineteenth century Istanbul, Farbia Zarinebaf-Shahr notes that she was not able to find any evidence of female guild members in the sijills. Marcus also had similar findings. Fariba Zarinebaf-Shahr, "The Role of Women in the Urban Economy of Istanbul, 1700-1850," International Labor and Working-Class History, no. 60 (2001): 146; Abraham Marcus, Columbia University, and Middle East Institute, The Middle East on the Eve of Modernity: Aleppo in the Eighteenth Century (New York: Columbia University Press, 1989), 159.
[677] Zarinebaf-Shahr, "The Role of Women in the Urban Economy of Istanbul, 1700-1850," 145.

consider that this was a factor that would have pushed women into investment, rather than professional, activities.[678]

Women's commercial exclusion was also the indirect result of the state's patriarchal system of market taxation. As H. Gerber illustrated, guild membership was mainly (though not exclusively) evidenced by the occupancy of shops in markets. Accordingly, guilds were taxed by the state according to the number of shops occupied by their members.[679] While no formal restrictions on guild membership existed, membership was not universal and excluded women, low-skilled workers. Control over guild membership by a guild's leaders allowed its members to maintain certain privileges such as maintaining market controls on the prices and distribution of their goods, and monopolization benefits for the purchase of raw materials and goods for a guild's members.[680] Indeed, as Gerber sums it up, "holding a shop in the market leads to payment of guild taxes; paying taxes makes the traditional privileges of the guilds legally enforceable."[681]

There were some exceptions to women's general exclusion from guilds. Market brokerage (*dalāla*), an important activity for connecting women's informal artisanal work in textiles, weaving, and embroidery, to markets, was an area in which court records attest women's guild membership in. Narrative historical sources also record women as dominating the abovementioned crafts.[682] Mamluk biographical dictionaries and legal responsa featured women as peddlers and brokers (*dallālāt*), as well as serving as hairdressers, female

[678] For earlier periods, Shatzmiller found no evidence of such places in her study of women's labor in markets and concluded that "even the major industrial manufacturing, spinning, weaving, and ebroidery was carried out at home." Shatzmiller, *Labour in the Medieval Islamic World*, 358–59.
[679] Gerber, *Economy and Society*, 34–36.
[680] Gerber, *Economy and Society*, 48–51.
[681] Gerber, *Economy and Society*, 36.
[682] Shatzmiller, *Labour in the Medieval Islamic World*, 241.

attendants in public baths and hospitals.[683] With respect to dalāla, Amnon Cohen has argued that the etymology of the term dallāl (m.)/dallālā (f.) likely reflects a reference to the occupation of public-cryers; however by the sixteenth century the sijill records make it clear that the occupation of dallāl referred purely to market brokerage, whereas, a separate title (sing. *munādī*) was given to public-cryers.[684] According to Cohen, the dallāl guild in Jerusalem "was one of the most active guilds during the 17th century."[685] Membership in, and leadership of, this guild was very competitive due to the fact that most crafts guilds appointed exclusive market brokers, those who would negotiate prices on their behalf and secure favorable market distribution. As such, brokers, in addition to their independent activities could rely on an almost guaranteed income from such appointments, which could be lucrative.[686] Relying on the seventeenth century guild sijill records edited by Maḥmūd ʻAlī ʻAṭā Allāh[687], Cohen observed: "whenever the term 'all' members was used in association with this guild, it had a much wider meaning than normally assumed: it also included women and Jewish members. There were Muslim women involved in brokerage, as specific references were made to guild members – 'male' and 'female' alike."[688]

In Cohen's annotated catalog of sijills related to Jerusalem's Jewish community, he noted a sijill from Ṣafar 1004/October 1595 in which three Jewish dallālāt made attestations and defended claims at court, on the same day.[689] In the first case, a Jewish dallāla registered a guarantee on her behalf for all debts she had undertaken in doing her work, and this was

[683] Rapoport, *Marriage, Money and Divorce in Medieval Islamic Society*, 32–33.
[684] Cohen, *The Guilds of Ottoman Jerusalem*, 178–79.
[685] Ibid.
[686] Ibid.
[687] ʻAṭā Allāh, Maḥmūd ʻAlī, *Wathā'iq Al-Ṭawā'if Al-Ḥirafiyya Fī'l-Quds Fī'l-Qarn Al-Sābiʻ 'Ashar* (Nablus: Jāmiʻat al-Najāḥ al-Waṭanīyah, Markaz al-Tawthīq wa-al-Makhṭūṭāt wa-al-Nashr, 1992).
[688] Cohen, *The Guilds of Ottoman Jerusalem*, 181.
[689] Cohen, *A World Within*, vol. 1, 195. J-77-162.

issued by a Jewish saddle-maker (*sarrāj*). In the second, a Jewish woman (without any professional title, presumably not a dallāla) was guaranteed by a Jewish dallāla for any debts she incurred, while the former also guaranteed the debts of the latter – a mutual surety. Notably, the debts of both women were additionally guaranteed by a Muslim dallāl. Lastly, the third case involved a third Jewish dallāla who was summoned to court and berated by the qāḍī for engaging as a broker without having a formally registered guarantor. The qāḍī subsequently banned her from brokerage until she obtained one. Despite the clear religious-communal solidarity that bound these three dallālāt, the aforementioned records indicate that professional ties crossed religious and gender lines, as the guarantee of a Jewish dallāla by a Muslim dallāl indicates. This case may also provide an example of how one woman entered the brokerage profession, by building her professional mettle through obtaining credit from other brokers through mutual surety oaths.

Cultural taboos concerning the public mixing of the sexes and the exclusion of women from workspaces did not extinguish women's commercial activities in markets; rather, women seemed to move with ease and occupy informal public places. Chronicles, sijills, legal treatises and diaries from the fifteenth and sixteenth centuries show that women were active market participants in public spaces, at times presenting challenges to the normative ideals of a socially-religiously male dominated public sphere. Elyse Semerdjian's work on the state's regulation of prostitution and alcohol brewing, for instance, indicates that women working in these occupations were protected by, unsurprisingly, the same authorities that were tasked with policing them.[690]

[690] Elyse Semerdjian, "Sinful Professions: Illegal Occupations of Women in Ottoman Aleppo, Syria," *Hawwa* 1, no. 1 (2003): 60–85.

Despite women's brokerage and lending in markets, such activities could be controlled within the patriarchal social structure by applying social and cultural restrictions on women's lending. In other words, extra-judicial means could silence women's lending activities. The easiest of these was to discredit the honor of female lenders, even those who engaged in the legitimate putting out of loans on behalf of orphans. Men who wished to do so, could simply claim they were women of disrepute and initiate a court case against them on that basis. These claims could be made by male associates, or even husbands, of women engaged in these activities to control these women's social behavior. Ibn Ṭawq provides one such case, of a woman popularly known as Bint Shaʿbān. Bint Shaʿbān practiced the profession of putting out loans for orphans. Following marital strife, her husband repudiated her and filed a complaint against her character to the local qāḍī, claiming that she was lewd (*fāsiqa*) and "ill-suited to manage the accounts of orphans." After questioning her and investigating the matter, the concerned qāḍī ordered the stamping of their home's entrance with a seal (to demarcate and prohibit her activities).[691] When the outraged qāḍī found out about the couples' reconciliation, he removed the seal on their home, and instead imprisoned the husband for violating his order.

For Ottoman Jerusalem, the case of Bīla bt. Shamʿūn provides a case of the entrenchment of Jewish women's lending activities in this city. It is not clear when she settled in Jerusalem, but she is described as being an itinerant non-Muslim resident (*al-amānīya*) in the registers. Her wealth becomes apparent when we learn that she sold a house she owned in Jerusalem in 980/1572 for the substantial sum of forty sūlṭānīs.[692] Cohen

[691] Ibn Ṭawq, *Taʿlīq*, 414-415.
[692] Jerusalem Sijill acts 58(b), 58(c), 59(b), 60(a), 61(c), 63(d), 64(e), 65(b), 105(d), 123(b), 131(d), and 163(f) in Cohen, *A World within*, vol 1, 148–150. For sale of Bīla's house, see J-55-58-3.

recorded twelve court documents in which she was a litigant, mainly as a defendant, and all occurring within a period of four months.[693] While the short-lived nature of these cases may lead one to speculate that she was not a long-standing member of the Jerusalemite community, possibly an itinerant trader or pilgrim, her diverse commercial activities and deeply entrenched lending transactions in the community may indicate otherwise. She received a high level of support from leaders of the Jewish community who came forward to collectively guarantee some of her debts, and the few surviving court records of her debt dealings are likely a subset of a much larger debt footprint that appears to have been lost.

Of Bīla's abovementioned eleven court cases, nine were filed by creditors claiming that she had defaulted on her debts. The concentration of these complaints in such a short period reflects an organized effort by several creditors acting jointly against Bīla, particularly since several of the cases raised against her in court were made in tandem.[694] This was not the first time that Bīla had faced financial difficulties. She had been imprisoned for what the court sijill noted was "a long period," such that the court could "find out whether she was [just] stubborn or [really] poor," as stated in one sijill, since she had claimed bankruptcy.[695] Several months later, after release on bankruptcy, she was back in court to face further claims from other creditors. Sympathetic to her claim of insolvency, the qāḍī offered Bīla the opportunity to retrieve and present proof to the court regarding her impoverished situation.[696] This was the normative court procedure and referred to the furnishing ḥujjas of deeds of court rulings, attestations, contracts and such, in order to support her case, which she did. In

[693] Bīla's twelve court cases were recorded between 7 Muḥarram, 980/19 May, 1572 to 11 Rabīʿ al-Thānī, 980/20 August, 1572.
[694] *Three* debt claims occur on 7 Muḥarram [J-55-58-2, 55-58-3, and J-55-59-2, *one* on 8 Muḥarram [J-55-60-1], *one* on 9 Muḥarram [J-55-61-3], and *two* on 12 Muḥarram [J-55-63-4, 55-64-5, and 55-65-2].
[695] The phrase is Cohen's own translation; J-55-131-4
[696] Ibid.

line with the procedural norms of bankruptcy described in chapter two, Bīla's incarceration was intended to pressure her to uncover hidden assets and truly prove her insolvency rather than deliver penitential justice.[697] Her status as a non-Muslim woman does not appear to have prejudiced either the court procedure or the instituted punishment.

6.2 Social Status, Agency and Litigation

Women's delegation of control of their waqfs and properties to men's management (typically as their agents, sing. mutawallī) reflected a common need to insert male authority in the day to day management of properties, particularly to deal with vexing cases of waqf mismanagement, theft and defaulting renters. Although discerning the intentions behind the actions of women in this regard is difficult, some records of this kind of delegation can illuminate the sort of challenges faced by women's management of inherited waqf estates.

In Dhū al-Qa'da 911/November 1583, Fatima bt. Abdul Rahman al-Baqqāl, the nāẓir of her grandfather's waqf, appointed her brother-in-law "Shaykh 'Alā' al-Dīn, as her agent and representative (*wakkalat wa anābat*). The sijill states that his principal duties, in addition to maintaining the waqf's structures (*īṣlāḥ al-'amāyir*), was to improve the waqf's revenues and income generating ability (*ḍabṭ mutaḥaṣṣil wa ray' al-waqf*) and to pursue legal action against those aiming to steal from the waqf's revenues (*min al-da'wa 'la man waḍa' yadihi 'ala mutaḥaṣṣāl al-waqf*) and to bring cases against such people to account and take them to court (*al-mūkhāṣama wa-l-mūḥākama*). The two witnesses to Fatima's agency appointment

[697] For the late fifteenth century, see J.J. Witkam, Inventory of the Oriental Manuscripts of the Library of the University of Leiden, Vol. 15, Or. 789, ff. 80b-82a: *Mas'alat Hatt al-Thaman wal-Ibra' minhu wa Sihhat dhalika* from the fatwa collection of the Mamluk jurist al-Qasim b. Abdullah b. Quṭlūbughā (d. 879/1474); For an early seventeenth century example, see J.J. Witkam, *Inventory*, Vol. Or. 14.428, Document M.

of her brother-in-law indicates her family's connection to the marketplace. One was a simsār (real estate broker) while the other carried the title ketkhūdā (guild-head).[698] Her case illustrates a typical well-to-do woman's reliance on the market and legal enforcement power of her male kin and their entrenched social networks.

With respect to social class distinctions, it seems that elite women relied on wakāla arrangements far more than non-elite women, and this may have been due to several reasons. First, elite women were far more bound to the preservation of household honor codes given their importance for marriageability. As Peirce's abovementioned analysis suggests, male agents, especially husbands, sons or cousins, shielded elite women from public purview and ensured them protected (*ḥaram*) status. Second, wakāla contracts were costly, both in the fees paid to agents as well as those paid to courts were they were registered. Third, and most important, elite women benefited from an inherited network of legal and market professionals associated with their patriarchal household structures that facilitated their successful management of capital. Non-elite women had to develop them, at great financial, as well as social, cost. Elite women who inherited this social capital could develop it though. Elite women's networks also allowed them control over hinterland properties, sometimes far beyond their localities.

Women's reliance on male representation to manage distant assets transcended the bounds of agency agreements, and was also incorporated into partnership associations. Property and agricultural production were the predominant arenas of women's involvement in this regard. Agricultural rental income trumped industrial production, particularly under the economic strain of the late Mamluk period. Several surviving waqf deeds from late

[698] D-1-72-2.

fifteenth century Damascus refer to waqf agricultural estates that were leased out to partnerships, and some of these were spearheaded by women. One such waqf, created by a certain Ibn ʻImād al-Qawwāṣ in 882/1477 consisted of small shares in three farms and a village. This waqf's founding deed states that these farms were "under the hand", or management, of Khadija and her three male partners.[699] Khadija and her partners also appear as managers of another Damascus farm, owned by a certain Muhammad al-Khashshāb, at the time of its inclusion into a waqf two years earlier.[700] As Ibn Ṭawq also offered, though, it was more often the case that female heirs hired intermediaries, such as himself, to rent out their shares of waqf agricultural lands and collect their dues in late fifteenth century Damascus.[701] Ibn Ṭawq personally leased waqf lands as an investment activity and then subcontracted the collection of crops to tenant farmers, as well as managed the sale of crops, usually at auction. This is a process that Ibn Ṭawq describes repeatedly for fields he leased and visited frequently, often with his business partners.[702] To my knowledge, none of Ibn Ṭawq's agricultural investment partners were women, however, he did lease plots from numerous women and some of these lands came from waqf properties under their management as nāẓirs. These were often very small shares, usually two or three qirāts, in agricultural estates that were rented for a few hundred dirhams per year.

Over the course of the fifteenth century, with the successive drain of the Mamluk treasury to Ottoman campaigns, and economic crises, there came a steady disposal of bayt-al-māl properties, particularly in the latter half of the century, which made their way into private

[699] خديجة و باقي شركائها محد واحمد وتاج الدينج; Aydīn Ozcan, *al-awqaf fi misr qabl khilāl al-ʻahd al-ʻūthmāni* (ISAR: Istanbul, 2005), 108.
[700] Ozcan, *al-awqaf*, 119.
[701] See the case of two sisters who were appointed by Ibn Tawq for renting out their small waqf farm outside Damascus. Ibn Ṭawq, *Taʻlīq*, 384.
[702] See for example, Ibn Ṭawq, *Taʻlīq*, 110.

ownership and then endowment as family waqfs.[703] These properties were bought by Mamluk and non-Mamluk elites, and was a preferred mode of investment for women elites during this period.[704] It was not since the Ayyūbid period that women were recorded as having been so involved in the land investment market and the patronage of waqfs.[705] Rapoport has hypothesized that it was the lack of such investment opportunities for elite women during the height of the Mamluk period, when conditions were more favorable to the state's tax regime, that compelled them to increasingly engage as moneylenders, among other professional pursuits.[706] Waqfs were sites of household power, galvanizing intermarriage, supporting the continuity of lineages and keeping money in the family, so to speak. By purchasing properties and endowing their own waqfs, women elites also contributed to the maintenance of household waqfs. To speak about women's activities in waqf management as reinforcing patriarchal structures, though, is misleading. Fifteenth century waqfs from Damascus indicate that women served in a variety of roles, as both managers/tax farmers of private estates as well as endowers of waqfs. While waqf deeds show that women were sometimes explicitly excluded as beneficiaries, such waqfs are in the minority. Rather, the most common practice was the distribution of waqf beneficiary interests according to sharia inheritance rules. Like men, women employed multi-nodal waqf strategies for partitioning and managing family estates under master waqfs, and these reflect individualized plans that mirrored the social

[703] Adam Sabra, "The Rise of a New Class? Land Tenure in Fifteenth Century Egypt: A Review Article," *Mamluk Studies Review*, Vol. 8, No. 2, 2004, 205-206.
[704] Sabra contends that up to half of property purchases from the bayt al mal during this period were carried out by women. Sabra, *Poverty and Charity in Medieval Islam*, 92–93; For studies on awqaf and this process, see: 'Imād Badr al-Dīn Abū Ghāzī, *تطور الحيازة الزراعية في مصر*; Lellouch and Michel, *Conquête Ottomane de l'Égypte (1517)*.
[705] R. Stephen Humphreys, "Women as Patrons of Religious Architecture in Ayyubid Damascus," *Muqarnas Muqarnas* 11 (1994): 35–54.
[706] Rapoport, *Marriage, Money and Divorce in Medieval Islamic Society*, 24.

relationships and kinship hierarchies that were promoted by the beneficiaries, rather than the founders.

That said, the waqf strategies employed by elite women often speak to the imperatives of maintaining a patriarchal household order. As an example, Fatima bt. Abī Bakr Bin Qamar al-Dīn, a member of the Ibn al-Farfūr clan whose men occupied many of the qāḍīships at the turn of the sixteenth century, endowed minority shares in ten agricultural properties she owned in 862/1457, around Damascus and in the Bekaa valley.[707] These were geographically scattered and bought from the bayt al māl a year prior to the waqf's founding. Her waqf deed stated that one quarter of these properties was to be for her benefit and her mother's benefit during their lifetimes, and that three quarters would be allocated to her four siblings (two males/two females). The lack of reference to any of her own children and the passing of the waqf supervision to her mother suggests that Fāṭima was quite young and unmarried. Indeed, this process may have been a managed process initiated on her behalf by her mother.[708] After the end of the family line, the waqf income would be dedicated to the orphans and widows of the ribāṭs of the waqfs of the two holy cities, al-Ḥaramayn al-Sharīfayn. When this waqf was founded, its properties were leased to Fatima's nephew, Badr al-Din Bin al-Farfūr, who would later become the Ḥanafī chief qāḍī of Damascus during the last decade of Mamluk rule (noted in chapter one above). Waqf deeds produced in the early sixteenth century refer to him as a qāḍī. At the end of her long life, in 925/1519, Fatima chose to endow her remaining ownership shares from the same villages and farms in a new waqf entirely for the benefit of her nephew Badr al-Din bin al-Farfūr and his heirs.[709]

[707] Ozcan, *al-awqāf*, 209.
[708] See similar cases, in Ozcan, *al-awqāf*, 204, .
[709] Ozcan, *al-awqāf*, 210.

While land and credit were two lucrative sectors that increasingly opened up to female investors in the late fifteenth century, as shown above, the way transactions were navigated by women in these fields relative to men during this period is still vague. The disposal of bayt-al-māl properties created investment opportunities for women, for sure, and these cannot be viewed outside of women's waqf strategies. Gender distinctions in the management of waqfs were less gendered, than one would expect. Women were able to manage waqf properties and manipulate credit as means for transmitting inter-generational familial power. Although women administrators of waqfs had to rely on male agents, by social necessity, this did not necessarily constrict their ability to control their assets. Beyond a safety net, it was more useful for women to be the founders of waqfs than the beneficiaries of waqfs, since they could change the course of waqfs during their lifetimes. As beneficiaries, they could not. Damascene elite women used different waqf strategies to advance different social interests, and these were not static or unresponsive to material changes around them. They could not do so, however, without their male relations and their male relations held in-common a desire to maintain the integrity of their household through consolidation of waqf assets, a process which itself relied on the transmission and management of waqf property by women. In the late sixteenth century Damascus, women regularly appear in court registers, in person, as purchasers of property. Such purchases were often on their own account, but they could also be on account of other family members and children. Wives of deceased military elites bought property for their minor children, using their own funds and those inherited by their children.[710]

[710] D-1-143-3

6.3 Adjudicating Debt Disputes in Court

The experience of women in courts was certainly that of a minority. Not only did women's litigation represent a minority of cases, relative to men, when women appeared in court they were also a physical minority in the court room. When women appeared in court, that is when they did not engage with the courts through a male agent, they were outnumbered by the all-male staff of the courts, the presiding qāḍī, witnesses, notaries, other staff and experts that the court sometimes drew upon, who were, largely men. Other legal constrictions, such as the discount on women's legal testimony in sharia courts (women's witness testimony counted for half of that of men's) may have also complicated their dealings and increased their dependence on the legal intercession of their male relatives and agents.

Generally speaking, elite women represented themselves in person, in court, less frequently than non-elite women. This was not because elite women engaged in less litigation, but rather, that elite women more frequently relied on the services of male relatives and employees to act as their agents in courts through wakāla appointments. Substantial court fees for registering claims, contracts, and attestations as well as those related to notaries, witnesses, and experts placed elite women at an advantage over non-elite women as consumers of the law. However, both elite and non-elite women appeared in court with the same frequency as plaintiffs at the time that cases were initiated. This was in line with Ḥanafī judicial practice (and Mālikī and Ḥanbalī practice, though not Shāfiʿī and Shīʿī practice) that required the appearance of both principals to a case at its initiation.[711] Cases of elite women

[711] With respect to the daʿwa, E. Tyan observed that "the appearance of the parties, is, in principle, a necessary condition precedent to the fighting of the issue; there does not exist, in Islamic Law, a procedure of judgment in default of appearance. Further, various procedures of indirect coercion are laid down with the object of securing

regularly surfaced in court, however, such women rarely appeared in court, whether to face claims by creditors or to pursue claims against debtors. Two cases from the Damascus sijill of 991-993/1483-1485 illustrate this dynamic between elite women's social status and their influence using agents in court litigation.

In Ṣafar 991/October 1583, a Ḥanafī qāḍī (perhaps the chief qāḍī) of Damascus, Lūṭf Allāh b. Mūsā, witnessed the attestation of an elite Damascene woman, Badria bt. Muḥammad b. Shihāb al-Dīn Ibn al-Muzalliq, likely a great grand-daughter of the Mamluk merchant and qāḍī Shams al-Dīn Ibn al-Muzalliq (discussed later in this chapter) to a debt of twenty sulṭānīs that she owed her brother-in-law, Shams al-Dīn Muhammad al-Kattānī, a merchant grandee (*al-khawājā al-kabīrī*) and son of a reputed qāḍī. In the record, she appoints her nephew to undertake the future repayment of the loan on her behalf and any court appearances in this regard. Her attestation was witnessed by three merchant notables (*khawājas*), her above brother-in-law, nephew, and several other male witnesses. Her attestation in this sijill also serves to legalize (taṣāduq wa thubūt shar'ī) this obligation, perhaps indicating that this was an informal debt owed to her brother-in-law that was now being formally registered in court.[712] In the following month, Badrīya's above brother-in-law appears again in court to register a debt against a Christian man; Badrīya's debt attestation appears to have been part of a larger set of collections claims by her brother-in-law during this period. Notably, this latter record lacks any of the elite witnesses and grandiosity of

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the appearance of a recalcitrant defendant. As a last resort, the judge will appoint for such a defendant an official representative (wakīl musakhkhar)." E. Tyan, "Daʿwā - Brill Reference," 1965, http://www.brillonline.nl./entries/encyclopaedia-of-islam-2/dawa-SIM_1739?s.num=2&s.au=%22Tyan%2C+E.%22; Boğaç A Ergene, *Judicial Practice: Institutions and Agents in the Islamic World* (Leiden; Boston: Brill, 2009), 218–21; For this general rule, see also: Galal H El-Nahal, *The Judicial Administration of Ottoman Egypt in the Seventeenth Century* (Minneapolis: Bibliotheca Islamica, 1979), 21.

[712] D-1-14-3.

Badrīya's record. The numerous entitled men witnessing her appearance in court reveals a performative aspect that accompanied such women's presence in court.[713]

Over a year later, in a sijill from Rabi al-Thani 993/April 1585, the same Ḥanafī qāḍī issued a court order mandating (ilzām) a certain Fāris b. Ibrāhīm al-Ḥamawī al-Ṣaḥrāwī to pay overdue rent to a landowner, al-ḥurma Fatima bt. ʻAbd al-Bārī Ibn al-Qamar, for rent of an orchard outside the city's Bāb Touma gate. This woman's elite status seems to have been more the product of her propertied wealth than a connection to an influential husband or esteemed lineage. The rent (thirty-six sulṭānīs) was for a two-year period from 990-992/1583-1584. A year after the end of the period, Fāṭima claimed that twenty-three sulṭānīs remained unpaid, this amount now having become converted into a debt. In the case, the renter had failed to provide evidence (bayyina) supporting his claim that he had paid all his dues. Notably, Fāṭima, who was not present at the issuance of this ruling, was represented in this case by her agent, a merchant grandee, Muḥammad b. (illegible name in margin). This merchant was tasked with collecting this due amount, and his presence was witnessed by several other merchants, and two witnesses.[714] The Damascus sijill contains numerous other examples of elite women acting on behalf of elite women's credit claims. Ramadan 991/September 1583, a brother appeared in court to represent himself, and to act as his sister's agent, in collecting overdue proceeds from an oil press they jointly inherited from their father. She is referred to as *al-sit al-maṣūna sayyidat al-tujjār* (the honorable maiden, lady of merchants).[715] In the end of the same month, a daughter of a senior military

[713] D-1-21-2.
[714] D-1-147-2.
[715] D-1-7-3. The travel chronicle of Sigoli Frescobaldi (1384) makes reference to many female traders at the ports of Cairo and Alexandria in the fourteenth century. Ahmad ʻAbd al-Rāziq, *La Femme au Temps des Mamlouks en Egypte*, 48.

commander (*blūk bāshī*) appoints her brother as agent, himself a janissary, to collect all debts and money due to her. [716]

Elite married women also did file cases against debtors without the involvement of their husbands, and at times, on behalf of business partners, siblings or other relatives with whom they were partners. These were exceptions, rather than the rule. By legal necessity, such women would have had to appear in person, in court, to file their cases. One such case from the 991-992/1583-1584 Damascus register, involves the daughter of a merchant, Mistress Fāṭima bt. Muhammad al-Shaddād. Fāṭima had filed a case against a debtor on behalf of herself and her three brothers Yaḥya, Maḥmūd, and ʻAlī (the last two of whom also carried the title khāwāja) for an overdue debt of fifty-five sulṭānī. This may have been a debt owed to their deceased father. The register states that Fatima's brothers had appointed her as their agent for the task, to secure repayment of the money, whether through out of court settlement (ṣulḥ) or through the courts, in front of two vetted and reputable (*maqbūlīn*) witnesses who had appeared in court to support her claim. The sijill presents an incomplete case; as it concludes with the debtor denying any debt owed, and the qāḍī ordering Fatima to produce evidence (bayyina) for the debt, most likely in the form of an agreement or receipts. The sijill concludes with Fatima leaving to obtain such proof.[717] As was commonly the case in commercial disputes, the burden of proof here was on the plaintiff.[718] Such cases seem to

[716] D-1-35-3; In the same month, another woman Amina bt. Rajab al-Jarāḥ is accompanied by her husband to court to attest the sale of her fractional ownership of a farm to a *sipahī*, D-1-22-2.
[717] 11 Ramaḍān 992/16 September 1584; D-1-74-2.
[718] This corresponds to the popular legal maxim that "The burden of proof (by testimony) lies upon the one who makes the allegation and the oath belongs to him who denies" / "*al-bayyina ʿalā l-mudda ʿī wa-l-yamīn ʿalā man ankar*." Brunschvig, R., "Bayyina", in: Encyclopaedia of Islam, Second Edition, Edited by: P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel, W.P. Heinrichs.

support a priority for written evidence (e.g., ḥujjas) over oral testimony in Ottoman courts, as Reem Meshal has recently advanced.[719]

In a case from a year earlier, another married woman, Fatima bt. Muhammad who was known by the moniker Bint al-'Ajamī filed a case against a man (first part of name illegible) al-Dīn b. Yūsuf, who was known as al-Qāri' (the teacher/Qur'ān reciter), to whom she had loaned five sulṭāni. This was not a substantial amount, and Fāṭima's lack of a surname, as well as her laqab, give me reason to think that she was a small-time moneylender. Further, unlike the above case, this lender did not present any witnesses to support her case, but she did present a debt contract as evidence to the qāḍī. The loan was undertaken as one that would be repaid "on-demand" (*'ala ḥukm al-ḥulūl*).[720] This type of loan was common, and in my estimate, was used mostly in cases where collateral was insufficient or altogether absent. It is not unique to women's credit activities. Fatima's case here illustrates court practice for the legalizing of credit contracts that were incepted outside of court, as appears to have been the case.[721] After being presenting with the debt contract, the qāḍī questioned the debtor, who confirmed that he had indeed received a debt from Fatima. In order to "formalize" this debt obligation upon the creditor, Fatima asks the qāḍī: "does this (loan contract) obligate him (the debtor) to pay it? (*hal īlayhi ilzām al-mūd ʿī 'alayh*?). The qāḍī affirms that this agreement does indeed form a legal obligation on the debtor (*ilzāman shar ʿīyyan*), and that he was therefore "legally obligated to settle the subject

[719] Meshal, *Sharia and the Making of the Modern Egyptian*, 103–24.
[720] This formula is identical to that applied for marriage contracts, discussed further below. It was an on-demand callable debt.
[721] Even in the absence of contracts, debtors usually were made to register attestations (sing. *iqrār*) in court regarding amounts they owed, such that this testimony could serve as evidence in the event of a default. No such record is noted here.

amount."[722] The question and response format of this interplay between plaintiff and qāḍī brings to mind that of fatwās, and seems to me to be a formulaic trope used to register such liabilities in court.

The preceding two cases point to the greater prominence given by sharia court qāḍīs to written evidence versus oral testimony. This is despite the sufficiency, in Islamic law, of oral witness testimony for the validation of contractual dealings. While this surely may have been due to the court's increasing bureaucratization and bias towards documentary evidence, Meshal also posits that "overwhelmingly, it was women, former slaves, and members of religious minorities who asked the court for ḥujjas."[723] Certainly, this surely would have strengthened the case for disenfranchised members of society, and non-elites. However, my review of credit transactions from the registers of Damascus and Jerusalem indicates that elite men also relied heavily on the formal registration of their loans and the obtaining of ḥujjas. Most prominently perhaps were the plethora of loans issued by qāḍīs, janissaries, governors and other employees of the state to a variety of urban and rural debtors, ranging from group loans to religious and professional communities, to loans to tenant farmers on timār lands. While I agree with Meshal's contention, I would tend to think that the mobility of Ottoman officers and bureaucrats would have necessitated the registration of debts in courts, this being an imperative for defending against possible future litigation in their absence. Local Syrian Arab elites may have had less need for court ḥujaj, but it is hard to tell.

[722] Shawwāl 991/November 1583. Apparently no relation to other Fatima bt. Muhammad referred to above. D-1-32-3
[723] Meshal, *Sharia and the Making of the Modern Egyptian*, 134.

6.4 The Role of Credit in Marriage and Divorce

The bifurcation of the dotal gift (ṣadāq) under Islamic law, into an advanced portion and a deferred portion, gifted by the husband, inherently incorporates a debt component into the institution of marriage; moreover, the common medieval practice of husbands providing in-kind and cash payments for the annual maintenance of their wives, to meet their clothing, food, bathing and other needs, placed a further financial duty on husbands, one that automatically converted into debt when marriages came to an end as a result of divorce or a husband's death. Rapoport's comprehensive study of marriage and divorce in the Mamluk era examines a wealth of documentary, legal, and narrative sources to reveal how, from the mid-fourteenth century onwards, marriages in Egypt and Syria underwent unprecedented monetization.[724] Indeed, as Rapoport shows, over years of marriage, it was the yearly maintenance installment that mushroomed to overtake the deferred portion of the ṣadāq as the largest financial obligation to wives, and such obligations were rarely, if ever, settled on time, it being the customary practice for these to exist as ongoing debts during marriage.[725] The size of such marriage debts could be very large. Al-Sakhāwī reported, for instance, that Ibn Ḥajar al-'Asqalānī's will included a debt attestation of "300 gold dinars for undelivered clothing, a sum which could have allowed her (his wife) to buy a large house in the center of Cairo."[726]

Sixteenth century sijill records from Jerusalem and Damascus appear to reflect a continuation of such customs and the use of courts as sites where women recorded marriage

[724] Rapoport, *Marriage, Money and Divorce in Medieval Islamic Society*, 51–68.
[725] Rapoport, *Marriage, Money and Divorce in Medieval Islamic Society*, 55, 63.
[726] Rapoport, *Marriage, Money and Divorce in Medieval Islamic Society*, 62; al-Sakhāwī, Muḥammad b. 'Abd al-Raḥmān and Ibrāhīm Bājis, 'Abd al-Mājid, *Al-Jawāhir Wa'l-Durar Fī Tarjamat Shaykh Al-Islām Ibn Ḥajar* (Beirut: Dār Ibn Ḥazm, 1999), 1203.

debts over the course of marriages, as well as after their dissolution, as a result of divorce or the death of husbands. In this regard, women's recording of marriage debts appears little differentiated in function from the previously discussed recording of commercial debts in court. The relationship between a husband's repudiation of wives and their marriage indebtedness, is not something easily captured in the sijill record, due to the methodological constraints previously mentioned with this source type. Biographical dictionaries and unique narrative sources, like the diary of Ibn Ṭawq, however help to fill gaps. While fundamentalist jurists like Ibn Taymīya and his disciple Ibn Qayyim al-Jawzīya preferred a hardline approach towards barring women from receiving cash allowances, and preventing loose interpretations of how a deferred portion of the ṣadāq was to be paid, prevailing juristic attitudes and customs seem to indicate a reasonable acceptance of these practices in Mamluk courts.[727] Moreover, the attitude of reactionary jurists, Ibn al-Ḥājj included, should not lead us to jump to conclude that marriage, for men, was simply an irreconcilable debt trap. Examples from fatwās, polemical tracts, and biographical dictionaries tend to present one dimensional exposes of women preying on their husbands, who were forced to sell their assets to service their marriage debts and the like. This is, however, in contrast to Rapoport's finding that most divorces were consensual separations (*khul'*), which were mostly negotiated. I agree with Rapoport, that "the formalities of divorce deeds concealed a complex interplay of various "legal and extralegal" pressures," and moreover, assert that sijills and documentary evidence alone cannot reveal the workings of divorce arrangements.[728] This is even more so when one considers that most divorces were consensual (khul').[729]

[727] Rapoport, *Marriage, Money and Divorce in Medieval Islamic Society*, 60–61.
[728] Rapoport, *Marriage, Money and Divorce in Medieval Islamic Society*, 69.
[729] Rapoport, *Marriage, Money and Divorce in Medieval Islamic Society*, 95.

Let's take the case of Shahāb al-Dīn al-Raqqāwī who promised to issue a divorce his wife, 'Ā'isha bt. Ibn al-Ḥūrānī, a case of infidelity and settlement reported on by Rapoport. After returning from a trip to Cairo, this husband, in 887/1482, is recorded by Ibn Ṭawq as promising his wife, on pain of divorce, that he had not had sexual relations with anyone except her and the female slave (jāriyā) they had at home since the start of their marriage.[730] Two years later, Ibn Ṭawq is again witness to this couple. Rapoport relates that in the second instance, "before going on another trip, al-Raqqāwī pledged again that were he to marry another wife or take a concubine, his wife was free to divorce him, provided that she was ready to give up the remainder of her marriage gift."[731] My own reading of Ibn Ṭawq's entry differs in that I did not locate a reference to the wife offering to give up her marriage gift in exchange for a divorce. This second attestation rather appears to be a settlement of dues involving 'Ā'isha bt. Ibn al-Ḥūrānī marriage gift, as well as her own debts to her husband.

Ibn Ṭawq is witness to the husband's attestation that the "only dues" owed to him by his wife is an existing debt of 130 ashrafī dinars. In turn, the wife attested that the "only dues" owed to her by her husband was the unpaid deferred portion of her marriage gift, the ṣadāq (amount not listed). At this attestation, the husband paid his wife one dinar of this deferred liability as well as undertook an oath that he had "thrice divorced" his of other wives and has no wives other than 'Ā'isha. Further, on pain of repudiation (a single divorce), he undertook not take on any other wives or slave-girls in future. Lastly, Ibn Ṭawq witnessed the husband's gifting of most of his household belongings to his wife, including a "china-set."[732] The debt attestations of this pair compel one to see this case in a different light, as a

[730] Rapoport, *Marriage, Money and Divorce in Medieval Islamic Society*, 75; Ibn Ṭawq, *Ta'līq*, 198.
[731] Rapoport, *Marriage, Money and Divorce in Medieval Islamic Society*, 75; Ibn Ṭawq, *Ta'līq*, 402.
[732] Ibn Ṭawq, *Ta'līq*, 402.

wife making her husband pay, literally, for his promiscuity. The husband's giving up of rights to future sexual partners provides a sordid view into how negotiated debts factored into household life and could be used as a measure of social control. Notably, in contrast to most cases covered in the literature, it is the wife, rather than the husband, who owes most of the debt. While the remainder of her marriage gift is unknown, she owes a very substantial debt to her husband. Regardless, though, it is likely that such khul' negotiations were most effective, in serving as a tool for partners to arrive at mutually beneficial remedies outside of courts.

Should 'Ā'isha and her husband have opted to settle their dispute in court, they would have had to accept the uncertainty of a qāḍī's ruling and interpretation, which may have been moot on deciding the payment of deferred ṣadāq during the course of marriage. By the mid-fourteenth century, marriage contracts were typically defined by treating the dowry's deferred portion as a debt obligation (*'alā hūkm al-ḥulūl*) payable on demand.[733] While popular accounts of jailed husbands abound, as a result of this customary practice, one should not be led to believe that it was applied without differing interpretations, even among qāḍīs of the same legal school, madhhab. A case from the responsa collection of the Egyptian Ḥanafī jurist Ibn Quṭlūbughā reflects the strength of patriarchal resistance against this measure, and although Ibn Quṭlūbughā's opinion is in support of the customary norms of paying out the deferred ṣadāq in installments over the course of marriage, or as decided by

[733] The successive marriages of the slave woman Zummurud all relied on sadaq based on hūkm al-ḥulūl. Rapoport, *Marriage, Money and Divorce in Medieval Islamic Society*, 65; Rapoport observed that, "This new feature (the on-demand marriage debts) attracted the attention of Najm al-Dīn al-Ṭarsūsī (d. 758/1357), the chief qadi of the city, who devoted a treatise to the interpretation of the clause. According to his view, a 'payable on demand' stipulation allows the wife to demand payment at any time, and the qadi should send the husband to jail if he refuses to pay up." Rapoport, Yossef, "Women and Gender in Mamluk Society: An Overview," 27.

married partners, his opinion shows how acerbic this practice was to some Ḥanafī jurists, of his own madhhab, even though the Ḥanafī jurists were far more at ease with this practice than the Ṣhāfʿī, and certainly Ḥanbalī madhhabs.[734]

In his fatwā, Ibn Quṭlūbughā is told about a wife who married a man for a ṣadāq of 100 dinars, of which forty was paid in advance (*mūqaddam*) and the remainder (sixty dinars) was deferred (*mū'akhkhar*), and payable at will (*'alā hūkm al-ḥulūl*). After entering into marriage, the wife refused her husband (sexual) access and raised a case against her husband demanding the immediate payment of her deferred ṣadāq. The Ḥanafī qāḍī denied her request, and relied on the saying of Najm al-Dīn al-Zāhidī (d. 658/1260?) contending that "at-will" sadaq arrangements had come to be customarily understood as delayed until divorce or the husband's death ("*Ṣār ta'khīr al-ṣadāq ila'l-mawt wa-l-ṭalāq lizūman 'ādah wa sharī'a ma 'rūfah*").[735] Requested to opine on the legal validity of this view, Ibn Qūtlūbughā issued a staunch rejection. He argued that resorting to claims about what comprises customary practice and what does not is beside the point. Rather, Ibn Quṭlūbughā contends that marriage contracts are similar to commercial rental contracts, where a given good or service is procured for a fixed amount, that are to be consumed over an amount of time. He further argued explicitly for a literalist reading. He says: "what is understood by 'immediately'/*ḥālan*, (i.e., *hāl*, *hulūl*), even if one were to apply our customary understanding, is that it means 'now'/*al'ān*(!)" Hence, for him, the wife's demand for being repaid according to hūkm al-ḥulūl must be understood as an immediate obligation and has

[734] This work is in manuscript of collected treatises and fatawa by Ibn Qutlubugha, owned by Leiden University. Another copy of this majmu, although with substantial differences, is found at Princeton University and has been recently published. See: al-Qāsim ibn 'Abd Allāh Ibn Quṭlūbughā, "Rasā'il Al-'allāmah Qāsim Ibn Quṭlūbughā" (Leiden, n.d.), folio 135, Or. 789, Leiden University Library; Ibn Quṭlūbughā, *Majmū'at Rasā'il Al-'allāmah Qāsim Ibn Quṭlūbughā*.
[735] Ibn Quṭlūbughā, *Rasā'il Ibn Quṭlūbughā*, 135f.

nothing to do even with the issue of postponement or deferment. While Ibn Quṭlūbughā's opinion accords to the marriage customs of the day, his substantiation rather relies on the literal terms of the contract rather than reflecting on the customary norms that conditioned its practice.

A century on, in the late sixteenth century, sijills reveal that the prevailing marriage contracts were based on at-will (ʻalā hūkm al-ḥulūl) payment of the deferred ṣadāq.[736] The practice of husbands accruing debts related to clothing, bathing, food and other expenses are also prevalent. For instance, in Ramaḍān 992/September 1584, a woman named Fatima bt. Muhammad al-Khayḍarī sued her husband for a debt of twenty-five dinars in Damascus, equivalent to ten years' worth of accrued payments he was obligated to make for clothing her (*kiswatīhā ʻalayhī*) during this time. She also demanded her half of three brown cows they jointly owned, and the return of all her belongings and personal items that she had brought into their marriage, among them cups, plates, rugs, and some curtains. Of note here is that Fatima pursued her case while being married, and not in person, but rather through her agent, the son of a well-known senior military officer (*jāwīsh*).[737]

Baldwin stresses that women seeking to obtain what he terms judicial divorce, that is a divorce enacted by a qāḍī in the event of a husband's impotence or abandonment, could be obtained fairly easily outside of Egyptian Ḥanafī courts, as it had been in the Mamluk period. In Egypt throughout the sixteenth century, Cairo's court records suggest that women had recourse to courts of other madhhabs, the Mālikī and Ḥanbalī in particular, for this purpose, and doing so did not prejudice the recognition of these women's' divorces by the Ḥanafī

[736] As token examples , see several from Damascus D- 1-7 and D- 1-19.
[737] D-1-67

courts, or the Bāb al-ʻĀlī – although a short treatise by Ibn Nujaym explicitly argues for women's protection in this regard, implying that it was not the Ottoman state's preference to do so (the state's Ḥanafism was generally opposed to the ease with which women could obtain such divorces).[738]

While the sixteenth century sijill records from both Jerusalem and Damascus are those of the Ḥanafī chief qāḍī's court and his deputy (the sessions of other madhhab qāḍīs are exceedingly rare in abound. For Jerusalem, one routinely comes across cases where qāḍīs order arbitrary detention or temporary imprisonment (*i ʻtiqāl*) for husbands who have not met their financial duties to provide for clothing, housing, or have missed installment payments of their deferred dotal gift. As previously noted, although such practices were criticized and debated by Mamluk polemicists, such as Ibn al-Ḥājj, they were the order of the day in late-Mamluk Cairo, Mamluk qāḍīs in the fifteenth century routinely sided with women against their husbands, when the latter were found to be debtors. In Ottoman Jerusalem a virtually identical pattern emerges indicating a strong continuity in this culture and the judicial practices attached to it. Some examples from sijill 46 (972/1564-5) suffice here to illustrate this point: In 3 Ramaḍān 972/ 4 April 1565, the chief qāḍī of Jerusalem jailed al-Zaynī ʻAbd al-Qādir Abī al-Sifa after reviewing a case brought against him by his wife, Um al-Ḥamd bt. Khalīl Minṭāsh. ʻAbd al-Qādir admitted that he had overdue kiswa payments to his wife.[739] The very next day, Um al-Ḥamd arranged to drop the charges against him, after he agreed to pay his dues following a night in jail, and this amicable settlement (taṣāduq) was recorded in

[738] Baldwin, *Islamic Law and Empire in Ottoman Cairo*, 85–88.
[739] J-46-228-3. For another case from the same month, see that of ʻUthmān al-Sharīf b. ʻAlī who is jailed by his wife for not paying her dowry (*mahr*). J-46-240-1.

court by the same qāḍī.[740] Wives also routinely sought to preempt such actions by incorporating a clause in their marriage contract, or an oath undertaken during marriage, their marriage would be automatically repudiated in of a default in maintenance or other agreed payments by the husband. The Jerusalem sijill's show that when such instances occurred, husbands had to register their settlement of debts to their wives in court before returning their wives to the marriage.[741]

Perhaps one of the most contentious practices concerning debt and marriage was the forced divorce oath, that had come to prominence in the early fourteenth century and was famously debated between Ibn Taymīya and Taqī al-Dīn al-Subkī.[742] As the following cases demonstrate, this practice was still widely practiced in early Ottoman Jerusalem. This practice arose out of the customary practice by Mamluk amīrs to force subordinate Mamluk officers to undertake loyalty oaths that would set-off the latter's divorce from their wives if broken, however it expanded to become a widely adopted practice by and between elites of different status. In Jerusalem, one can observe political elites enforcing similar oaths on debtors, referred to as ta'līq al-zawāj, under their supervision. This was a practice that highlighted the high inequities between the power of elites and non-elites and was used on groups, as well as in individual cases. One can look, for instance, at the case of four peasants from the village of Irṭās (a village belonging to the Hebron waqf) who took oaths promising to repudiate their wives if they failed to pay their joint tax-debt of 50 sulṭānī to the Hebron waqf's administrator within one month's time.[743] Such oaths could also be abused by qāḍīs.

[740] J-46-230-1. For other cases of a husband's imprisonment for not paying for his wife's clothing payments, *kiswa*, see J-46-36-7 and J-46-137-3.
[741] J-46-11-1
[742] Rapoport, *Marriage, Money and Divorce in Medieval Islamic Society*, 91–103.
[743] J-46-36-2

In what was surely a humiliating act, the Ḥanbalī deputy qāḍī of Jerusalem took a divorce-oath in Rabī I/October 1564 in which he undertook to repay the (small) sum of 7 sulṭānī in seven monthly installments to the nāẓir of the Ḥaramayn waqf, on pain of divorce if he defaulted. In another case from Rabī II 972/November 1564, Ṣalāḥ al-Dīn al-Fākhūrī gave a similar oath to the Ḥanafī deputy qāḍī of Jerusalem, Maḥmūd al-Dayrī, who al-Fākhūrī had borrowed 7 sulṭānī and 3 para from.[744] In a twist of fate, twenty three years later, on 26 Muḥarram 966/27 December 1587, al-Fākhūrī's son, Shams al-Dīn who would issue a loan of 20 sulṭānī (in paras) with a ta'līq promise to a certain Abdulla b. Ali al-Ramlī. The mu'āmala was in form of a sale of a yellow cloth, and this debtor paid 1 sultānī with 19 deferred in installments of 2 para per day. The sijill records that al-Ramlī, the debtor, "promised him to pay the amount and if he were to miss a payment for any given month, he hereby undertakes to irrevocably divorce his wife ("*wa 'alaq al-mushtarī al-madhkūr ṭalāq zawjatahū … 'ala inahū lā yaksur qisṭ*").[745] Such ta'līq registrations, though, could be taken to absurd ends such as the case of wife who took her husband to court to forcibly cause a divorce (he had taken an oath to divorce his wife if he ever bought her sweets again) because he had brought home *qaṭā'if* (pastries) and *kishk* (cheese curd) one day. The husband argued to the qāḍī that this food was intended for his daughter, and not his wife, and had obtained a fatwā beforehand from the muftī of Jerusalem to do so. The qāḍī dismissed the case.[746]

Ta'līq cut across social status and class; as well, this custom relied on inter-madhhab facilitation and interdependence. A ta'līq case involving the famous jurist Najm al-Dīn al-

[744] J-46-60-3. The Ḥanafī deputy-judge in this case foresaw his debtor's default because he filed an injunction (*ilzām*) against the debtor three months later to settle his debt. J-46-84-8. For another case of *ta'līq*, unrelated to the prior two cases, but from the same sijil, see J-46-199-1.
[745] J-67-76-1
[746] J-67-95-3

Ghazzī (d. 1651) highlights this importance, found in Ibn Ayyūb's diary-cum-biographical dictionary, which I reproduce here. This event occurred some five years after Badr al-Dīn al-Ghazzī's death, father of Najm al-Dīn, and a good friend of Ibn Ayyub. At this juncture, Najm al-Dīn would have been around twenty and Ibn Ayyūb, who was a deputy Shāfi'ī qāḍī in Damascus, would have been around sixty years old:

> "On Thursday, the third (day) of the month (Muḥarram 999/October 1590), I was visited at my home by our Shaykh, Shaykh al-Islām Najm al-Dīn Muḥammad b. al-Shaykh Badr al-Dīn al-Ghazzī al-Shāfi'ī who was accompanied by a man from the peasantry. He (al-Ghazzī) told me he had repudiated his wife at the hand of the Ḥanbalī qāḍī and it was his intention to return to her. She [subsequently] gave him her permission to reconcile, and this was witnessed by two men. So, I (Ibn Ayyūb) returned her to him. I issued a ruling that removed the contingency upon which his divorce was conditioned and nullified it altogether (*hakamtu lahū bi'adam 'awd al-ṣifa al-mu'allaq ṭalāq al-zawja 'alayhā wa'inḥilāliha min aṣlihā*). And I voided all oaths the husband undertook before and after the reconcilable separation (*al-baynūna*) occured, irrespective of whether he acted upon these oaths or not, as it [the custom] is in our madhhab."[747]

Ibn Ayyūb's above entry does not specify details concerning the divorce, whether it was due to an unpaid marriage debt, an oath that al-Ghazzī had made to his wife, or other cause. However, beyond being consensual, it is implied that the divorce was triggered by al-Ghazzī and brought by his wife to the Ḥanbalī deputy qāḍī.

[747] Ibn Ayyūb, *Nuzhat*, 154–55.

Historians of the Mamluk and Ottoman eras have widely acknowledged women's administration of waqfs, and in particular, their use of waqfs as vehicles for investment and credit.[748] Beyond the use of waqfs to provide a more equitable distribution of inheritance to their daughters, waqf founders were keenly aware of the many methods available for trading and monetizing waqf assets.[749] Moreover, they were aware changes in distribution and management of waqf properties were likely to happen decades down the line, and perhaps it is because of this that founders generally treated their waqfs as going-concerns, generally retaining control of their own endowments during their lifetimes, as the case of Fāṭima Bin Qamar al-Dīn above indicates. As Carl Petry's study suggests, late Mamluk women's management of patrimonial waqfs demonstrate how female nāẓirs could be undermined by other family members seeking to sabotage their control over family assets. Conversely, female nāẓirs deployed marriage strategies to enmesh their interests with influential men who could safeguard their control over waqf assets. In so doing, such marriage alliances also provided upward social mobility for Mamluks who married the widows of Mamluk amīrs and rulers, and expanding their influence through the management and redistribution of their waqf property interests, this being produced somewhat loosely in the name of maintaining the continuity of certain Mamluk military household lines.

The use of family waqfs as instruments of indebtedness, in association with marriage and family-alliances, were important tools for thwarting the encroachment of male relatives,

[748] Carl F. Petry, "Class Solidarity versus Gender Gain : Women as Custodians of Property in Later Medieval Egypt"; Carl F. Petry, "The Estate of Al-Khuwand Fatima Al-Khassbakiyya: Royal Spouse, Autonomous Investor," in *The Mamluks in Egyptian and Syrian Politics and Society*, vol. 51, Medieval Mediterranean (Leiden ; Boston, MA: BRILL, 2004); Jennings, "Women in Early 17th Century Ottoman Judicial Records - the Sharia Court of Anatolian Kayseri."

[749] Muḥammad Muḥammad Amīn, *Awqāf wa-al-ḥayāh al-ijtimā'īyah fī Miṣr, 648-923 A.H./1250-1517 A.D. : dirāsah tārīkhīyah wathā'iqīyah* (Cairo: Dār al-Nahḍah al-'Arabīayh, 1980), 341–60.

or even the state's reach, in controlling assets. Women had to rely on alliances with men from inside and outside the family in order to do this. Between the Mamluk and early Ottoman periods, women's relationship to waqfs continued to operate on a similar basis, albeit, the Ottoman sixteenth century offered more efficient and predictable legal recourse, with a secure judiciary that provided much wider powers to local qāḍīs. Significantly, women's reliance on men does not imply a position of weakness, elite women adeptly used institutions and social-legal norms to meet their objectives. To borrow Leslie Peirce's phrase, women "maximized their control of property within an environment of constraints and opportunities."[750] Petry's work on the master waqfs of Qāytbāy and al-Ghūrī reveals that waqf revenues far exceeded the expenses required by their charitable services. Although the subjects of his studies were concerned with the highest military elites of society, a similar dynamic was at play on a much smaller level for non-Mamluk elites. Excess waqf income (lit. fāyiḍ) was distributed to beneficiaries or reinvested to purchase more waqf assets. Since most waqf revenues came from agricultural revenues, waqfs regularly issued credit to farmers, and the process of monetizing agricultural production could itself often lead to the use of short and medium-term debt, as shown with the accumulation of peasant debts in Jerusalem's al-Ṭāzīya waqf in chapter four. Expenses and amounts drawn by beneficiaries also were registered as debts and could lead to waqf insolvency. While mostly temporary, these situations could lead to years of overdue salaries and stipends for teachers and students of schools, soup kitchens, and other endowed institutions that relied on benefaction. Ibn Ṭawq reports on a number of cases where this occurred.

[750] Peirce, *Morality Tales*, 210.

Women's manipulation of waqf debts is illustrated in the story of Sāra bt. Shahāb al-Dīn Ibn al-Muzalliq, the daughter of a Damascene trading magnate, who drew on her father's future waqf revenues to use as dowry in order to enter into a marriage with Ibn Ṭawq's shaykh, and patron, the chief qāḍī of the Damascus Shāfi'ī court, Taqī al-Dīn Ibn Qāḍī 'Ajlūn. Ibn Qāḍī 'Ajlūn used this loan from to serve as part of his marriage gift to Sāra in Rajab 903/February 1498. This marriage alliance came exactly one year after the murder of her husband Shams al-Dīn Mūḥammad b. Ḥasan Ibn al-Muzalliq in a Mamluk conspiracy that was involved in al-Ghūri's struggle to become sulṭān.[751] Their marriage was short-lived, lasting only two weeks, and appears to have been done out of political expediency. Ibn Ṭawq reports that Sāra's marriage ṣadāq was 200 dinars, and only a quarter was paid by Ibn Qāḍī 'Ajlūn, with the remainder being a combination of a loan provided by Sāra (from her father's waqf) and the rest as deferred debt portion of her ṣadāq.[752] The ṣadāq was not paid to her at the time of the marriage contract itself, but two days later, at her home. It was Ibn Ṭawq himself who personally delivered the Shaikh's ṣadāq with two male witnesses. One of the witnesses was the accountant of Sāra's father's waqf, and she instructed her accountant to draw on a debt from the waqf's revenues (*maḥṣūl*) or excess income (fāyiḍ) of her father's waqf and gift it to Ibn Qāḍī 'Ajlūn, thereby making it legally his.[753] We do not have a reconciliation of Ibn Qāḍī 'Ajlūn's debt repayment to Sāra following their divorce two weeks later, however, it is certainly likely to have taken place.[754] Sāra divorced Ibn Qāḍī 'Ajlūn

[751] al-Ghazzī, *Kawākib,* vol. 1, 37. Ibn Ṭawq, *Ta'līq*, 1591.
[752] Ibn Ṭawq, *Ta'līq*, 1586.
[753] Ibn Ṭawq, *Ta'līq*, vols. 4, 1586 "*Adhanat li-Shihab al-Din an yaqbiḍa min muḥtaṣal waqf wālidiha wa fayidīhū… wa mallīkatahā li-mawlānā al-Shaikh wa adhanat fi qabḍihā*", 1589.
[754] Or, in Judith Tucker's words, "A woman who was no longer a virgin could only assent to a marriage by clearly voicing her agreement in terms that brooked no other interpretation."; Judith E Tucker, *Women, Family, and Gender in Islamic Law* (Cambridge, UK; New York: Cambridge University Press, 2008), 42.

after implicating him of engaging in immoral acts (ta'n) and colluding with Mamluk's to bring about her husband's death.[755]

Ibn Ṭawq's entries from thirteen years prior give some context to Sāra's association to this waqf, and possibly to Ibn Qāḍī 'Ajlūn himself, for he now occupied the chief qāḍī position that her husband had once held a decade prior to his death. Ibn Ṭawq's good friend al-Shaikh Zayn al-Din Khiḍr al-Ḥisbānī purchased the rights to the mūtakallim position (or tax farm) of the Ibn Muzalliq waqf and served as its manager for at least five years, during 885- 890/1480-1485.[756] As mūtakallim, Khiḍr was in charge of administering the waqf's financial accounts, collecting revenues, and paying salaries to the teachers of the waqf's zāwiya. In Rajab 887/August 1482, Khiḍr paid 140 dirhams in overdue stipends to students of the waqf's zāwiya which he performed at its premises.[757] Six months later, Shaikh Abu al-Faḍl al-Qudsī, the head of the Ibn al-Muzalliq zāwiya, was a witness, along with Ibn Ṭawq, to Khiḍr's payment of 2,000 dirhams to Sāra bt. Ibn al-Muzalliq's maid-servant (jāriya) as payment towards the share of Sāra's deceased son in the Ibn al-Muzalliq waqf revenues.

Things took a sour turn for Khiḍr in Muharram 890/January 1485, when he reached out to Ibn Ṭawq in a distressed state. Khiḍr had been jailed by Shams al-Din Mūḥammad al-Muzalliq (Sāra's husband and chief qāḍī at the time) for debts that he was reported to have owed Sāra. Khiḍr had apparently purchased the mutakallim position over the Ibn al-Muzalliq waqf for a period of three years at a consideration of 10,000 dirhams per year, payable to Sāra directly. This arrangement was concluded with Sāra's husband on her behalf, and it

[755] Boaz Shoshan, *On the Marital Regime in Damascus, 1480-1500 CE*, ASK working Paper 15, Annemarie Schimmel Kolleg, Bonn, 2014, 4. [Accessed online: https://www.mamluk.uni-bonn.de/publications/working-paper/wp-15-shoshan.pdf]
[756] Ibn Ṭawq, *Ta'līq*, 660.
[757] Ibn Ṭawq, *Ta'līq*, 178.

seems that the Ibn al-Muzalliq family had claimed that Khiḍr misappropriated funds, and had not kept up with the agreed lease payments.[758] Ibn Ṭawq recounted Khiḍr's plea, when the latter said to the former "by hook or by crook obtain a (*taḥayal-lī*) loan for me from the orphaned heirs of Ibn Huṣn's estate, at least for two or three days, even if on interest!"[759] Khiḍr had been in jail for about four days at that point, and it would take almost a week for him to be allowed to go and obtain the necessary amount to repay Ibn al-Muzalliq. Ibn Ṭawq, in the following week, recorded spending an entire day working over a reconciliation of the Ibn al-Muzalliq waqf accounts on Khiḍr's behalf. In addition to being a notary and witness, Ibn Ṭawq was also an accountant. With the help of Ibn Ṭawq, Khiḍr was able to submit the complete accounts for the Ibn al-Muzalliq waqf for the period 885-886/1480-1481[760], and about two weeks on, Khiḍr obtained a sizable loan of 4,000 dirhams (about 80 dinars) from Ibn Ṭawq's shaykh (Taqī al-Dīn Ibn Qaḍī ʻAjlūn) and an unspecified woman. Khiḍr likely applied this loan to settle his debts with the Sāra Ibn al-Muzalliq, although there is no explicit record of that in Ibn Ṭawq's diary.

Several observations are noteworthy. First, over a period of at least thirteen years, but perhaps longer, Sāra had access and, it seems, control over her father's waqf. This is in spite of there being no explicit reference to her being the waqf's nāẓir. She also controlled the income attributed to her deceased son's share in the waqf. She borrowed from the waqf to finance a marriage. And she was able to ensure administrative oversight of its finances, through her husband, by threatening its mūtakallim, Khiḍr, with imprisonment – which she carried out on at least one occasion. In exercising such measures of control, Sāra required the

[758] Ibn Ṭawq, *Taʻlīq*, 437. Ibn Ṭawq recalls that Khiḍr was asked by Ibn al-Muzalliq: "Where is the thirty thousand dirhams? Go do the accounts properly (اعمل الحساب اصلا وفصلا)."
[759] Ibn Ṭawq, *Taʻlīq*, 437
[760] Ibn Ṭawq, *Taʻlīq*, 438

use of male relatives and employees. Whether it was a husband pressing charges or an accountant recording debts in the waqf ledgers on her behalf. These actions should be viewed as male resources serving implicit matriarchal power. However, her distressed marriage to Ibn Qaḍī ʻAjlūn also suggests that maintaining her control of the family waqf needed a powerful male intercessor who could thwart the attempts of powerful political figures and male relatives from sinking their teeth in the waqf.[761]

The tendency of elite women's waqf management to serve the interests of maintaining patriarchial household structures was well established. Alif, the daughter of a Damascene qāḍī, Sāliḥ b. ʻUmar al-Bulqīnī, endowed two zāwiyas in Damascus during her lifetime. After four marriages, one of which was to the Caliph al-Mustanjid bi'l-lāh, to whom she bore a child, Alif married her paternal cousin Badr al-Din after the death of his wife, who herself was Alif's sister. After this last husband had died, Alif had accumulated a large amount of family wealth, and it is at this point, as al-Sakhāwī informs us, that she began to increase her gift giving and charitable contributions (*fatazāyad iqbālūha ʻala al khairāt*). Alif patronized many ḥadīth recitation gatherings by famous scholars, she expanded the madrasa endowed by her father to teach the Qur'ān to widows, she gave to orphans, and, notably, she lent vast sums of money to her brother's son, Badr al-Dīn, to invest in the purchase of political and administrative posts previously held by her father. Sakhāwī saw no contradiction in jointly classifying Alif's loans to her nephew and her various charitable giving as good deeds. By promoting the purchase of offices in her branch of the al-Bulqīnī family, Alif, was perpetuating her household's political-religious power and thus nobly

[761] In narrating her marriage to his shaikh, Ibn Tawq clearly relays the disdain and disapproval of her Sara's cousin, a certain Shams al-Din to her marriage to Ibn Qadi Ajlun. When he was approached to act as the male representative of Sara in officiating her marriage, he refused and cursed them both. A nephew of Sara's interceded to serve this role. My view is drawn from this, as an educated guess.

sustaining Damascus' religious economy.[762] Indeed, indebtedness for the purchase of political offices was rather a norm. Al-Sakhāwī's good friend and notable Jerusalemite Ḥanafī 'ālim Ibrāhīm b. Muḥammad al-Dayrī (d. 876/1471), who studied in Cairo in the early fifteenth century and held numerous posts, had to let go of his kātib al-sirr post, only fifteen days into his tenure in that position, due to the numerous debts he had collected to pay for this and various other offices he held.[763]

The transition from Mamluk to Ottoman rule, as concerns the establishment and management of waqfs in Syria, does not seem to have been very disruptive, at least.[764] While cases of waqf property confiscation and misappropriation were recorded in the first three years of Ottoman rule, this seems more likely due to the corruption and careless administration of the first Ottoman Defterdār in Damascus, Nūḥ Çelebi, than to any systematic state plan for appropriating waqfs.[765]

The deeds of cash-waqfs founded or managed by women elites in Jerusalem have similar constraints as men's and voice the same fears about the likelihood of future abuses by corrupt administrators, or the negligent issuance of loans to bad debtors. The pool of cash-waqfs I have reviewed indicates that waqfs endowed by women were typically smaller than

[762] Al-Sakhāwī, *al-daw al-lām ʿi*, entry no. 39, vol. 12, 7-8. The Bulqīnī family had strong ties with the house of the Mamluk era caliphs. The above Badr al-Din's granddaughter entered into two marriages, first to her first cousin, also a Bulqīnī, and then to a caliph. Idem., entry no. 128. Other cases of interfamily marriages by women of this family can be seen in entries 180 and 221 from Sakhāwī's work.
[763] Al-Sakhāwī, *al-daw al-lām ʿi*, Vol. 1, 150. This person is of the same al-Dayrī family that inherited the administration of the Ṭāzīya waqf discussed in chapter four. For similar cases: Idem, vol. 5 – 97, 167;
[764] Winter has reviewed several notable awqāf established by former Mamluk elites in the immediate aftermath of the Ottoman conquest, in the years 927/1520, 932/1525, 936/1529, 946/1539, and as late as 947/1540. He attributes this pattern to the Ottoman general disregard for the smaller potential, and lesser threat, of Mamluk reprisals in Damascus, than Cairo, the Mamluk stronghold. The legal and formulaic structure of the early Ottoman era waqf deeds in Syria correspond to those of the late Mamluk period. Michael Winter, "Mamluks and Their Households in Late Mamluk Damascus: A Waqf Study," in *The Mamluks in Egyptian and Syrian Politics and Society*, ed. Michael Winter and Amalia Levanoni, vol. 51 (Leiden; Boston, MA, 2004), 312.
[765] Michael Winter, 300.

those of men. I am not sure if this is due to women's smaller inheritances or was a deliberate choice to incept smaller cash-waqfs. The objects of endowment of these waqfs are, however, the same between men and women (e.g., endowing recitation of the Quran, feeding and housing the poor, etc.). While the larger more well-known cash-waqfs in the city were established by Ottoman women elites (such as the Baymāna Khātūn waqf discussed in chapter three and the Balqīs Khātūn waqf discussed below), cash-waqfs were also managed by elite Jerusalemite women from well-known 'ulamā' families, such as the 150 sulṭānī cash-waqf that was established by Mūsā al-Dayrī, the imam of the Dome of the rock sanctuary, for the benefit of his granddaughter Ā'isha, daughter of Mūsā's predeceased son Jamāl al-Dīn.[766] In 977/1569, almost a decade after this waqf's founding, Mūsā's granddaughter Ā'isha appeared as the waqf's nāẓir and renewed a 30 sūlṭānīs loan to Yūsīf b. Ishāq b. Mūghān, a wealthy Jewish resident of Jerusalem. She was not present in court, but acted through her agent, and likely close relative, Sa'd al-Dīn Muḥammad Bin Rabī'.[767] This loan was guaranteed through the mortgage of a property owned by Mūghān and accrued 6 sūlṭānīs of interest (a rate of 20%) per year. The mu'āmala on this loan recorded the sale of a yellow silk robe (*qaftān kamḥaz aṣfar*) by the waqf to Mūghān and that it was paid and received by 'Ā'isha's agent, in good order in accordance to the law (*wa tasallamaha minahu al-taslīm al-shar ʿī*).[768]

Administrators of women's awqaf could also abuse their privileges by taking loans from awqaf under their control. This was the case of a waqf of a certain Fatima Khatun from 1540s Jerusalem. The administrator of this waqf took an in-kind loan from the waqf, in the

[766] J-53-200-3. For a description of this waqf's founding deed, see the end of section 3.3.
[767] Another figure from the same family, Jamāl al-Dīn Bīn Rabī', was listed as the nāẓir of Mūsā al-Dayrī's own cash-waqf as well as Mūsā's first cousin; also discussed in chapter three.
[768] Ibid.

form of a half-qinṭār of olive oil with a one-year deferred payment. Such a transaction could allow this administrator to monetize this commodity and trade in its capital, to the detriment of the waqf.[769]

The waqf deed of Balqīs Khātūn (dated Muharram, 1000/ November 1591), an elite woman from Cairo, relates that "when she realized that the time to depart from this world was approaching and that life was nearing its end," she delegated her agent, Mustapha Agha b. Abdulla, to proceed to Jerusalem and establish her cash-waqf of 170 "Mūrādī" sūlṭānīs (the coinage during the reign of Murad III, 1574-1595) towards recitation of the Qur'ān. Mustapha Agha b. Abdulla's agency (wakāla) was enacted in the presence of three other Aghas, all retired in Cairo. Balqīs Khātūn's 170 sūlṭānī endowment was to be managed judiciously and its administrator was called upon to be "wary of any hint or association of ribā" (*wa yattaqī shabhāt al-ribā*) when lending out funds. He was to "deal in money at [the rate of] ten for eleven and a half (11.5%), no less and no more – in accordance with legal artifices" (*yū ʿāmal fī al māl biḥīla shar ʿīyya*). The waqf founder also explicit forbade the administrator from lending to any sipahi or janissary. This was further to other prohibitions on lending to speculators or those "from whom securing payment is difficult" ("*wa lā li man ya ʿsar al-khalāṣ minhū*").[770]

Most telling of the political shifts of its time is the prohibition in Balqīs Khātūn's waqf for lending to sipahīs and janissaries. The power of the sipahi cavalry officers had waned to a great degree by the turn of the seventeenth century and was giving rise to a new

[769] J-45-148

[770] Ghanāyim, Zuhayr, Ashqar, Maḥmūd, and Shannāq, Fārūq, *Al-Wathā'iq Al-Waqfīyah Wa-Al-Idārīyah Al-ʿā'idah Lil-Ḥaram Al-Qudsī Al-Sharīf : Sijillāt Maḥkamat Al-Quds Al-Shar ʿīyah*, vol. 2 (ʿAmmān: al-Lajnah al-Malakīyah li-Shu'ūn al-Quds, 2006), 106–7.

landed elite, with the dying away of the timār system. Likewise, at the time of this waqf's establishment, the janissaries were charged with having instigated a series of revolts in bilād al-shām that placed them in conflict with the sipahī corps, as well as the Ottoman sultan, and gangs that they formed allowed them to occasionally prey on urban populations. Rivalry between these and other groups produced a period of local political instability in Syria broadly, and chronicles relating to Jerusalem during this period refer to marauding bands that were assisted, or worked in conjunction with, sipahis and janissaries that were quelled by other Ottoman forces. In proscribing lending to these groups, Khātūn's waqf was certainly prioritizing the repayment of debts over lending to heavily influential local elites, those who may have been more likely to act outside of the law during this period, and therefore, threaten the integrity of the waqf's capital.

Khātūn's waqf also contains a legal formula that reflects the legal anxiety concerning the cash-waqf instrument in the last quarter of the sixteenth century. This stratagem, which was also applied to ordinary waqfs, was used to cement the legal integrity of cash-waqfs at founding, and prevent future devolution by jurists opposed to the cash-waqf. The stratagem involved the waqf founder recording an attempt to rescind the waqf upon founding, in effect, changing his or her mind. The waqf founding deed then would state that such an attempt was repelled by the presiding qāḍī, who reinforced its validity by explicitly authenticating the subject waqf's legal validity. In doing so, future opponents to the subject waqf could not cite judicial malfeasance in order to devolve it. The waqf's founding deed records the following in this regard:

> "Following the waqf's establishment, further to the completion of all procedures and the legalization of the waqf by his noble honor, the guide of

qāḍīs, Ismā'īl effendi, the agent (of Balqīs Khātūn) attempted to retract the endowed amount from the waqf's administrator, protesting that the legal legitimacy of the cash-waqf (waqf al-naqd) is in dispute (*ghayr muḥakam*) due its illegitimate status in the eyes of the great Imam (Abu Ḥanīfa)(*al-imām al-a'ẓam*). The qāḍī subsequently took up the matter for reconsideration (*fa'astakhār Allāh*), and ruled in favor of the waqf's legitimacy, legal integrity, in both specific and general terms, along the lines of the position of Imam Zafar, may God be pleased with him – while fully aware of the on-going conflict among leading jurists (*al-a'imma al-ashrāf*) on this issue."[771]

Thirty-two years later, Balqīs Khātūn's cash-waqf was still operational and under the management of a seemingly judicious administrator. In Dhū al-Ḥijjah 1032/October 1623, Balqīs Khātūn's waqf administrator, Hibat Allāh al-Dayrī issued a modest loan of 4 ghurush to a man named Ibrāhīm bin Mūsā, with the collateral of a lien on half a residence/apartment (dar) in the Bab al-'āmūd neighborhood, as well as a personal guarantee from the debtor's brother.[772] The following month, on 28 Mūḥarram 1033/21 November 1623, al-Dayrī raised a case against Abd al-Ḥaq al-Fityānī, the guardian of four orphaned nieces of al-Fityānī, for demanding payment of a ten sūlṭānī debt owed by the children's father, Muhammad al-Samit a year earlier. Upon the request of the waqf's administrator, the court reviewed the sijill record from a year earlier (Mūḥarram 1032/November 1622), in which the debt was recorded. On the basis that registered debt, the presiding qāḍī ruled in favor of the waqf's

[771] Ghanāyim and Shannāq, *al-Wathā'iq al-waqfīyah,* 108-109.
[772] Ibrāhīm Ḥusnī Ṣādiq Rabāyi'ah and Halit Eren, *Sijillāt maḥkamat al-Quds al-shar'īyah : sijill raqm 107*, Silsilat sijillāt al-maḥākim al-shar'īyah 1 (Istanbul: Markaz al-Abḥāth lil-Tārīkh wa-al-Funūn wa-al-Thaqāfah al-islāmīyah, IRCICA, 2013), 51; J-Sij 107, 145.

administrator's right to call on a loan guarantee if needed in order to settle the waqfs debt of ten sūlṭānī coins, plus an additional one and a half coins (10.5% of interest) that the waqf was entitled to.[773] The sijill act subsequently shows that Abd al-Ḥaq al-Fityānī was able to negotiate additional time for repaying the debt to Balqīs Khātūn's waqf, as two months later we find al-Dayrī's acknowledgement of receipt of the debt and exoneration (*barā'a*) of al-Fityānī in court.[774] The size of al-Fityānī's loan is exceptional, as other records of Al-Dayrī's management of Balqīs Khatūn's debt portfolio is characterized largely by much smaller loans.[775] The sijill record reveals that al-Fityānī was a employed as a reciter, *qāri'*, by this waqf, along other members of the same family, indicating an inherited position. The size of this loan, the relationships involved, and the interest rate of 10.5% (lower than the 20% charged on the other loans), suggest that this loan was a preferential one.

Conclusion

As the above cases illustrate, women's various uses of credit, for both private (e.g. marriage) as well as professional (e.g. moneylending) pursuits, was commensurate to their social standing. Lower class women, who lacked a professional network and property, were not only disadvantaged financially, but also had inadequate representation in courts and markets. In the latter respect, women's experience would have mirrored similar challenges faced by men; for instance, dallālāt needed guarantors to perform brokerage and

[773] Rabāyi'ah and Eren, *Sijill raqm 107*, 81; J-107-237.
[774] Rabāyi'ah and Eren, *Sijill raqm 107*, 144; J-107-419.
[775] The sijill records for the year 1042/1632, reflect several small debt transactions issued by, or repaid to, the Balqīs Khatūn waqf: a 4 ghurush debt repaid to al-Dayri in J-119, 245; a few ghurush loan advanced to two brothers, J-Sij 119, 354; a loan of five ghurush and five paras issued in exchange for collateral of a knife and a ring, to be repaid as six ghurush and five paras, reflecting a 20%-25% rate of interest (8 Muharram), J-119-432; a loan was issued to a man for 12.5 ghurush plus three ghurush and a half considered the value of "medicine" with a collateral of one half of another man's share in a commercial partnerhip (8 safar), J-119-444; a loan of 4 sultani coins, paid in paras, and 18 pieces of an embroidered type of cloth (15 safar), J-119-456; and lastly, a loan of 22 paras to the shaykh of the neighborhood (*ḥārra*) (23 safar), J119-458.

moneylending, and in this respect these requirements were parallel to men's. However, the witness testimony of women dallālāt would have been lesser to men's in court, and even inadmissible if they were not Muslims. However, notwithstanding the structural-legal disparity that privileged Muslim men's testimony, litigating against women debtors in court appears to have followed the same procedural and legal rights and basis as that afforded to men, if the case of Bīlā the Jewish debtor is to be taken as representative of bankruptcy proceedings for women. Bīlā's imprisonment also reflected the normative fiqh consensus which considered imprisonment as a means coercive means for proving financial insolvency and revealing hidden sources of money, rather than as indefinite punishment. In contrast, the lending of elite women tended to be carried out through awqāf rather than directly to market borrowers. A number of cash-awqāf endowed by women operated in Jerusalem in the last decades of the 1500s; most notable among these were the Baymāna Khātūn, Fāṭima Khātūn, Injībāy Khātūn and the Balqīs Khātūn awqāf. In common with the cash-awqāf in Jerusalem that were founded by Ottoman military elites, women's awqāf were reliant on elite local 'ulamā' families for their management. These cash-awqāf came to affect conventional family awqāf in Jerusalem that came to be used to put out credit in the market and take mortgage in collateral in exchange. This process was mediated by professional network, as noted in the case of Amina.

Courts were more concerned with the use of written rather than oral evidence for adjudicating debts produced by women, and there is not a discernable difference between elite and non-elite women's cases in this regard, despite elite's much greater access to services, specialists, and witnesses who could arguably influence outcomes.

The picture on the side of awqāf and debt was a double-edged blade. Women often had to fight off male relatives, or the state, or those who sought to discredit women by claiming them unsuited/incompetent to manage investments on behalf of minors. While women usually maintained absolute control over awqāf during their lifetimes, such control was usually administered through male relatives and associates as intermediaries. Moreover, the anxiety that some deeds express was warranted, as sijill records often reflect the abuse of these awqāf by male intermediaries and administrators. Judges were not unaware of such abuses, yet allowed for them as long as they did not represent major impairments to the awqāf they related to.

Conclusion

One cannot overstate the prevalence of credit in the late medieval and early modern history of Bilād al-Shām. From the late fifteenth century, the Ottoman state set interest rate limits in ḳānūnnāmes to prevent predatory lending. Şeyhülislam Ebu's-Su'ud's rulings also required that all interest-loans should take the mu'āmala shar'īya legal form. However, as this dissertation has shown, it is worthwhile to consider that the mu'āmala shar'īya was neither an Ottoman invention, nor a legal instrument used exclusively by Ḥanafīs. The mu'āmala shar'īya, and ḥīyal more broadly, were commonly used by Mamluk jurists of different madhhabs. Shāfi'ī jurists, who continued to be the demographically dominant madhhab in Bilād al-Shām for most of the sixteenth century, were instrumental in the continued use of mu'āmalāt shar'īya in Ottoman courts in an environment of inter-madhab collaboration, where, for instance debtors relied on Shāfi'ī madhhab rules for registering their debt guarantees in Ḥanafī supervised courts. Thus, while Ottoman law was set apart from the legal pluralism of the Mamluk period, certain elements in the practice of law carried over from Mamluk times.

Notwithstanding the cash-waqf's introduction to Bilād al-Shām in the mid-sixteenth century, it is hard to say whether the use of credit expanded, declined or remained the same between the late Mamluk and early Ottoman periods. What is certain, however, is that the power and jurisdiction of qāḍīs with respect to regulating debt in the market changed and grew. As reflected in my chapter five, Mamluk qāḍīs had long been associated with the activity of lending the capital of orphan estates, an activity that carried forward in Ottoman times. The widespread use of mu'āmalāt was also an aspect of continuity. However, what

was distinct in the latter period was the codification of lending norms in the qānūn and the explicit mandate of qāḍīs, as the state's agents in regulating market lending, and ensure the public's adherence to both the sharī'a and the qānūn. In this regard, qāḍīs regularly imposed fiqh protocols on indebtedness, such as enforcing imprisonment and ilzām orders on defaulting debtors, and in facilitating bankruptcy declarations for those who were insolvent. However, ironically, Qāḍīs did not police interest rates to ensure they meet ḳānūnnāme restrictions on ribā.

The emphasis placed by qāḍīs was more on whether a debt was enacted legally, under a mu'āmala shar'īya, and less (if at all) on the extent to which a debt exceeded the maximum lending rate listed in the ḳānūnnāme. This finding is significant because it suggests that Ottoman Law, as it concerned credit, developed a legally formalistic attitude towards the ḳānūnnāme only when it concerned already established legal customary ('urf) practice (the mu'āmala being one such custom), and seemingly allowed qāḍīs more room for judicial preference (istiḥsān) when it came to ḳānūnnāme laws that were less anchored in 'urf. The ḳānūnnāme interest rate restrictions, were relatively recent for both those living in the Ottoman central lands, as well as in Bilād al-Shām or Egypt in the sixteenth century. The earliest ribā laws date from the late 1400s, but only became securely in place in terms of their legal importance in the 1540s, with Ebu'l-s-Su'ud's edicts. When compared to the established practice of mu'āmalāt the ribā laws had little foundation in legal custom. However, by the late eighteenth century, a jurist such as Ibn 'Ābdīn could speak confidently about abiding by the state's interest rate limits, those which by that point were long-standing, dating from two centuries prior.

In view of this aspect of the law, I have argued that qāḍīs did not show concern for regulating, for lack of a better word, market credit. There is little evidence in the sijills to suggest that qāḍīs sought to uphold an interest rate policy, in Jerusalem at least. Market rates floated, in spite of the ḳānūnnāme rules. Market lending rates were frequently between twenty and thirty percent at the end of the century, a period of high inflation, but they were demonstrably much lower in the 1550s. This was not due to a laissez-faire interest rate policy on the part of the central Ottoman state, but a lack of one, I would suggest. The main strategies employed by the Ottomans to fund their treasury deficits towards the turn of the seventeenth century were starkly similar to those deployed by the late Mamluk state: devalue currency and the imposition of arbitrary or new taxes. Rebellions and popular revolts, of course followed in both cases. For credit, it would mean a reinforcement of the above dynamic in times of economic stress.

I have argued that limited record of financial accounts, muḥāsabāt, in sijills suggests that courts did not have a strong financial enforcement ability, or interest. This was as true for the accounts of executors of orphan estates as it was for cash-waqfs, and the accounts of other institutions. When they do appear, the disproportionately low number of muḥāsabāt indicate that managers of capital invested in loans came to courts to register accounts in order to clear potential (or outstanding) liabilities, rather than as part of a regular court-mandated practice. This was also the case with the (more frequently occurring) muḥāsabāt of conventional (non-cash) waqfs, like the Ṭāzīya waqf. The fact that courts charged a specific fee for legalizing muḥāsabāt, supports the contention that there was very limited judicial oversight over market credit as well.

‘Urf debt practices, such as the ta‘līq divorce oaths that were popularized during the Mamluk fourteenth century, continued to be popular in sixteenth century Jerusalem and appear in the court records, as does the oft cited practice of a deferred dotal (ṣadāq) debt. The latter was callable at any time by wives and cases of imprisoned husbands, while infrequent, do appear in court registers from Bilād al-Shām.

Some scholars have recently put forth a picture of Ottoman law as having been very diffused, whereby judicial agency and authority was distributed among different sites and stakeholders, rather than just held by qāḍīs. Conversely, others have argued that the hallmarks of Ottoman law, the ḳānūnnāme and legal bureaucratization, were designed around the centrality of the authority of qāḍīs. This group advances beyond the traditional, and outdated model of a ‘secular’ kānūn and a ‘religious’ sharī‘a law of the jurists, by arguing that the later expansion of juridical power in the seventeenth century, was the result of political and economic, rather than religious, forces. All scholars agree, however, that qāḍīs played a central role in the day to day registration of debts and the adjudication of related disputes. Qāḍīs had the power to imprison defaulting debtors at will, as I have shown above. On this aspect, I contend that this activity by qāḍīs should not be viewed as policing. In all instances, it was in reaction to complaints brought forth by creditors. Rarely do the sijills produce a qāḍī censuring a moneylender for usurious lending as qāḍīs regularly did in response to market abuses by guildmembers, merchants and, notably, silversmiths (whose work was integrally tied to the supply of currency). Unlike all these aforementioned sectors, that were under the direct supervision of qāḍīs in Jerusalem, the moneylenders were not a group whose activities were regulated by courts, whether one speaks of interest rates or the availability of credit.

Connected to this unevenness is a problem concerning judicial procedure. Of the numerous muḥāsabāt discussed above, on more than one occasion, we come across a judicial "ruling" (ḥukm) at the end of a sijill. In normative fiqh terms, this suggests a legal ruling in favor of a litigant in a dispute, however, such muḥāsabāt do not mention disputes. A court notarized muḥāsaba, on the contrary, was used by its preparer (e.g. executors, waqf administrators) as a writ absolving them of liability, and courts served a notarial-authenticating function for producing these and all manner of other ḥujjas. Why were such rulings there when they served no clear judicial purpose, and for which there was no dispute? It is a court routine that bothered both Ibn Quṭlūbughā and Ibn Nujaym on grounds of violating generally agreed upon court procedure and rule-determination (tarjīḥ). Both were also distressed at the generous discretion that junior jurists-qāḍīs had to issue rulings on matters that did not warrant a ruling, such as in the absence of any underlying dispute. Issuing rulings outside of the taqlid of one's madhhab was also apparently frequent in both Mamluk and Ottoman eras, according to Ibn Quṭlūbughā and Ibn Nujaym. They attest the overwhelming resilience of legal customs, which at times went counter to normative fiqh rules in both periods. There is no simple answer to the question of such judicial rulings, but my observations tentatively argue for a connection to this having been a kind of legal preempting of sorts that parties to an agreement used to clear their name, for example, in anticipation of reprisal or a court dispute.

It is appealing to think that the continuity of Mamluk judicial practices in the early Ottoman era were enabled by the relatively short judicial appointments of Ottoman chief qāḍīs, lasting one to three years. This would have given chief qāḍīs little stake in investing resources to effectively supervise their underlings, even though they had expansive power to

do so. The rampant political and economic instability of the last quarter of the century may have made such supervision more pronounced. The Ottomanization of legal institutions in Bilād al-Shām and the incorporation of Damascene ‘ulamā’ households into the patronage networks of the center was also slow in coming. Indeed, institutes of learning in the region were not incorporated into the ilmiye system and there is some evidence of an aloofness in attitudes of ‘ulamā’ in Egypt and Bilād al-Shām toward the Ottoman legal establishment, yet accommodation was of course a requirement for maintaining professional privileges. In this sense, lineages of ‘ulamā’ elites were able to negotiate and maintained some political power well into the end of the sixteenth century, and for some families, such as al-Ghazzī, well beyond it.

In my evaluation of Jerusalem waqfs, and the Ṭāzīya madrasa waqf, I illustrated the extent to which urban waqfs were connected to rural villages, and the dependencies that these associations created over the long-term. The Ṭāzīya madrasa’s case illustrated the extent to which waqf credit could cripple their operations and create a cyclical dependency on the need for waqfs to borrow money to fund repairs and other services. The role of the state was central in managing the supervision of debt claims as well as the reconciliation of debts to the operating costs of waqfs and qāḍīs and state-appointed waqf nāẓirs regularly appeared in waqf proceedings that could work out the distribution of funds. In comparison to cash-waqfs, regular waqfs had a longer horizon for realizing revenue, since grain and other agricultural production was sold on credit and the debts arising from non-payment and other losses ate into a waqf’s ability to pay its bills.

The market devaluation of the Ottoman akce in 1583-5, and related inflation, seems to also have been connected to a spike in interest rates and widespread insolvency towards

the end of the century. The prevalence of mutual surety arrangements in the 1580s and 90s also indicates that while the availability of credit increased, it came at a higher cost and increased indebtedness on the part of the Jewish community of Jerusalem resulted in a series of communal defaults for it. The increase in mutual surety may also suggest that there was too much money chasing too few suitable opportunities for investment, as lenders accepted continuously higher risks.

In both Mamluk and Ottoman contexts, the state played a central role in managing orphan estates. Up till the beginning of the fifteenth century, orphans benefitted from a dedicated depository and bureau for managing the investment of their inheritances in loans. The disappearance of this institution appears to have taken place in the late Mamluk period. We do not possess historical record of how effective the orphan bureaus were in Mamluk times, but if al-Subkī's cynicism is to be taken seriously, the effectiveness of this institution must have been dubious from its start in the early fourteenth century. Ottoman qāḍīs continued to manage orphan estates , as they had been under the Mamluk era. The main difference, however, was that the legal subterfuge of the mu'āmalāt shar'īya had become more institutionalized, as noted above. Although it was a legal, religious, and social imperative for protecting orphan capital was certainly at work, the state's actual supervision of the management of mu'āmalāt by executors and guardians though does not appear to have been sophisticated or regimented in either the late Mamluk period or the Ottoman sixteenth century. The muḥāsabāt of loan portfolios of orphan estates indicate that the court's role with respect to supervising orphan capital was mostly notarial. And while executors did use courts to initiate cases against defaulting debtors, courts did not actively police the activities of executors of orphan estates.

Lastly, my evaluation of the relationship between gender and credit reveals that women's registration of loans in court, as creditors, was commensurate to their social standing. Lower class women, who lacked a professional network and property, were not only disadvantaged financially, but also had inadequate representation in courts and markets and were unlikely to register their loans in court, in contrast to elite women who tended to so with frequency. Despite elite women's much greater access to services, specialists, and witnesses who could arguably influence outcomes, elite women faced the same structural-legal disparity that privileged Muslim men's witness testimony over women's. That said, credit disputes involving both women debtors and creditors in courts followed the same procedural basis as that of men, and the sijills indicate that there was an overwhelming emphasis on ḥujjas for proving debts, which held as much or more weight than witness testimony in the sixteenth century.

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