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The Intent of Charity

While doing archival research at the Başbakanlık Osmanlı Arşivi (BOA) in 2008, I encountered the kind of "file" that historians and historical anthropologists dream of: a thick collection of documents and correspondence that extended over many years and included original documents from Mount Lebanon sent as a result of an investigation. The trigger for the investigation was an 1875 inquiry from Mount Lebanon's governor,[1] Rüstem Pasha, to the highest official religious-legal authority in the Ottoman Empire, the office of the *şeyhülislâm*, the chief imperial mufti,[2] about some waqfs. "Some inhabitants of the 'Mountain' [Mount Lebanon]," he noted, "have been founding waqfs with the intent [*qaṣdıyla*] of escaping the sale of these properties in fulfillment of debts." He asked, "Are these waqfs legally valid?" (BOA.ŞD.MLK 2271/66/9).

At the time, the question did not particularly puzzle me, as suspicion about founders and their use of waqf for various self-serving purposes lined up with scholarly analyses of waqf that emphasized founders' ulterior motives. The question arose at a time of vast changes in the Ottoman property regime, including a new land code, an attempt to bypass tax farmers in favor of direct taxation of titleholders, systematic foreclosure for debt, up-front ownership by foreigners, and

1. Since 1861, Mount Lebanon (known as the Mountain [*al-jabal*]) had been a semiautonomous Ottoman governorate (*mutaṣarrifiyya*), whose governor was appointed by and responsible to the Ottoman Porte. While the inhabitants of the Mountain were mostly Maronite Christians and Druze, civil transactions followed the official Islamic legal school of the Ottoman Empire, the Ḥanafī *madhhab*.

2. The *şeyhülislâm*, the mufti of Istanbul, sits at the top of the Islamic scholarly hierarchy in the Ottoman Empire. For more details on the office, its functions, and development, see Repp (1986).

increased security of usufruct rights in *miri* (state-owned) land. In such a tumultuous landscape, the attempt to escape some brutal effects of these changes did not come as a surprise. However, when I sat down to start writing, after having gone through most of my qadi court archive, the formulation of the question began to intrigue me. In the qadi court records I had never encountered any such inquiry or lawsuit regarding the sincerity of founders. The governor's question became even more puzzling as I started reading about law and intent in Euro-American legal theory and encountered the maxim that "law is concerned with external conduct, [and] morality with internal conduct" (quoted in Morris 1976, 1).

This question of intent sent me down my notebooks, pressing Ctrl+F and searching for some keywords: "intent" in English, and "*niyya*" and "*qaṣd*" in Arabic.[3] They appeared in a few places. I read the sections around them. Long-forgotten conversations and episodes in my ethnographic research started coming back to me, and I started seeing them differently. I remembered a mufti describing people using waqfs as NGOs, and thus endowing a little money or in one case a few computers. From his description of "five computers from here, five computers from there," I had assumed that he was suspicious, but as he began to elaborate, he had stopped himself mid-sentence and changed topics. I now realized that he perhaps did not want to attribute bad intent to these founders. It took an encounter in the archive for me to question my own common sense, to realize that my deep suspicion of the DGIW, the DGIW's suspicion of waqf founders, and the more generalized suspicion of people's intent in charitable giving was circumstantial. I started wondering whether that concern with the sincerity of acts of charity was a reflection of the modern grammar of interiority, especially the idea that we have inner depths that are the locus of the true self, as Charles Taylor (1989) and others have noted (e.g., Burckhardt 1921). But if state officials were worried about the intent of subjects, the records of my qadis showed the qadis were not.

Concerns with interiority are not new to Islamic law (T. Asad 2003, 225), and the intent of getting close to God is essential to the making of waqf as an act of charity. Furthermore, the question of the waqf-making ability of indebted individuals is not new in the Ottoman Ḥanafī fiqh. However, as this chapter demonstrates, in the earlier elaborations, intention was structured along this-worldly effects and otherworldly effects and was always tied to action and expression. The question of waqf-making now introduced a new grammar of intent that opened the inner self and its intentions to scrutiny beyond its outward expressions and introduced suspicions about ulterior motive, contrary to the cultivated abstinence from subjecting intent alone to scrutiny in the Ḥanafī school. This new grammar, along with a changing relation between the family and charity as discussed in the next chapter, was used to legally question the validity of family waqfs as charitable

3. The words *qaṣd* and *niyya* both indicate intent, but *niyya* is the one that jurists use more often to discuss intent in the abstract, whereas *qaṣd* indicates intent behind an action. For a discussion of the use of these two words in the Islamic legal tradition, see Powers (2006, 3–4 especially).

acts. This further ensured the dominance of the new property regime and the foreclosures it enshrined, restricting the challenge that waqf, as an instrument of ownership devolution, posed to that dominance.

The chapter starts with a snapshot of the grammar of intent in the Ḥanafī tradition, especially around waqf-making requirements. Using legal manuals and historical court records of loans from the Beirut qadi court, I analyze the way loans were secured in Ottoman legal practice prior to the Tanzimat. Waqf was not perceived as a threat to enforcing debtors' claims because of a regime of debt that emphasized forgiveness. In the second section, I outline some of the Ottoman legal reforms that expanded and systematized foreclosure and show how they destabilized the debt regime promoted in the Ottoman canon. I then turn to the political-economic and social situation in Ottoman Mount Lebanon to understand why such a question on the use of waqf to escape debt arose. I argue that the answer given by the office of the şeyhülislâm enshrines a minority opinion formulated in the early sixteenth century during the price revolution, which rendered intent an object of suspicion and scrutiny. In the third section, turning to the French Mandate, I show how systematic foreclosure, introduced by Ottoman reforms, was expanded by French regulations, which instated it as a real right independent of mortgage contracts. Suspicion about the intent of founders and debtors continued to appear in both legal texts and queries from French advisors. In the last section, I scrutinize my conversations with various practitioners involved in waqf today and observe how the old grammar of intent continues to arise among practitioners of the tradition, despite the generalized suspicion around waqf foundation and charitable intent today.[4]

OTTOMAN ḤANAFĪ SUBJECTS OF WAQF BETWEEN INTENT IN ACTION AND DEBT FORGIVENESS

On Intent in the Ottoman Legal Canon

How was the legal subject conceived in the Ottoman fiqh?[5] What is the role of intent in the validity of his or her actions? Is the legal subject's intent accessible

4. For a similar but much more expansive and complex account of the transformation of debt regimes between the late eighteenth and early twentieth centuries in the Indian Ocean, see Bishara (2017).

5. A previous version of this section and the following appeared in Moumtaz (2018c). The Hanafi fiqh was the dominant framework for civil and criminal law in Mount Lebanon, especially after the eighteenth century. Touma (1972) describes two phases in the organization of the judiciary in Mount Lebanon up till 1861. In the first phase, which starts around 1450, before Ottoman rule, and continues into the eighteenth century, before the reign of Bashir II (1789–1840), the Ottoman governor of Damascus (or whichever province Mount Lebanon was attached to) confirmed a Druze judge, the Shaykh al-Shuyukh (according to Touma, these judgeships were hereditary), who applied Islamic law not only among the Druze but also among Muslims, Christians, and Jews of the Mountain (Touma 1972, 474). This function was eventually taken up by the governors of the districts and/or a judge they themselves nominated. In parallel, there were Druze and Maronite judges who applied Druze and Maronite law

to scrutiny, and, if it is, how is intent examined? In a monograph on intent in Islamic law, Paul Powers asserts, "Aside from religious faith itself, intent is arguably the most important subjective or 'internal' component of the action prescribed, proscribed, and evaluated by Muslim legal scholars" (2006, 1). The importance of intent articulates what Brinkley Messick calls foundationalism in Islamic law, where the "site of authoritative meaning-generation" is in the heart, internal, within the self, "beyond direct observation" (2001, 153). Testifying to the importance of intent in Islamic law and practice, most *qawāʿid* (legal maxims) manuals start with the maxim "[The qualifications of] deeds are determined by their intentions" ("innamā al-aʿmāl bi'l-niyyāt").[6] In Ibn Nujaym's canonical Ḥanafī version of the manuals, the discussion on intent is longer than any other maxim and includes ten subtopics like the essence of intent, the reason behind its legislation, and its sincerity, timing, and location. Ibn Nujaym reports the legal definition of intent as the "aim [*qaṣd*] of obedience and drawing close to God in performing an act [*fī ījād al-fiʿl*]" (Ibn Nujaym, *Ashbāh*, 24). The proper intent is then *qurba*, becoming close to God. The purpose of requiring intent, explains Ibn Nujaym, is to distinguish worship acts (*ʿibādāt*) from mere habitual acts. For instance, the intent of submitting to God makes fasting a ritual rather than a weight-loss strategy. Intent then also becomes unnecessary in certain worship acts like remembrances (*adhkār*) or reciting the Qurʾan, acts that are unmistakably aimed at worship. Even more, intent fixes the legal determination of certain acts. Here Ibn Nujaym gives the example of slaughtering an animal: an act considered permissible or recommended if intended for eating; an act of worship if intended for ritual sacrifice; and a prohibited act if intended to celebrate the arrival of a prince.

Beyond the technical definition of intent as obedience and *qurba*, the discussion of the legal maxim uses the understanding of intention as "what one really meant," what in American law is known as "subjective intent." There, for Ibn Nujaym, the general rule is that "if intent in the heart differs from its expression 'in the tongue,'

in family matters. In the second phase, starting in the eighteenth century, the rulers of the Mountain abrogated the functions of the judge appointed by Damascus or by district governors and those of the Maronite judges responsible for family law. This system culminated under Bashir II, who appointed and dismissed the judges himself and applied Ḥanafī law to all the Mountain and its subjects. Both Bashir II and his predecessor nominated a Sunni judge as the head judge of the Druze community. With the founding of the *mutaṣarrifiyya* in 1861, a new system of tiered courts under the control of the governor and tied to the central government was instituted by the Réglement of Mount Lebanon and refined and revised by the successive governors based on their on-the-ground experience (for details, see Akarlı 1993, 132–46).

6. In Ibn Nujaym's manual, the discussion on intent is split between two rules: "There is no reward except through intent" and "Matters are evaluated according to their purposes." Wensinck in *EI*2 (2012) translates the latter as "Works are only rendered efficacious by their intention" (*EI*2), while Powers renders it as "Actions are defined by intentions" (2006, 1). I base my translation on Ibn Nujaym's explication that the intended meaning of actions (*al-aʿmāl*) is the qualification of actions (*ḥukm al-aʿmāl*).

true intent is the one in the heart" (*Ashbāh*, 39). However, how can a judge know what is in the heart? This dilemma raises the question of the role of expressions and their performativity in arenas other than worship (since judges do not interfere in worship), as in pronouncements of divorce, manumission, and oaths. The main issues arise around the effects of expressions that depend on intent, where the effects can be this-worldly and legal, or otherworldly. For instance, what is the effect of saying, "I divorce you" as a joke? Ibn Nujaym here uses a key distinction to judge the effect: *qaḍāʾan* and *diyānatan*: whether the decision concerns and occurs in the "domain of adjudication, which is enforceable in this world" or in the "domain of conscience," which affects only the "relationship between the believer and God" and is subject to God's justice in the hereafter (Peters and Bearman 2014, 2). Even though intent is always accessible to God, humans and judges can know it only through the *ẓāhir*, or "manifest signs and forms of legal expressions" (Messick 2001, 153), such as words and writing. Thus, a joking pronouncement of divorce has legal effects in this world but would not be counted among one's reprehensible actions in the hereafter. Another example is that of a man who swore not to lead group prayer. He gets up to pray. Another man then arrives and prays behind him. For the purpose of his relation to God, he has not broken his oath. However, if he had promised his wife to divorce her if he leads prayer, and she takes him to the judge, then the judge bases his judgment on the manifest (*al-ẓāhir*), which is that he led another man in prayer—unless he can show proof that he has expressed such an intent not to lead in prayer. We see here the dominant grammar of intent in the Ḥanafī tradition (and one could say in Islamic law generally) as tied to its exterior signs (Ibn Nujaym, *Ashbāh*, 25).

Another meaning of intent—that of ulterior motive—arises in the discussion of the sincerity of intent or devotion, *ikhlāṣ*, a Qurʾanic term that denotes purity.[7] In worship, in acts of submission to God (*ṭāʿāt*), sincerity is opposed to "making show" (*riyāʾ*) (according to the dictionary *Lisān al-ʿArab*). A large part of Ibn Nujaym's discussion on *ikhlāṣ* is about the effects of "making show" and the

7. Interestingly, the English term *sincere* has similar connotations. Trilling traces the early uses of the adjective *sincere* in English to the Latin *sincerus*, when it was used in the literal sense of "clean, or sound, or pure" (2009, 12). So, one spoke of "sincere wine" to say that it has not been adulterated and of "sincere religion" to imply that it had not been "tampered with, or falsified, or corrupted. . . . But it soon came to mean the absence of dissimulation or feigning or pretence" (Trilling 2009, 13). This latter sense of sincerity is very much present in the Qurʾan as well, as discussed in the introduction. Although outside the scope of this chapter, one can perhaps link that development in meaning to the social change ushered by the rise of Islam, as Trilling does for modern Europe. Indeed, Trilling argues that the new conception of the self as the sincere individual arose in the sixteenth century with the beginning of feudalism's demise and increasing social mobility and with it, the anxiety around people who are in places where they should not be. According to Trilling, the concept of sincerity seems to acquire saliency in periods of social reordering: for England and Europe, it applies to people moving across classes, above the station to which they were born; in early Islam, it could apply to people moving across religious and class divides.

absence of reward for worship acts performed to please others rather than God. In pecuniary transactions, the problem of ulterior motive arises with legal transactions whose effects are illegal, such as a sale that eventually allows charging interest and circumventing the prohibition on usury. This is the problem of what Powers, following philosopher of language John Searle, calls complex intention or the accordion effect (2006, 15). The dominant Ḥanafī position with regard to pecuniary transactions is a formalist one whereby "subjective states have no effect unless made overt" (Powers 2006, 115). Ḥanafīs prioritize intent in-action rather than complex prior intention and do not consider context in order to ascertain ulterior motive.[8] "When the ultimate aim of the contracting party is not apparent either from the terms of the contract or from the prevalent usage of the object under contract, the Ḥanafīs . . . ignore ulterior motivation, which has no legal effect on the validity of the transaction" (Arabi 1997, 215). Given the number of legal stratagem (*ḥiyal*) manuals in Ḥanafī fiqh, this position is not surprising.[9] Nonetheless, such contracts require particular expressions because clear words for the Ottoman Ḥanafīs are considered performative in the Austinian sense: they make things happen in the world even if the intent is not there.[10] It is only when the words are ambiguous that there is an attempt to figure out intent, and here again through its outward expression.

Waqf is a pecuniary transaction, but its charitable purpose makes it also an act of worship, as discussed in chapter 1. To be valid as a worship act, waqf necessitates the intent to get closer to God, or *qurba*. Intent was then not alien to discussions of waqf founding even in the late Ḥanafī Ottoman canon. The question, however,

8. This is the opinion of Abu Hanifa, whereas his students sometimes take into consideration indirect evidence, such as the dominant intent in the majority of cases (such as that musical instruments are used for entertainment), and if that intent is illegal, then they deem these contracts invalid (see Arabi 1997, 213–14).

9. The Mālikī and Ḥanbalī schools of Islamic law give more weight to intentions (see, for example, Powers 2006, 116–18; Arabi 1997), as can be seen in cases of *tawlīj*, when a parent uses a lawful contract of sale, acknowledgment of debt, or gift to one or some of his or her heirs in order to escape inheritance law. Mālikīs consider the contract valid unless there is direct evidence that it was illegal (witnesses to the parent admitting to fraud) or circumstantial evidence pointing "unequivocally to its fraudulent nature" (Powers 1996, 100). For more on *tawlīj*, see Powers (1996).

10. J. L. Austin demonstrates that utterances do not always "'describe' or 'report' or constate anything at all," but can, under certain conditions, also "do things" in the world, as in the pronouncement "I name this ship the *Queen Elizabeth*" (1962:5). The use of outward expressions to determine intent becomes a particularly thorny issue when such outward expressions are "*alfāz al-kufr*" (utterances of unbelief) that are used to determine that a Muslim has renounced Islam, which has very grave consequences (execution). Unlike a joking expression of divorce, whose legal consequences are immediate, the effects of these expressions are mitigated by a questioning of real intent and giving the accused the chance to give context or, deny unbelief, or to repent (Omar 2001, 93–94). Late Ḥanafīs had a very extensive list of what constituted utterances of unbelief. This became an issue during the Safavid-Ottoman conflict, when strict enforcement of the law would have led to the execution of many subjects of the Empire. For the solution to this dilemma, the "renewal of faith," see Burak (2013).

is whether intent was actually available to the scrutiny of judges and how they could uncover it. In the Ottoman canon, because "intent is subjective—invisible, silent, 'internal'—Muslim jurists must establish some legally recognized means for discerning it, such as deciding which objective indicants point to which subjective states" (Powers 2006, 3). In the case of waqf, intent and the validity of the waqf as a charitable act were determined by actions and expression; they were determined by the fulfillment of conditions with regard to the founder, the expressions used, the object endowed, and the beneficiaries. The founder had to have the legal capacity (*ahliyya*) to act; he or she had to be a sane adult free person. He or she had to use certain expressions that denote waqf. The objects endowed had to be his or her *milk*. Finally, the beneficiaries had to belong to a class of acceptable recipients to ensure the *qurba* purpose and the perpetuity of the waqf. Thus, as long as the waqf founder fulfilled these conditions of waqf-making, the waqf was valid. His or her action and expression were the indicants of his or her intent. Was there a concern with *ulterior motive* in and of itself, be it escaping inheritance law, confiscation, or debt repayment, as was posed in the question of the Ottoman governor of Mount Lebanon?

The question of waqf and debt arises from the earliest waqf manuals up to the latest codified manuals of the nineteenth century. Al-Tarabulusi (d. 1516), for instance, declares that the waqf of an indebted person "who is not under interdiction is valid *even if he intends by founding the waqf to harm his creditors* because their rights are established in his legal personality (*dhimma*) and not the object" (al-Tarabulusi 2005, 10, italics mine). The ruling on the validity of such a waqf shows that ulterior motive does not have a legal effect. Even more, it makes clear a fundamental aspect of debt contracting in Ḥanafī law: that it does not give rights to any object but is instead "an incorporeal right existing in the *dhimma* of the debtor" (*EI*2, *dhimma*). The particular phrasing of al-Tarabulusi in terms of intent to harm and not to pay back debts is very rarely mentioned, because the crux of the issue in discussions of indebtedness is the latter's effect on the legal capacity of the founder. Because indebtedness and even insolvency do not impact the legal capacity of founders ("liʾann al-waqf tabarruʿ wa lam yashtariṭ liṣiḥḥatih barāʾat al-dhimma min al-dayn al-mustaghriq bi'l-ijmāʿ"), they can still make waqfs—unless they are imprisoned for nonpayment (Ibn ʿAbidin, *Tanqīḥ*, 1:218).[11] Similarly, even if they have secured the loan through an immovable property, they can make a waqf of another property they possess.[12]

11. I more systematically discuss the effect of indebtedness and insolvency on the donative capacity of founders below.

12. There is a further ruling that "the waqf of an insolvent [*muflis*] *rāhin* is invalid," but the texts are unclear whether the ruling concerns the waqf of the security or whether it applies to another property that is not a security. In the *Tanqīḥ*, Ibn ʿAbidin uses this ruling after a question regarding the waqf of the security itself.

There is, however, another reason why the intent to escape foreclosure does not arise in the same way as it does in the question of the Mount Lebanon governor: the Ottoman Ḥanafī debt regime and its enshrinement of an ethic of forgiveness rather than foreclosure.

On Debt in the Ottoman Fiqh Property Regime: Forgiveness and Equity

A loan according to Ottoman Ḥanafī law does not require a security for it to be valid. It can be just noted down; a Qurʾanic verse enjoins the worshippers to keep record of debts (2:282).[13] However, a voluntary act *(tabarruʿ)* of giving an object as a security that serves only to increase the guarantee of the right (*ziyādat al-ṣiyāna*) can be offered by the debtor (Ibn Nujaym, *Baḥr*, 8:237). This is the *rahn* contract, translated as pledge or a security (Hallaq 2009, 267), and defined as the "detention of an object because of a right, like a debt, that can be satisfied by the object" (ʿAyni, *Ramz*, 2:287). Here again, part of a Qurʾanic verse is at the root of the obligation to transfer the object (2:283, *farihānun maqbūḍatun*) (Ibn ʿAbidin, *Tanqīḥ* 2:408). When the object moves to the possession of the creditor (or an agreed upon third party), the voluntary pledge becomes irrevocable. The transfer of possession does not imply any transfer of the rights of usufruct and use (ʿAyni, *Ramz*, 2:289), or the right to sell the object to the creditor. These rights remain in the hand of the debtor. However, none of the rights on the object can be exercised by the debtor or the creditor, for the purpose of the rahn is simply the confinement of the object, which therefore can only remain detained (ʿAyni, *Ramz*, 2:289). The creditor cannot "rent" back the rahn (also used in the sense of the object pledged) to the debtor but can lend it back, allowing the debtor to still use the property (Ibn ʿAbidin, *Tanqīḥ*, 2:408). While a similar contract called *bayʿ bi'l-wafāʾ* (similar to the *bayʿ al-khiyār* described by Bishara 2017, 90–99) developed, and was much more commonly used in Beirut, to allow using and deriving usufruct from the rahn, the new contract did not transfer ownership to the creditor, who could not sell the property. The rahn contract provides security because it gives the creditor priority in acquiring his or her debt from the estate of the debtor when the latter dies, before other creditors who do not have a rahn and before the division of the estate among heirs (Ibn Nujaym, *Baḥr*, 8:231).

13. The first part of Muhammad Asad's translation reads:

> Whenever you give or take credit for a stated term, set it down in writing. And let a scribe write it down equitably between you; and no scribe shall refuse to write as God has taught him: thus shall he write. And let him who contracts the debt dictate; and let him be conscious of God, his Sustainer, and not weaken anything of his undertaking. And if he who contracts the debt is weak of mind or body, or is not able to dictate himself, then let him who watches over his interests dictate equitably. And call upon two of your men to act as witnesses. . . . And be not loath to write down every contractual provision, be it small or great, together with the time at which it falls due; this is more equitable in the sight of God, more reliable as evidence, and more likely to prevent you from having doubts [later]. (1964, 75–76)

Given that a rahn involves confining the property and withholding any transactions by the debtor or creditor, one would expect the waqf of a rahn to be invalid. Yet jurists appear to allow some leeway when it comes to waqf, most probably because of its provision of various public goods, from early on (e.g. Khassaf 1999, 244). The waqf of a rahn by a (solvent) debtor (whose debt is not yet due) is valid, according to Ibn al-Humam, if the rahn is redeemed (*in iftakkah*) or if the founder dies after paying the loan. However, if the founder dies without having paid off the debt, the waqf is invalidated and the rahn sold. Other jurists like al-Tarabulusi are more stringent with affluent indebted founders: the judge forces them (*ajbarah*) to pay off their debts if they want to waqf a rahn. Insolvent debtors, for their part, cannot make a rahn into a waqf; the judge is to annul the waqf and sell the rahn to pay off the debt (all in Ibn Nujaym, *Baḥr*, 5:190; also quoted in Ibn ʿAbidin, *Tanqīḥ*, 1:218).

Comparing rahn with kin concepts in European law (whether in the common law or civil law traditions) highlights the particularities of the understanding of debt in the Islamic legal tradition. It also helps us see the novelties introduced in the Ottoman property regime around debt and rahn in the nineteenth century, based on European laws and codes, as these laws became more salient in the Ottoman Empire, especially with foreigners in the empire being subject to their national laws because of the capitulations.[14] The object of the rahn could be movable or immovable in civil law language, and chattel or real estate in common law language, obliterating the European legal distinction between pledge/pawn and mortgage (Gatteschi 1884, 51). To further push the comparison, one needs to look at forced sales, which were key in guaranteeing the "full usefulness and efficacy" (1884, 60) of these pledges according to nineteenth-century Orientalists like the Italian lawyer residing in Alexandria, Domenico Gatteschi.[15] "According to our laws, . . . forced sale [of the object pledged/collateral], or foreclosure, is an inevitable consequence of the pledge, or mortgage," whereas in Islamic law, Gatteschi notes, the existence of a pledge is not "enough to produce the forced sale of the object pledged" (1884, 60). The above analysis makes the concepts of *usefulness* and *efficacy* the criteria for evaluating these laws. But why did Gatteschi reach the conclusion that systematic forced sale was not present in Islamic law? Are the criteria of usefulness and efficacy what determine the operation of forced sale in the Ottoman Ḥanafī canon? Let us examine the logic and the place of foreclosure for debt for Ottoman Ḥanafīs in the fiqh and in legal practice.

14. The Ottoman capitulations are clauses attached to treaties done at the height of the empire's power in the sixteenth century, granting privileges to some European powers as diplomatic tools to create alignments with the Ottomans in their incursions against other European powers and to facilitate commerce. Later, with the rise of European power, these privileges, especially the commercial and legal ones, became a way that Europeans gained economic advantage and interfered in the Ottoman Empire. See İnalcık (2012) for this classic view, and Özsu (2012) for a revisionist account that highlights these instruments as sites of contestation.

15. For more on Gatteschi, see Wood (2016, 103–4).

In the Ottoman Ḥanafī canon, when a debtor defaults on payments, the creditor can request the debtor's imprisonment until the debtor fulfills his or her debt, in whatever way the debtor wishes—not necessarily by selling the object mortgaged. The first purpose of imprisonment is to allow the judge to determine whether the debtor is affluent or in financial hardship. Indeed, imprisonment aims to instigate "the boredom of the heart and then the payment [of the debt]" (ʿAyni, *Ramz*, 2:87), because the prison does not have a bed or a mattress, and the detained cannot have guests, nor go out for a Friday, the hajj, a funeral, Ramadan, holidays, or even the death of a near of kin. Imprisonment is also a retribution (*jazāʾ*) for injustice, here delaying payment due by an affluent person (ʿAyni, *Ramz*, 2:288), independently of the presence of a security (rahn). Affluent debtors can be imprisoned for life or until they pay their debt, according to a minority view.[16] At first hand, then, forced sale does not appear to be the standard procedure prescribed in the Ottoman Ḥanafī fiqh, or the inevitable consequence of the rahn contract, as wished for by Gatteschi.

Nonetheless, forced sales are not unheard of. First, the rahn contract can include a stipulation to give the creditor the power to sell the object in case the debtor fails to pay the debt by the time specified in the contract (for example, MBSS.S 04/101, 9 Feb 1857 [15 C 1273]). So, while the rahn contract does not stipulate foreclosure for debt, such a clause can be included in the contract. Second, if the debtor becomes insolvent (*muflis*)—his or her debts exceed his or her assets (cash, personal property, and real estate)—but has assets, the creditors can request his or her interdiction (*ḥajr*), and the payment of the debts by the judge on behalf of the debtor, first using cash, then selling personal property, and finally real estate (ʿAyni, *Ramz*, 2:224; Ibn ʿAbidin, *Tanqīḥ*, 2:149). Finally, if the imprisoned affluent debtor stubbornly refuses to pay (*mutamarridun muta ʿannitun*) after a judge orders him to do so, the judge can sell enough of the debtor's property on the

16. Such an approach to debtors' prison is very different from the French ancien régime debtors' prison (known in French as *contrainte par corps*), which allowed merchants to secure debt through the body of the debtor, when this debtor did not have immovable property—the main store of value and signifier of wealth and honor at the time—that could serve as a collateral. In that economy, mobile wealth was suspicious and dangerous. In addition, in France, debtors' prison was tied to the commercial code, and the ability to put debtors in prison was one of the privileges accorded to a certain class of people. Merchant courts, backed by guilds, were founded based on "Old Regime corporate ideas of jurisdictional authority" (Vause 2014, 655). After the French Revolution, with the enshrinement of the principle of equality and state sovereignty, state law came to govern all citizens equally. Nonetheless, because of the failed experiments of the Terror government with paper money, apprehension about the free market and mobile wealth led to the re-establishing of the *contrainte par corps*. Proponents of debtors' prison "affirmed the ideal that a government dependent on mobile wealth was morally and economically feasible, as long as creditors and debtors were themselves virtuous" (Vause 2014, 672), and the *contrainte* was what was going to ensure this virtuousness. In that scenario, merchants were not simply self-interested agents, they were "servant[s] of public welfare engaged not so much in profit seeking as in the management of an important sector of the national interest" (Shovlin, quoted in Vause 2014, 657). The *contrainte* was finally abolished in 1867.

debtor's behalf and settle the debt (*al-Fatāwā al-Hindiyya*, 3:419–20). Forced sale in this case and in the previous one is the view of the students of Abu Hanifa (Shaybani and Abu Yusuf), contrary to Abu Hanifa's view that the affluent debtor should be imprisoned forever, or until he or she pays, as noted above.[17]

Both imprisonment and forced sale of the assets of a solvent debtor for fulfilling debts have a very important caveat: the debtor must have the means (cash, movables, immovables) to pay; he or she must be affluent (*mūsir*) or insolvent having property. Both measures are suspended when the debtor is in financial hardship (*muʿsir*).[18] This ruling originates from the Qurʾanic injunction that "if, however, [the debtor] is in straitened circumstances, [grant him a delay] until a time of ease; and it would be for your own good—if you but knew it—to remit [the debt entirely] by way of charity" (2:280).[19] It is this very verse that Ibn ʿAbidin uses in an answer to a question about the validity of imprisoning a debtor who has legally been proven to be in duress (*Tanqīḥ*, 1:547).

While the penniless and propertyless debtor is set free, the insolvent debtor who possesses movables or immovables whose value would not suffice to pay off the debt as established by a judge falls under a different rule. His or her property is sold to pay off the debt, but jurists here use the concept of *ijtizāʾ* (sufficiency) to determine the legitimacy and extent of forced sale. Jurists debate what is essential property to be exempt from distribution to debtors. They distinguish between movables, personal items (clothing, tools of the trade, fiqh books) and immovables, especially one's home. Al-Ramli summarizes the possessions that debtors in hardship can keep: the clothes that they need, a cauldron (*dast*) or two, and the home that is not excessive (Ibn ʿAbidin, *Tanqīḥ*, 1:546). As importantly, sustenance of the debtor's family (like a wife's maintenance) takes precedence over the rights of creditors. The creditors can take back the debt in installments by taking whatever remains from a debtor's earnings after ensuring his livelihood and his family's ("[mā] yafḍul ʿanh wa ʿan nafaqat ʿiyālih") (Ibn ʿAbidin, *Tanqīḥ*, 1:546). Jason

17. Abu Hanifa does not allow such forced sales because, in his view, interdiction is an offense that humiliates debtors and brings then to the level of animals, which is a public harm (*ḍarar ʿāmm*) that cannot be made to compensate for a private one (*ḍarar khāṣṣ*) (ʿAyni, *Ramz*, 2:224).

18. Mālikīs distinguish two forms of *iʿsār*, or financial hardship: destitution (*iʿdām*) or scarcity (*iqlāl*). The destitute (*al-muʿsir al-muʿdim*) do not possess any cash, movables, or immovables. The impoverished (*al-madīn al-muqill*) do not possess money at hand but might possess movables or immovables whose value does not suffice to pay off their debt and whose sale would cause them duress, like selling the house that serves as a shelter to their family. Destitution makes imprisonment, forced sale, and even the demand for payment prohibited, an injustice and a grave sin (*kabīra*) (al-Salami 2010).

19. While there are reports that this verse addresses Muslims who had engaged in usury (*ribā*) before their conversion and thus applies only to *ribā*, Qurʾanic commentators interpret the verse as a more general injunction that applies to debt more broadly (see, for example, Tabari 2003, 5:57–63). In his commentary, Ottoman şeyhülislâm Ebüssuʿûd explains the verse as just a general injunction (Abu al-Suʿud 1990, 1:314).

Kilborn summarizes the guiding philosophy, following al-Marghinani, as "[the debtors'] indispensable wants precede the rights of his creditors" (2011, 354).

For instance, a question in the chapter on interdiction in Ibn ʿAbidin's supercommentary on *al-Fatāwā al-Ḥāmidiyya* (*Tanqīḥ*, 2:257) revolves around the case of an insolvent impoverished debtor who does not possess anything but a dwelling that answers his or her needs, and whose needs would not be fulfilled without the house. Ibn ʿAbidin answers that such a sale is illegitimate, but continues with an analogy to clothing, which has been discussed by earlier scholars: if the debtor possesses more clothing than he or she needs, he or she is to sell it all, buy a garment to wear, then pay off some of the debt with the money from the sale. Ibn ʿAbidin's solution, as "our scholars" say, is then to sell the house only if it exceeds the needs of the debtor, buy a smaller house that is more appropriate to the debtor's new social status, and use the remainder of the money to pay back the creditors.[20] Forced sale therefore brings criteria (like need and sufficiency) that are socially constructed while also taking into account the social financial status of the debtor and bringing a moral imperative to give time to a debtor in duress. Here the concept of an "absolute" right of the creditor to recover a debt is superseded by an emphasis on what kind of person one (both creditor and debtor) should be and the life one should be leading.[21] That is because the subject, even in pecuniary transactions, is morally constructed.

The concept of duress and its influence on requests of debt payment do not remain in the books of the library, but come through in the archive. For the existing record in Beirut between 1842 and 1885,[22] the cases of claims of financial hardship (*iʿsār*) (for example, MBSS.S5A/23/3, 5A/20/3, 7/125/3, and 7/172/2) reproduce the arguments discussed above for or against the collection of a debt. All cases are articulated as lawsuits (*daʿāwā*) and follow a similar blueprint, as is the case with most judicial decisions and contracts.[23] The document copied on the page of the court *sijill* represents a summary of a process that did not happen in a single court session. The lawsuit, most likely, happened over the course of a few days, if not a few weeks, as it involves finding witnesses, imprisonment, and bringing witnesses to court. The lawsuit starts with a creditor who claims that a debtor owes him (*fī dhimmatih*) a certain amount of money, and requests the debtor to pay it

20. I have not found a discussion of the fate of a bankrupt debtor who had made his only house into rahn: should the judge sell the house? Given that the wants of the debtor take precedence over the creditors' rights, I imagine that it is not sold.

21. Many dues (like child and spousal maintenance [*nafaqa*], dower [*mahr*], etc.) are defined in the fiqh based on the norms of a certain class in a certain time and place, rather than in absolute terms. See, for example, Hallaq (2009, 279) for maintenance.

22. The record starts in 1842. Lawsuits about foreclosures stop appearing in the registers in 1885 (MBSS.S27 is the last register containing entries about debt, with the exception of debts owed from the estate of a deceased); that is the date when they must have been moved to the Nizamiye Courts.

23. This is no surprise as model documents for many contracts and legal transactions were included in manuals known as *shurūṭ*. See entry on *sharṭ* in *EI*2.

back. The debtor acknowledges the debt and claims to be in financial duress. The burden of proof falls here on the creditor who is claiming that the debtor is affluent and has the means to pay off his debt, because poverty is the "*aṣl*," the "natural state of affairs" (Ibn ʿAbidin, *Ḥāshiya*, 4:318).[24] If the creditor is able to summon witnesses to attest to the prosperity of the debtor, the judge requires the debtor to pay off the debt. If the creditor cannot summon such witnesses, the debtor needs to take an oath as to his duress, because he cannot summon witnesses himself to deny the claim of prosperity since testimonies are only valid as a confirmation, not as a denial ("bayyina ʿalā al-nafī . . . lā tuqbal") (ʿAyni, *Ramz*, 2:87; Johansen 1999, 37). Such a testimony (denying affluence) can only be a supplement to an original proof, which here is imprisonment (ʿAyni, *Ramz*, 2:87), as the willingness to stay imprisoned is taken as a proof of duress. The judge then orders the debtor to be released and the creditor to wait for the debtor to be in a "state of affluence" (*maysara*).

In these lawsuits, what are the arguments used to counter the right of the creditor? Why isn't it treated as an "absolute" right? What types of rights and values do the jurists and the law prioritize and in what circumstances? In all cases of hardship, there is no dispute about whether the creditor has a rightful claim: she does, as the debtor owes her money. Debtors acknowledge this claim. To counter this right, debtors advance an argument based on capability. They always make the claim that they are currently in "financial hardship, unable to pay off their debt" ("muʿsir lā qudra lah ʿalā īfāʾihā").[25] In hardship, the debtor is unable to provide his necessary food ("lā qudra lah ʿalā taḥṣīl qūtih al-ḍarūrī"), let alone pay his debt, as one debtor claimed. He also may not have any immovables or movables (*ʿaqār* and *manqūl*), as some witnesses testify. When duress is proven, examining how the judge weighs arguments for or against collection becomes crucial to understanding the reasoning behind the administration of justice. The judge's decision states: "I ordered the creditor to grant him a delay until the debtor becomes in a financial ease" ("amartuh bi-inẓārih ilā maysara"). This decision follows verbatim the Qurʾanic verse mentioned above,[26] a verse that is sometimes quoted and used as a justification for the judge's decision (MBSS.S5A/20/3). In the hierarchy of proofs, a Qurʾanic injunction trumps other proofs, and one can say that quoting the injunction to wait also serves as moral admonishment, most likely bringing to the creditor's mind the second half of the verse: "It would be for your own

24. The burden of proof falls on the plaintiff who is arguing against the "natural state of things" or "appearances" (Johansen 1999, 437). So, if A is in possession of a piece of land, and B claims that this land is his or her *milk*, it is up to B to prove that claim. The judge assigns the role of plaintiff and defendant, a crucial task as it affects the burden of proof (see Schacht 1964, 190–92).

25. In some of the cases, in addition to financial hardship, a debtor claims he is insolvent (*muflis*) (MBSS.S7/172/2, Ah5A/20/3). Abdullah bin Nasir al-Salami says that "every *muʿsir* is insolvent but not every insolvent is *muʿsir*." Therefore, mentioning that they are insolvent seems redundant.

26. "If, however, [the debtor] is in straitened circumstances, [grant him a delay] until a time of ease; and it would be for your own good—if you but knew it—to remit [the debt entirely] by way of charity" (Qurʾan 2:280).

good—if you but knew it—to remit [the debt entirely] by way of charity." The injunction for patience, and even debt forgiveness, seems to be a major consideration in the rulings into the late nineteenth century.

In Beirut's shari'a court records, sale for fulfillment of debt was not unknown, but it certainly was not a generalized clause. Gatteschi was not wrong, then, in ascribing a "lack" of systematic foreclosure for debt in Islamic law. Nonetheless, examining the articulation of rights and duties and their fulfillment in Islamic law, here with regard to debts, shows that this "lack" originates from a different logic of negotiation, fulfillment, and enforcement than Gatteschi's concern with the *efficacy* of pledges. In this logic, the notion of justice is not separated from a moral assessment of rights; it is "a moral logic of social equity, rather than a logic of winner-takes-it-all resolutions" (Hallaq 2009, 166). Even though the creditor has a right, the debtor's conditions, especially the consequences of enforcing the creditor's right, are taken into account. A different kind of ethic regarding debtors appears: charity, forgiving debts, and forbearance inform decisions. These conclusions about the connection between debt and morality seem to confirm David Graeber's insight in *Debt: The First 5,000 Years* (2011) that debt regimes in non- or less-monetized economies were regimes of trust, built very much on cycles of credit, where foreclosure was not fully enforced.[27] People did lose land and valuables but not on the scale to come after the enshrinement of forced sale in the law.[28] It was with the monetization of the economy and the rise of European finance capital that nonpayment of debt started to become criminalized, and that we moved towards an insistence on foreclosure for debt. Let us see how this happened in Ottoman Mount Lebanon.

TANZIMAT FORECLOSURE FOR DEBT AND THE NEW LEGAL SUBJECT: SCRUTINIZING INTERIORITY

A New Debt Regime

The middle of the nineteenth century saw the rise of a new debt regime in the Ottoman Empire. Nonetheless, the different codes and regulations governing different subjects and land categories created a complex and variegated legal terrain, despite widening the foreclosure net.[29] New regulation on "mortgage" was included

27. The Ottoman Empire had a monetized economy, but it did not encompass all transactions and areas. A discussion of debt in Mount Lebanon will follow in the next section.

28. In that regime, waqfs were outside the domain of foreclosures: waqf objects could not be used as a security for a loan since *rahn* could be done only to *milk* objects.

29. The main regulations on mortgage can be found in *Düstur*, 1. Tertip (1289 [1873]); Ongley and Miller (1892); and Young (1905); and in the Mecelle (Haydar 2010). Ongley and Miller's translations are a bit convoluted and unclear; Young's are much clearer. The regulations are the Land Law of 1858 [7 N 1274] (Articles 115 to 118); the Tapu Law of 1859 [8 J 1275] (Articles 25 to 29); the supplement to the Tapu Law in 1861 [26 S 1278] (Ongley and Miller 1892, 135); the Irade of 1860 [Ra 1279], on the sale

as early as 1850 in the Code of Commerce, which was based on the 1807 French commerce code. The code established systematic foreclosure for debt, stating, for instance, that "the judge can authorize the trustees of the bankruptcy to proceed to sell the immovables or the merchandise of the insolvent" (Piat and Dahdah 1876, 588). The code was first used in mixed commercial courts that settled disputes between Ottoman and foreign merchants, as well as among Ottoman merchants themselves (Rubin 2011, 26). Through its application at the Beirut Commercial Court in the 1850s, the Code of Commerce reached the inhabitants of Mount Lebanon, as all commercial litigation in the Mountain, in addition to civil litigation involving foreigners, was placed under its jurisdiction (Akarlı 1993, 132–33).

The extension of foreclosure on *milk* in Nizamiye Courts was enshrined through the Mecelle in 1871. The civil code modified the Ottoman Islamic legal regime of forgiveness that is described above, allowing systematic foreclosure on rahn. Indeed, Article 757 clearly states: "If the debt comes to term and the debtor does not fulfill it, the judge orders him to sell the mortgaged property and to pay off his debt. If he refuses [to do so], the judge sells the mortgaged property and pays off the debt." Ali Haydar, in his six-volume commentary on the Mecelle, notes that the last part of the article follows the *madhhab* of the students of Abu Hanifa and, as discussed above, that their teacher does not allow forced sale by the judge, who can imprison the debtor only until the latter pays off the debt by selling the mortgaged property or by other means. Furthermore, Ali Haydar brings up some of the debt relief measures discussed in the fiqh and explains that they do not hold when there is a rahn involved. "This mortgaged property is sold even if it is the residence of the debtor, and even if he (or his heirs if he passes away) do not have any other house they can reside in, because the right of the creditor is attached to it" (Article 757). When there is no rahn involved, the same exemptions for the needs of the debtor apply (Article 999). Gone were considerations of poverty and need, of sufficiency and destitution. The Mecelle instated a debt regime for *milk* lands, where foreclosure on mortgages was enforced independently of the state of the debtor and its effects on him or her.

The foreclosures allowed by the Code of Commerce and the Mecelle did not apply to all kinds of land. Both waqf and *miri* land could not be mortgaged, based on Ḥanafī law, since the possessor of these lands did not possess the right of alienation, *raqaba*. And indeed, the Land Code of 1858, which applied to *miri* land, reiterated positions similar to the Ottoman late Ḥanafī debt regime discussed above. Article 116 confirms that waqf and *miri* could not be mortgaged. However,

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of the land of certain debtors for payment of debt; the Law of 1869 [23 N 1286], on the forced sale of *miri* and *mevkûfe* lands, and the *müsakkafât-i* and *mütsaghallât-i vakfiye*, along with its 1871 annex [21 N 1288] (Ongley and Miller 1892: 216–17); the Irade of 1871 [21 R 1287], on the procedure of mortgage; the Law of 1871 [15 L 1288], concerning the sale of immovable property for debt. Mecelle Articles 118 (*bayʿ bi'l wafāʾ*), 119 (*bayʿ bi'l-istighlāl*), and the whole of Book 5: Rahn (Articles 701–63) and its 1871 addendum [26 S 1288] deal with mortgage and foreclosure on *milk*.

the code allows the contract of *ferâğ bi'l-vefâ* (the equivalent of *bayʿ bi'l-wafāʾ* for lands that are waqf and *miri* since one cannot sell them), whereby "the holding is registered as sold to the lender but with the right of redemption by the debtor on full payment of debt" (Mundy and Smith 2007, 46). As Mundy and Smith note, this permission in practice introduced a "form of mortgage" on *miri* (2007, 46). The Land Code also restated that foreclosure was not possible without a rahn or *ferâğ bi'l-vefâ* (Article 115). As in the Ḥanafī fiqh, at the death of the debtor, creditors with debts guaranteed against land through *ferâğ bi'l-vefâ* had to receive the amounts owed to them before the heirs could inherit the land (Article 118). Nonetheless, if the debtor died without heirs, the land would revert to the state, making it impossible for the creditor to recover his debt (Article 118). Both during the lifetime and after the death of the debtor, the creditor could not sell the land—unless the debtor expressly gave her that right, as in Ottoman late Ḥanafī requirements. However, an exception was granted to the Treasury in an Irade issued in 1862 [Ra 1279], and *miri* land could be sold without permission from the debtor by the judge to fulfill debts due to the Treasury even during the lifetime of the debtor.

The restrictions of the Land Code on the foreclosure of *miri* and waqf were, however, relaxed starting in 1869, fulfilling earlier unfulfilled promises to promulgate laws describing procedure and process of foreclosure. Indeed, the Tapu Law of 1858 had already noted that an 1858 imperial ordinance [9 N 1274] had allowed a creditor to sell mortgaged *miri* land to recover his debt, "solely because of public benefit" ("mücerred menfaʿat-i ʿâmme için") (*Düstur* 1289, 205). Laws published in 1869 [23 N 1286] and in 1871 [15 L 1288] specified foreclosure procedures during the lifetime and after the death of the debtor. Article 2 of the 1869 law, for instance, does not leave it up to the heirs to fulfill the debt of a deceased debtor in order to inherit the land; it allows the sale of the mortgaged property if the deceased's estate does not suffice to cover the debt, when it is guaranteed by a piece of land.[30] Foreclosure is also rendered possible on *miri* and waqf for a debt (when used in a contract of *ferâğ bi'l-vefâ*) established in court, even during the lifetime of the debtor (Article 1 of the 1871 law), by the judge and without the permission of the debtor. The extension of foreclosure on *miri* and waqf thus made these different categories much closer to *milk*, the forced sale of which the Mecelle allowed in 1871 (Article 757), pushing towards what Mundy and Smith term a "unified field of property law" where "formerly different categories" were unified (2007, 51).[31]

30. Nonetheless, if the debt is not guaranteed by that piece of land, or if that piece does not suffice to cover the debt, the creditor cannot pursue other properties of the debtor (Law of 1869, Article 4).

31. For a discussion of the entrenchment of the rights of usufructuaries on waqf (and therefore its assimilation to *milk*), see Güçlü (2009). Mundy and Smith (2007) propose that the use of the term "immovable property" (*emvâl-i ghayr-i menkûle*) in the title of the 1871 law on foreclosures [15 L 1288] testifies to this unification of property law. The argument is appealing, even though the variety of terms used in the laws on mortgage show that the effort to unify had a long way to go—for instance, *arâzî* in 1858, *emlâk* in 1867, *arâzî -yi amîriye ve müsakkafât-i ve müstaghallât-i vakfiye* in 1869; *emlâk* in 1870, *emvâl-i ghayr-i menkûle* in 1871.

Despite these advances in foreclosures, the new legislation kept many of the brakes that existed in the fiqh, while adding some others, thereby protecting debtors from becoming "free workers" in the sense of being dispossessed of any land and therefore having to sell their labor power on the market (Marx 1992, 272–73).[32] Thus, as early as 1862, the Irade that allowed foreclosures for debts owed to the Treasury also stated that the lowest-valued house of the debtor was to be left to the debtor. This provision was again reaffirmed in 1869 and 1871, enshrining this rule even after the death of the debtor. Article 7 of the Appendix to the 1869 law, dated 1871 [21 N 1288], thus states that if the heir does not have a house, "a habitation sufficient for him to live in shall not be sold, and if the maintenance of the deceased debtor depended on agriculture, sufficient land for the maintenance of his [household] will not be taken from his heirs" (Ongley and Miller 1892, 217). The codes also required various processes of clearance and registration in order to recognize the mortgage and to initiate the process of foreclosure (Article 26 of the Tapu Law of 1858 [8 C 1275]; Irade of 1870 [21 R 1287]). Most articles of the Law of 1871 only serve as caveats to restrict foreclosure: if there is an appeal, foreclosure cannot proceed; if the debtor proves that his revenues for the coming three years will pay off debt and interest, he can be exempt from selling the land (Article 2); public notices of the foreclosure need to be posted in the newspaper and public spaces (Article 8). Finally, foreclosure does not touch all the assets of a debtor, but only those used as securities in contracts of rahn or *ferâğ bi'l-vefâ*.

To add complication to the factors affecting the operation of debt and foreclosure (from type of land to person), different courts handled different cases. The Code of Civil Procedure (1879) clearly delimited the jurisdiction of each court. The Nizamiye Courts dealt with civil and criminal law and shariʿa courts with personal status law and waqfs (Rubin 2011, 63). Rubin notes that waqf, nonetheless, presented one of the gray areas, which allowed for "forum shopping" (2011, 64). He describes waqf cases that were brought to the Nizamiye Courts and suggests that litigants and courts took for granted that waqf cases could be tried in Nizamiye Courts (2011, 65). In a couple of the waqf cases he discusses, the Court of Cassation in Istanbul annulled the decision of the Nizamiye Courts for lack of jurisdiction. However, in one case, it did not, and Rubin sees in this case a possible confirmation of the difference between the everyday use of courts and the letter of the law. However, I would like to suggest that this might be due to the fact that jurisdiction is not always clear-cut: was a foreclosure involving waqf to be enforced in the shariʿa courts or in the Nizamiye Courts? How were the shariʿa courts to know whether a piece of land was the subject of a mortgage before allowing a waqf foundation? Such indeterminacies made waqf a possible threat to or reprieve from the new debt regime and its foreclosures.

32. One can read in these measures confirmation of the analysis of the Land Code as a way to "maintain rural stability and continuity" (Quataert 1997, 858).

These changes to the property and debt regime could not but affect the approaches to intent in these codes and beyond. Indeed, as Arabi (1997) reveals, there is an intimate connection between approaches to intent and approaches to pecuniary transactions. The permissibility of certain contracts depends on the approach to intent of the legal school (formalist like the Ḥanafīs or subjectivist like the Ḥanbalīs and Mālikīs). Discussing stipulations in contracts, Arabi explains that for the Ḥanafīs, most stipulations that are agreed upon by the contracting parties to the benefit of one of them (like stipulating the use of a sold house for a year before delivery) are invalid because they incur a profit without compensation ("ziyāda lā yuqābiluhā ʿiwaḍ") or "an increment with no countervalue" (1997, 38), which is the definition of usury, *ribā*. Thus, because Ḥanafīs do not investigate ulterior motive or real intent, anything that "looks like" usury is considered unlawful. Arabi explains that, to the contrary, Ḥanbalīs who judge "the legality of a transaction by the legality of its underlying motives" (1997, 38) are not as suspicious of a stipulation that "looks like" usury, since they can investigate the intent behind this contract.[33] For Ḥanbalīs, for instance, selling grape juice and knowing that the buyer will be making wine out of it is an illicit act, even if the buyer never expressed that intent.

Given that contract law is intertwined with the approach to intent adopted by the legal system, changes in contract law in Ottoman legislation of the nineteenth century were accompanied by changes to the approaches to intent. Thus, while the Mecelle opens with a series of legal maxims based on Ibn Nujaym's *al-Ashbāh wa al-Naẓāʾir* (Haydar 2010, 10), beginning with the usual "[The qualifications of] deeds are determined by their intentions" (Article 2), it proceeds then in a different direction. Article 3 contradicts the main tenet of the Ḥanafī approach to intent in contract law, its formalism, as it states: "What matters in contracts are intents and meanings, not expressions and structures; therefore the [contract of] bayʿ bi'l-wafāʾ follows the qualifications of rahn." Granted, this rule actually formalizes the way the Ottoman state dealt with the contract of bayʿ bi'l-wafāʾ as a contract of rahn even though it is called a sale (*bayʿ*). However, its framing as a general rule that prioritizes intent over expression directly seems to be in contradiction with other articles of the Mecelle, particularly the continuous illegitimacy of stipulations that do not benefit one of parties (Article 189). Such stipulations are considered invalid on the grounds of, as Arabi explains, "semblance of usury" (1998, 41). Given this

33. Arabi (1998) argues that this approach to intent liberates contracts from conditions on stipulations, since Ḥanbalīs allow any contracts and conditions to which the contracting parties agree, as long as the contract is not expressly prohibited in Islamic law. Nonetheless he warns that the liberation of stipulations does not imply a Ḥanbalī liberation of contract (Arabi 1998, 43). As Powers explains (2006, 119–20) with regard to the stringency of Ḥanbalī law about legal devices to escape usury, this emphasis on intent actually opens the door to challenges of many contracts and thus limits freedom of contract. Arabi (1999, 44) maintains that the Ḥanbalī liberation of stipulations is a step forward to the freedom of contract in Islamic law.

heightened concern with intent, it is perhaps then not a surprise that it arose in the question of the Ottoman governor of Mount Lebanon to the *şeyhülislâm*.

Debt and Foreclosure in the Governorate of Mount Lebanon

In the first letter he had addressed to the Porte, the governor, Rüstem Pasha stated that it had been brought to his attention that some Ottoman subjects of Mount Lebanon had founded waqfs with the purpose of escaping foreclosure and sought advice on the legality of such a practice and on the course of action. The Porte's response was to request further investigation and to demand copies of all waqf deeds, instigating a memo[34] from Rüstem Bey to the various subgovernors of districts of Mount Lebanon to that effect. The request yielded forty-six waqf foundation deeds established between 1866 and 1877.[35] The waqf foundations reveal that fifteen of the founders were Druze and twenty-four were Maronites, and most importantly that twenty-five out of the forty-six founders were men and women of a certain status, the various honorific titles preceding their names (shaykh, amir) placing them within the old notable tax-farming families of the area (Arslan, Hamadah, Shihab).[36] Rüstem's suspicion brought these foundations to light and linked them to foreclosure for debt. But perhaps, following qadi practices, we should not assume that these individuals were indeed intending to escape debts or that such a practice was indeed extant. Nonetheless, the inquiry does point to a problem of indebtedness and recovery of debts. Why was debt causing so much anxiety? Who was indebted and to whom?

Before the nineteenth century, debt had been part and parcel of the life of both peasants and landlords in Mount Lebanon; it was, as Bishara (2017, 51) demonstrates for the Indian Ocean and as Graeber puts it, "the very fabric of sociability" during a period when cash was limited (2011, 329). Between the sixteenth and the eighteenth centuries, despite the production of marketable crops sold in the Syrian interior for cash, barter was the main means of exchange between the inhabitants of the Mountain (Saba 1976, 2), and it remained an important one until the 1930s. Indeed, Latron (1936, 46) describes how peasants within villages avoided costly debts by relying on barter and deferring in-kind payments. Within a village, he advances, the total amount of cash available was always "derisory," or ridiculously little. Did the production of cash crops in Mount Lebanon, where silk monoculture dominated in the nineteenth century,[37] lead to the creation of large estates

34. The memo is reproduced in the document with waqf foundation deeds issued by the Shuf court in response to the memo (BOA.ŞD.MLK 2271.66/5/12A).

35. The deeds were distributed in the Mountain as follows: one from Zahla, two from Batrun, two from Kisrawan, three from Jizzin, nineteen from the Matn, nineteen from the Shuf (based on my count of the deeds reproduced in BOA.ŞD.MLK 2271.66).

36. On the tax-farming families of the Mountain, see, for example, Makdisi (2000, 31–32).

37. Starting in the early 1800s, so much of Mount Lebanon was cultivated with mulberry trees that inhabitants needed to import food and cattle for subsistence (Owen 1993, 30). Firro (1990, 152) gives

from lands of dispossessed peasants in repayment of debts? What was the role of debt in the local economy?

Discussion of indebtedness in the nineteenth-century Ottoman Empire usually centers on peasant indebtedness due to the commercialization of agriculture leading to foreclosures of small peasant holdings to moneylenders, most of whom were wealthy merchants or notables who then become the possessors of large estates (for a general survey espousing this earlier view, see Owen 1993). The need to produce for the market arose even for small peasants after the Tanzimat because of the new tax regime, which created many new cash-based taxes while continuing the old in-kind tithe (*ʿushr*)[38] (Owen 1993, 37). However, the teleological narrative of large, landed estates (*çiftlik*) producing cash crops to meet the increasing demand from Europe has been questioned (see, for example, Gerber 1987; Keyder and Tabak 1991). Quataert argues, "Large commercial estates . . . were unusual and economically unimportant except in Moldovia, Wallachia, and the Çukurova plain, much of the Iraqi regions, and in the Hama area" (1997, 863), and small holdings accounted for 82 percent of the total arable land in the Ottoman Empire in both 1859 and 1900 (1997, 863–64). Small landholders and peasants produced surpluses that went to the world market. Furthermore, Quataert argues, the development of large landholders came from the dispossession of tribes whose lands were considered *mevat* (Quataert 1997, 874). Moreover, in a study on peasant indebtedness based on debt registers for two towns in Western Anatolia, Aytekin (2008) shows that debt was actually much more cyclical and permanent as it worked to transfer some of the surplus that the peasants were producing to a class of wealthy merchants who had the cash to lend them—without indebtedness necessarily leading to foreclosures. This is not to say that these are the new consensuses about the effects of the commercialization of agriculture, but rather that we need to be more attuned to the particular social and political-economic milieux in order to understand the effects of the commercialization of agriculture in various parts of the Ottoman Empire.

The nineteenth century in Mount Lebanon saw the rise of a silk monoculture in Mount Lebanon, and tied the Mountain to the global circulation and accumulation of capital, particularly to the French silk industry and banking. It was also a time of change from the classical dual structure of (mostly Druze and the Maronite Khazins) tax farmers (*multazims, muqāṭaʿjīs*) and peasants.[39] First, all tax farmers

an estimate of 70–80 percent of the cultivated area being dedicated to mulberry trees in 1912, when production had declined.

38. For more on the tithe and older taxes, see Faroqhi (1997, 531–35).

39. Since the sixteenth century, the Mountain had been a semiautonomous emirate governed by a governor from among the local prominent families who was responsible for delivering taxes to Istanbul. The governor then distributed various tax assignments to other prominent families. Most of the tax farmers were Druze (Jumblat, ʿImad, Abu Nakad, Talhuq, ʿAbd al-Malik) except for the Khazins in the northern district of Kisrawan and the Hubayshs in Jubayl, while most peasants were Christian in both places. For a description of the old order and what led to the sectarian balance, see Traboulsi (2007, 1–23).

had their privileges and tax-collection duties stripped away due to a combination of local circumstances and reforms emanating from Istanbul, starting with the 1839 Gülhane Rescript, which promised the abolition of tax farming and the institution of direct collection by salaried functionaries. The Maronite tax farmers lost their influence and control over land and peasants through a combination of the rise of influence of the Maronite Church, a commoners' revolt, and the increasing numbers of tax-farmers' family members, hence the need to support them and divide the riches. The Druze started losing their privileges as the main tax farmers of the Mountain during the reign of Bashir II (1789–1840). Indeed, in the 1820s, after he eliminated his main competitor, the rich Druze Bashir Jumblat, Bashir Shihab II, who had newly become a Maronite, dispossessed the Druze tax farmers of their "fiefs and a number of them went into exile in the Hawran. Of the twelve seigneurial domains in the Southern districts, only two remained in the hands of the Druze landlords. The rest were taken by Bashir and distributed between his relatives" (Traboulsi 2007, 11). After a brief Egyptian occupation, supported by the Shihabs, all factions united in revolt against the Egyptians' heavy taxation, forced labor, and military conscription. "Returning from exile, the Druze sheikhs tried to regain their domains and power over their Christian subjects and faced the hostility of the new prince [Bashir III] as well as the resistance of the Christians. Conflicts over landed property broke out everywhere" (Traboulsi 2007, 13). The Ottomans supported the Druze's "property rights" and abolished the semiautonomy of Mount Lebanon, creating a dual administrative unit (*qāʾimmaqāmiyyatayn*) in 1842 under an Ottoman ruler. The period after 1842 was full of contestations between Druze notables and mostly Christian commoners as the former tried to regain control over their lands, as well as between Christian commoners and Christian notables in the northern district. There was a commoners' revolt in the North, which led to the establishment of a short-lived "republic" ruled by the commoners demanding the abolishment of tax farming and land taxes and even a redistribution of land. Fearing a spread of that revolt to the South, the Druze notables initiated a preemptive strike. The situation exploded in the violence of 1860, where thousands lost their lives.[40] With the intervention of foreign powers, the Ottomans proceeded to punish the culprits, which was a complicated task (see Makdisi 2000, 146–65). For our purposes here, the Druze notables were stripped of their lands and required to pay reparations (Traboulsi 2007, 24–40).

In parallel to the loss of wealth suffered by the Druze and Christian tax farmers, the development of the silk industry allowed the rise of a richer class of peasants as well as a new elite of merchants (Buheiry 1984, 293; Chevallier 1971, 148–49). Silk production benefited small peasants because of the particular contracts under which they cultivated the mulberry trees. Indeed, large landowners entered into sharecropping agreements known as *mughārasa*, whereby peasants received half (Saba 1976, 4) or a quarter (Khater 2001, 199–200n25) of the land and the trees they planted after the trees reached maturity and started producing leaves (Buheiry

40. For a detailed description of the violence of 1860, see Makdisi (2000).

1984, 294).[41] In addition, these small growers also profited from the increased prices of cocoons in the 1860s and 1870s (Saba 1976, 14). Some of these small peasants then invested these sums in buying land (Traboulsi 2007, 19). Others engaged in trade, buying surpluses from other peasants and selling them to merchants in centers (Saba 1976, 4), eventually becoming merchants in their own right.

This new structure altered the debt regime in the Mountain. No longer a fixture of the cycle of production and reproduction between peasants and notables, debt was now owed to a new class of people. With the need for cash for the purchase of eggs and the production of silk cocoons,[42] the role of moneylenders sharply increased and much of the literature even frames the discussion in terms of usury (for example, Traboulsi 2007, 19; Saba 1976, 1, 7 passim; Chevallier 1971, 203). With the loss of their sources of income and their increasing family sizes (Saba 1976, 8), the old tax-farming families had to borrow, particularly from the traders and merchants who sold their silk to Lyon's spinning industries. "Speaking of feudal ruling families in the middle of the nineteenth century, a Lebanese merchant contemporary estimated that the sum of their debt, with interest, amounted to fifty per cent of their revenues" (Saba 1976, 10).[43] Chevallier (1971, 202) mentions that the most notable families were indebted, including the Shihabs, Abillamaʿs, and Khazins.[44] Traboulsi adds that "the Abu Nakad [the Druze tax farmers of Dayr al-Qamar] . . . were heavily indebted and sold many of their properties to their Christian creditors" (2007, 20). With their tax-farming privileges under threat, and during their many rebellions in the middle of the nineteenth century, the Druze notables would take the borrowed money with them when they left the Mountain seeking refuge in the Syrian Hawran (Chevallier 1971, 237).

Peasants were also indebted to the merchants and to their overlords, despite or even through the latter's own indebtedness. In irrigated areas of the Mountain, with more regular harvests, peasant debt was mostly related to big expenditures (such as weddings and funerals). However, in irregular harvest areas with precarious growing conditions, peasants needed to borrow even to subsist, and therefore they were much more indebted; and their debt, as a riskier one, carried higher interest rates, making it a longer term debt. Interest there could be between 10 and 15 percent but reached even 20 or 30 percent, making it impossible to reimburse upon harvest. Given the gains that could be made from moneylending, small traders in the interior "were prepared to sell their merchandise at loss or to

41. Chevallier (1971, 138) and Buheiry (1984, 294) point out that the *mughārasa* in the Kisrawan did not involve the transfer of property rights for immovables, which Buheiry sees as one of the reasons that led to the peasants' revolt in the Kisrawan in 1858.

42. Local eggs could not meet the increased demand for silk, so producers had to import eggs, thus needing cash to buy them from merchants.

43. Unfortunately, Saba (1976) does not mention his source.

44. Saba (1976) confirms this with the names of the merchant-creditors: Amir Bashir Shihab, Shaykh Qansuh al-Khazin, Shaykh Said Jumblat, Amir Ahmad Abillamaʿ, and Amir Amin Arslan.

borrow from French merchants at six percent interest in order to have the cash to lend money to the small peasants at twenty percent or more, in exchange of future silk harvest" (Chevallier 1971, 233). These local small merchants had then a sizeable portion of the silk produced and accumulated wealth from the difference in the price at which they bought the cocoons (when making cash advances to the peasants and the notables) and the price at harvest, but also from the increase in the price of silk on the global market in the 1850s and 1860s (Chevallier 1971, 230).[45] Owen estimates that, after a fall related to the financial crisis in 1857 in Europe, by "1863 the value of loans granted to peasant cultivators by Lebanese silk merchants was already four times as high as in 1858 or 1861" (1993, 163).

Unlike peasants and even tax farmers, for whom debt was part and parcel of the yearly life cycle, merchants dealing mostly with cash exchange came to see debt "as tinged with criminality" (Graeber 2011, 329). For the merchants involved in the global cash economy, the recovery of these debts took on a new importance, so they started calling on the state for mechanisms to enforce their rights. As early as 1853, some Beiruti merchants signed a petition along with French merchants of the city asking that lawsuits between them and people from Mount Lebanon be tried in the Commercial Tribunal of Beirut (est. 1850)[46] rather than the courts of the Mountain (Chevallier 1971, 207). With the Levant starting to feel the effect of the European financial crisis of 1857, "the result was a general increase in bad debts [debts that could not be repaid] and a rash of bankruptcies which made the foreign merchants more anxious than ever to find ways of bringing their debtors to court" (Owen 1993, 163). When the jurisdiction of the Commercial Tribunal of Beirut over all commercial transactions was extended to the Mountain in 1861 (Akarlı 1993, 132–33) under the new regime of the *mutaṣarrifiyya*,[47] European bankers and merchants of Beirut were thrilled because the Mountain had hitherto provided a refuge to the indebted individual who "could only be forced to return if his creditor could persuade one of the *muqatajis* [tax farmers] there to arrest him. This the *muqatajis*, many of whom were themselves in debt to foreign merchants, were often unwilling to do" (Owen 1993, 163). Given this structure of generalized indebtedness to merchants, it may be unsurprising that debtors tried to use waqf to escape the long reach of the merchants. It may also be unsurprising that mer-

45. Chevallier (1971, 233–37) explains in great detail the way the merchants tapped into the existing debt regime in the area, where peasants borrowed against their future harvests. Because they needed the advances, peasants agreed to sell their future cocoon harvests at much lower prices than expected. At the time of the harvest, the merchants would then receive the cocoons and sell them at much higher prices, making extra profit. This led to many rebellions by peasants, especially when the harvests were bad and they could not even pay their debts, leading to the Ottoman Porte intervening to fix interest rates.

46. Date from Chevallier (1971, 236).

47. As mentioned in footnote 1, the *mutaṣarrifiyya* is a special Ottoman governorate created after the violence of 1860, which granted Mount Lebanon limited autonomy, guaranteed by European powers, which had supported various factions in the strife. For more details on the development and operation of the *mutaṣarrifiyya*, see Akarlı (1992).

chants complained to the governor about recovering their debts. And indeed, the governor mentions one of these complaints in his inquiry to the Porte about the validity of waqfs with the intent to escape foreclosure. Let me now turn to the answer that the office of the şeyhülislâm provided after having received and examined the forty-six waqf deeds, in order to show how the grammar of intent in these documents had changed from the late Ḥanafī canon.

Waqf and Foreclosure: Scrutinizable Interiority

In his answer, the şeyhülislâm, represented by his secretary, the *amīn al-fatwā*,[48] starts by analyzing the waqf deeds at hand and the validity of the waqfs, rather than by addressing the question of debt and intent. The şeyhülislâm states: "According to the opinion of Imam Abu Yusuf, in the same way that the validity of a waqf does not require its registration nor its handing over to the administrator, its validity does not necessitate the naming of an eternal beneficiary." This move allows him to use the divergent opinions in the Ḥanafī tradition to confirm the validity of these waqfs, despite what would be errors and omissions according to the dominant opinions in the school. For instance, some of the waqf deeds do not specify an inextinguishable beneficiary like the poor (BOA. ŞD.MLK 2271.66/3/3A/3.444, 23 M 1285 [1868]); others do not name an administrator (BOA.ŞD.MLK 2271.66/4/3A/23.2531, 21 M 1293 [1876]). The şeyhülislâm seems intent on treating these waqf deeds as valid, even though some of them appear to be simply using the waqf as a form of inalienable property without consideration of the procedure, form, and technicalities of a waqf foundation. That is, the şeyhülislâm could have easily pointed out that all of the waqfs miss some key elements in their foundation deeds, making them invalid, without having to delve into the question of the intent to escape foreclosure.[49] However, his attempt to move away from the question of the proper form and procedure for waqf founding hints to the importance of addressing the question of intent and debt and alludes to matter's significance.

Since the founding fathers of the school do not discuss the question of intent and ultimate motive, the şeyhülislâm turns to "reputable fiqh books" (*muʿtabarât-i kutub-i fiqhiye*) of the late Ottoman Ḥanafī library. This terminology, as Guy Burak demonstrates, is not fortuitous: it refers to the Ottoman Ḥanafī canon and contains particular books to be taught in a specific order (2015, 130–35), indicating the authoritativeness of the opinions to be discussed. The fatwa continues: "reputable *fiqh* books state that if an indebted person who is sound of mind and body and not

48. Over the course of the sixteenth century, due to the enormous number of questions posed to the mufti, the office of the şeyhülislām became more bureaucratized, and a special office for the issuance of fatwas was established under the direction of the *fetvâ emînî*, the secretary of the fatwa. For more on that office and its functioning, see Heyd (1969, 46–49).

49. An attempt to question the validity of these waqf foundations based on procedural mistakes would have actually been very much in line with late-nineteenth-century Ottoman practice, in what Rubin calls "the age of procedure" (2011, 83–111).

interdicted [who is free to dispose of his possessions] makes all of his movables and immovables into a *waqf* for a pious purpose his *waqf* is valid and allowable."[50] Indeed, as we discussed, these books actually separate debt from legal capacity (*ahliyya*), including that of waqf making, because legal capacity is defined in terms of elements of the capacity to contract: freedom, sanity, adulthood, and the absence of interdiction. If you recall, al-Tarabulusi considers the waqf of an insolvent debtor valid.

It is here that the şeyhülislâm turns to the foundational figure in Ottoman fiqh, the jurist responsible for justifying many of the Ottoman legal preferences through the Islamic tradition, Ebüssuʿûd Efendi. The summary that the fatwa presents is based on an opinion of Ebüssuʿûd from his *Maʿrûzât*, which appears at first glance like a fatwa with a question by a subject and an answer by the jurist.[51] The question was "Zayd [the Muslim equivalent of John Doe] is healthy and indebted, and in order to escape from his creditors, he made all of his properties into a waqf for his children. Is the waqf valid?" Ebüssuʿûd's answer was clear and simple. "The waqf is neither valid nor irrevocable. Judges are forbidden from confirming and registering the part of the waqf equivalent to debt" (Ebüssuʿûd 2013, 114). It is important to note that even though Ebüssuʿûd's opinion is framed as a fatwa, Ebüssuʿûd's *Maʿrûzât* constitute questions written by the jurist himself then presented (Ar: *ʿarḍ*; Tr: *arz*)—hence the name *Maʿrûzât*—to the sultan for the latter's answer, although Ebüssuʿûd "often suggest[ed] the course of action to be followed as well" (Repp 1986, 282). Ebüssuʿûd's opinion was then not just the opinion of a learned scholar of the empire, an opinion that would have remained ultimately unenforceable. His opinion acquired force of law, because the sultan issued this opinion as a decree that was binding on judges (Repp 1986, 280, 282).

Ebüssuʿûd's attempt at legislating about indebted waqf makers attempting to escape from their creditors shows that debt and its recovery must have been an important enough issue at the time of his tenure (1545–1574) to warrant consideration. Unfortunately, we do not have studies that analyze his *Maʿrûzât* based on the social and economic conditions of the time, and a good amount of research would be needed to determine the reasons behind his attempt to legislate around such issues. One can perhaps assume that the monetization of the Ottoman Empire and the price revolution of the sixteenth century that wreaked havoc in the Ottoman Empire at the time might have made the question of foreclosure crucial. In these circumstances, Ebüssuʿûd's *arz* could be interpreted as an early modern formulation of the problem we encounter three hundred years later.

In his *Maʿrûzât*, Ebüssuʿûd used his own independent reasoning (*raʾy*), rather than following the dominant opinions of the Ḥanafī school, while still remaining

50. BOA.ŞD.MLK 2271.66/6.

51. The *Maʿrûzât* are presented as very short answers that do not display juridical justification.

within its bound (Repp 1986, 282). His opinion in this case constitutes a transformation of the grammar of intent in the Islamic legal tradition. Ebüssuʿûd's opinion actually draws on a common fatwa, here formulated by a Mamluk jurist known as the Reader of the *Hidāya*, which is also reproduced in the other work cited by the şeyhülislâm in the 1879 fatwa to support his opinion, the ultimate compendium of Ḥanafī fiqh by the illustrious late Ottoman Syrian jurist Ibn ʿAbidin (d. 1842). The question in the older Mamluk fatwa concerns a man who owns movables and immovables and who is in prison because of a legal debt he owes to someone. This man then proceeds to dispose of his possessions, gifting, founding waqfs, selling, and spending in order to become poor and deprive his creditor of what he owes him. What is the ruling on his dissipation of wealth? Can the judge interdict him? The answer is yes, and the judge can even force him to sell property to pay back his debt (Qariʾ al-Hidaya 1999, 42–43). The question here is one of the legality of interdicting the debtor (rather than the validity of the waqf), which, as mentioned above, was a matter of debate in the tradition. Nonetheless, the effect of the interdiction is that the judge can act on behalf of the debtor to annul the waqf and previous contracts.

However, there is a crucial, albeit small, difference between this fatwa and the one by Ebüssuʿûd. Here the subject is imprisoned for refusing to pay his debt, a detail that Ebüssuʿûd does not mention. However, this small disparity makes a crucial legal difference. Imprisonment is the evidence that allows the jurist to establish that the man is trying to escape debt payment. Here, intent is not in and of itself open to scrutiny. It is again deduced from its expressions and signs, which act as evidence. Without these exterior signs, any man could be unjustly accused of trying to escape debt. In addition, forced sale, as seen in this fatwa—echoing our discussion of debt in Islamic law—was very much tied to questions of financial hardship or affluence. Indeed, the reason forced sale is allowed in this case is the affluence of the debtor. Had the endowed land been his only sustenance, something he could not do without, forced sale would not have been on the table. These small changes, then, are in fact crucial. They reverse the predominant ruling that even bankrupts can make a waqf, as long as they are not in prison for nonpayment of debt, unless they are trying to make a rahn into a waqf. They also open the door to legislation based on this suspicion, prioritizing the rights of creditors over good faith in debtors. Crucially, they signal a change in the grammar of intent, which becomes divorced from exterior signs, open to suspicion, and the basis of rulings independent of external expressions.

While Ebüssuʿûd had no qualms taking into account the possible intent of debtors to escape debt and harm their creditors, Ibn ʿAbidin seems more reluctant to paper over the radical change that Ebüssuʿûd's opinion constitutes in the preponderant view of the Ḥanafī tradition. Ibn ʿAbidin notes that Ebüssuʿûd's opinion contradicts the dominant opinion ("mukhālif li-ṣarīḥ al-manqūl") but then proceeds to justify his ruling following Ebüssuʿûd's opinion based on the

argument used in another compendium, *al-Fatāwā al-Ismāʿīliyya*, which utilizes procedural issues related to the judge's appointment (Ayoub 2014, 206–8). Ibn ʿAbidin quotes this collection's justification that the judge is a deputy of the sultan and is supposed therefore to follow the latter's directives. Since the sultan has prohibited judges from registering the waqfs of indebted founders, any judgment that contradicts this directive is considered invalid. Ibn ʿAbidin reports that Shaykh Ismaʿil al-Haʾik, author of *al-Fatāwā al-Ismāʿīliyya* and student of al-Haskafi in Damascus, also explains that the sultan had prohibited his appointee (the judge) to register such waqfs in order to safeguard people's property ("ṣiyānatan li-amwāl al-nās"). Such an argument presents Ebüssuʿûd's fatwa as the sultan's legislation based on public benefit (*maṣlaḥa*) and thus as falling within the domain of *siyāsa*.[52] The sultan is going against the preponderant opinion in order to uphold one of the main purposes of the shariʿa, the preservation of property.[53]

An important question remains about how Ebüssuʿûd himself justifies his opinion within the *madhhab,* or whether he even justifies it at all through an argument other than the above-mentioned *maṣlaḥa*. Still, for the purpose of my argument here, the most notable element of Ebüssuʿûd's opinion is that he acts upon the suspicion about the intent of founders, instead of dismissing such concerns with ulterior motives and returning to the formalism of the school. The adoption of his ruling, no matter how he justifies that ruling, introduces suspicion towards the intent of waqf founders *and* legislation based on this suspicion into the Ḥanafī tradition.[54] However, the new grammar that he introduces remained a minor tradition, and it was only in the nineteenth century, under the particular material and legal conditions that I described, that this opinion started to be enforced systematically; it was in fact promulgated as a sultanic decree in 1879 (Hariz 1994, 35).

52. Ibn ʿAbidin is putting the sultan's law in the idiom of *siyāsā sharʿiyya*, whereby rulers are conceived as rendering justice "in the name of Sharia in contrast to the formal rules of the fiqh" (Rapoport, quoted in Fadel 2014, 100).

53. The justification to follow Ebüssuʿûd's opinion contrary to the preponderant opinion of the *madhhab* opens a window onto a vigorous debate in Ottoman and Islamic studies: the response of local scholars to the Ottoman state's attempt at "canonizing" the Ḥanafī *madhhab*. The relation and negotiations between the Ottoman state legislation and local Damascene scholars in matters of waqf forms an important aspect in Richard van Leeuwen's book (1999). Van Leeuwen argues that the qadi had acquired a "more and more prominent role," both through the state's efforts but also through an "increasingly institutionalized body of scholars" (1999, 116). According to him, the institution of waqf became, by the end of the sixteenth century, "an instrument of state policies" (1999, 117). Some reviewers of van Leeuwen's monograph (e.g., Ghazzal 2001) disagree with him about the extent of state control of the *madhhab*.

54. Such an effect, as Hussein Ali Agrama shows (2012, 130–59), is usually characteristic of the modern rule of law and is tied to modern law's aim of maintaining public order because loopholes create the possibility of descent into chaos, with mushrooming legislation further entrenching state sovereignty. One could argue that, given Ebüssuʿûd's ties to dynastic law, similar aims of public order animate his fatwa.

This new grammar of intent differs quite dramatically from the one I described in the first section, which takes exteriors for their apparent meaning rather than seeking subjective intent or ulterior motive. This does not mean that sincerity and the harmony between inside and outside of a believer were not essential virtues of the believer. While sincerity is an ideal between the believer and God, in society, questions of sincerity in the domain of adjudication are discouraged because of the mediated access to intent that I described. In addition, as Saba Mahmood (2005) has argued, in Aristotelian models of ethical pedagogy, external performative acts are understood to create corresponding inward dispositions. While in this model the subject still seeks to eliminate the dissonance between inside and outside, that dissonance is not read as hypocrisy or lying, but is usually understood as natural in the path of ethical self-discipline. There were very clear limits to human questioning of sincerity, of the kind done by the governor. The new grammar of intent, which gives direct access to the interiority of subjects, "splits open the heart of the believer to find out whether he declared the profession of faith [out of belief in it] or not," as a famous tradition of the Prophet has it (Muslim 2005, 1:140–41).[55]

It is the late nineteenth-century conception of the subject that was legally used to question the validity of certain waqfs as charitable acts.[56] In the governor's question, the opening of the heart to scrutiny actually served to tie the subject to a different moral economy, where rights of creditors are absolute and repayment of debt is a moral duty outside any consideration of hardship. The attempt to close the gap between the intentions and the actions of the waqf founders entrenched the new debt regime and restricted the use of waqf as a way to contain its reach. The requirements of capital accumulation contributed not only to the reshuffling of the control of the means of production and of social relations but also left a mark on the conception of the person and the grammar of intent in the Islamic tradition.

55. The tradition tells the story of a Muslim who kills an unbeliever during a battle, even after the latter had uttered the profession of faith. After hearing the story, the Prophet asked the Muslim if he tore "open the heart of the believer to see if it uttered the profession of faith." The questioning is taken as an injunction for Muslims to leave "real intent" to God and simply follow external signs (*al-ẓāhir)*.

56. I would like to point out that the intent of founders in the particular case raised by the governor of Mount Lebanon (and in Ebüssuʿûd's *arz*) is deemed suspicious because they are founding waqfs dedicated to their children. In the earlier fatwas and even in Ibn ʿAbidin's example, waqf *tout court*, whether dedicated to families or to the poor, in addition to other transactions that aimed to escape debt, was problematic. This particular targeting of family waqf prefigures and is essential to a debate arising a few decades later in Syria and Lebanon on the very validity of the family waqf. Thus, the questioning of the "real intent" of family waqf founders initiates the beginning of the questioning of the family as a legitimate recipient of charity and the transformation of family waqfs into simple economic transactions, which were not part of "religion." In this question, we see the separation of the economic from the religious and the restriction of the religious to worship (see chapter 4).

FRENCH MANDATE FORECLOSURE AS A REAL RIGHT AND GENERALIZED SUSPICION

The Ottoman nineteenth-century reforms liberalized foreclosure of property subject to rahn and bayʿ bi'l-wafāʾ, making foreclosure possible, first on freehold and eventually on *miri* and waqf, without the consent of the debtor and during his or her lifetime. This new debt regime rendered waqf activity suspicious and "opened the hearts" of waqf founders to scrutiny. Ottoman legislators had nonetheless kept some restraints, preserving the livelihoods of people, especially peasants, and had limited foreclosure to assets that had been used as securities, except when the debt was owed to the Treasury. Did French Mandate legislation on debt and foreclosure take the Ottoman reforms to their natural conclusion and completely liberate foreclosures? What effect did this legislation have on the way the intent of the legal subject was conceptualized and scrutinized?

The French archive brims with contention and confusion about the various credit contracts and their effects, particularly forced expropriation (*nazʿ al-milkiyya al-jabrī*). Citizens addressed questions and complaints to the high commissioner or to his real-estate-matters delegate, Philippe Gennardi, about creditors who initiated forced expropriation but did not come to the auction and simply disappeared, about debtors trying to negotiate paper money equivalent to debts contracted in gold, about the righteous recipient of the compensation for the expropriation of certain waqfs, and about taxes on mortgages and forced expropriations (e.g., MAE251/2/Real Estate/23). These queries triggered correspondence among various French officials and between them and Lebanese/Syrian officials, indicating that the confusion partly stemmed from multiple legislation (the new Real Estate Property Code 3339/1930, the Code of Obligations and Contracts/1932, and the Code of Civil Procedure/1932) as well as French-Ottoman-Arabic translations. Let us examine the way this legislation tackled debt and foreclosure and its effects on intent.

The 1930 Real Estate Property Code follows existing contracts from the Ottoman period but redefines them as real rights of mortgage (*ruhūnāt*; sing. *rahn*) (Article 10): the right of rahn (Articles 101 to 116) and the right of sale with right of redemption (bayʿ bi'l-wafāʾ) (Articles 91 to 100). Only valid against a legally proven debt, the rahn contract puts an immovable in the hands of a creditor or a third party and gives the creditor the right to confine (*ḥabs*) the immovable until the payment of the debt (Article 101). This article restricts the rahn contract to immovables, whereas the Ottoman Mecelle (Article 701) allowed any property (*māl*) that could be the subject of a sale to also be the subject of a rahn. Rights acquired on the immovable before the rahn, such as a lease, remain valid (Article 109). In rahn contracts, the same asset can act as a surety for more than one debt, contrary to bayʿ bi'l-wafāʾ contracts. The debtor and the creditor cannot agree that the creditor will become the proprietor of the collateral if the debtor fails to pay (Article 107). These clauses and rights about rahn are very much in continuity with

Ottoman practices. However, French regulations tightened the range of uses that the parties of the mortgage can engage in with mutual consent. For instance, contrary to Article 749 of the Mecelle, which allows the creditor to lend the collateral back to the debtor, the debtor cannot request the use (*al-tamattuʿ*) of his immovable (Article 106). The creditor cannot make use of the mortgaged immovable freely and any revenues from the immovable go towards the payment of the debt (except repair costs) (Articles 111 and 112).[57] The latter allowance changes the Ottoman rahn contract, which did not give the creditor any rights to the usufruct or use of the immovable, but only to its *res* (see Ali Haydar's commentary on Article 747 [2010 2:157]).

Some continuity with Ottoman practice exists with bayʿ bi'l-wafāʾ contracts as well. Here, the seller sells an immovable (*ʿaqār*) with the option to repurchase it at any time or at the end of a specified time and with the buyer able to request the price with the return of the immovable (Article 91). Like Ottoman practice, and as stated in Article 3 of the Mecelle, the bayʿ bi'l-wafāʾ appears to follow the same rules as the rahn (*ḥukmuh ḥukm al-rahn*): it does not make the buyer the owner, but simply confines the object. This can be seen in Article 100, whereby if the seller does not return his debt, the buyer can request the sale of the immovable; he does not become the de facto owner. As a citizen attempting to clarify the differences between these contracts argued, the bayʿ bi'l-wafaʾ is a collateral, even if it involves transfer of property, because the buyer does not become the full and final owner of the immovable (MAE251/2/Real Estate/23). Neither buyer nor seller can sell, rent, or exercise any other real right on the immovable for the duration of the bayʿ bi'l-wafāʾ without the express consent of the other party (Article 93). The seller can remain an occupant of the immovable as a tenant (the contract will be then known as *bayʿ bi'l-istighlāl*) (Article 92). The contract can include a clause to allow the buyer to freely enjoy the immovable and part of its revenues (Article 94). The buyer is responsible for the care of the immovable if he or she receives it and for any damages to it that ensue, and any returns from the immovable are deducted from the debt owed (after the buyer takes for himself or herself the amount they agreed on and the amounts for maintenance and upkeep).

The continuities with Ottoman practice with regard to bayʿ bi'l-wafāʾ become less obvious when examining the articles discussing that contract in the Code of Obligations and Contracts of 9 March 1932 (Book I of Section III, Articles 473–486) because they contradict the Real Estate Code's discussion of the effects

57. The question of costs of repairs and maintenance is the subject of long discussions by the Mecelle's commentators because it revolves around the responsibility and liability of each of the parties. The general rule there is that the creditor is liable for the expenses necessary for the preservation (*al-muḥāfaẓa*) of the collateral (Article 723) or, as the commentator explains, for the intact return of the immovable (if he needs to rent a shed to keep some sheep used as collateral). The debtor is responsible for the expenses of repairs and upkeep (the feed for the sheep, for example) (Article 724). The creditor is not liable for damages incurred while he or she is in possession of the immovable, if he or she acted responsibly.

of the contract. In the Code of Obligations and Contracts, the sale is considered executed and the creditor has the right to sell, rent, or exercise other real rights on the immovable, without the permission of the debtor (Article 476). In addition, this code limits the timeframe of repossession to three years, a limit that even the judge cannot extend. These contradictions created confusion in the execution of contracts. We get a glimpse of the reason behind these contradictions in a note from the ubiquitous Gennardi to the high commissioner, where he explains that the Code of Obligations and Contracts in fact introduced a new contract, "unknown to Oriental legislations," the *vente à réméré* (a sale and repurchase agreement) (MAE251/2/Real Estate/31). Therefore, the Code of Obligations and Contracts called the *vente à réméré* "bayʿ bi'l-wafāʾ," a confusion, Gennardi notes, perpetuated earlier by Orientalists in the translation of the Mecelle. Gennardi proposes to rename the contract in the Code of Obligations and Contracts as *bayʿ bi'l-istirdād* instead of *bayʿ bi'l-wafāʾ*.

The introduction of such a contract, however, made debtors become more critical of the Ottoman bayʿ bi'l-wafāʾ because of its open-endedness. Thus, for instance, Princess Asma Samyé, granddaughter of Emir Abdelkader (al-Jazaʾiri, the famous Algerian anti-colonial leader whose exile ended in Damascus) addressed a request to the high commissioner asking for a limit to the window of buyback of bayʿ bi'l-wafāʾ contracts (MAE251/2/Real Estate/23), arguing that creditors were pursuing reimbursement of the debt many years after the contract, when the immovable had lost much of its value, and were still demanding the original sum owed. "Even if one admits that this principle arises from the dispositions of the Mecelle," she writes, "it cannot be absolute and applied in all circumstances without consideration of the particularities of each case." Creditors seem to be exercising their right to demand their money back at any time as allowed by the Mecelle (Article 716), instead of exercising their right to demand a forced foreclosure, since the latter would not fulfill the debt given the change in value of the immovable. With the absence of the forbearance injunctions that existed in the late Ḥanafī Ottoman canon, this right to demand payment of the debt at any time appears like an arbitrary power given to creditors, privileging their absolute rights.

With regard to forced sales, the French Mandate Real Estate Property Code 3339 of 1930 continued with the broad foreclosures instituted by the Ottoman Code of Commerce, the Mecelle, and the various laws on *miri* and waqf land. This is no surprise since the Ottoman reforms had been the result of European pressures for capital accumulation and circulation as much as they were part of a global moment of modernization and codification (Rubin 2011, 25–26). Code 3339 instated the right of forced expropriation (Article 158) as a real right termed *taʾmīn* (security) that guarantees the performance of a duty (usually the payment of a debt) (Article 120). Forced foreclosure then was separated from contracts of rahn and bayʿ bi'l-wafāʾ and enshrined as a right on its own, which does not need to be tied to the transfer of an object. Nonetheless, Code 3339 notes that

the rahn gives the creditor the right to request the forced expropriation through legal means if the debtor does not pay back (Article 101). These rights created an automatic process of foreclosure that bypasses the debtor and can be immediately executed by the creditor—through the courts. Articles 159–170 outline the process for forced expropriation: the creditor goes to the real estate judge to execute his right, the judge sends a note to the debtor warning him of the imminent foreclosure and requesting that he pays back within eight days (or show proof that he has paid); if he does not pay back, the judge can proceed to sell the immovable. The eight-day period allows the debtor to pay back without selling the property in question, as Ottoman practice (pre- and post-Mecelle) allowed.

A couple of years after the publication of Code 3339, however, forced foreclosures on rahn and bayʿ bi'l-wafāʾ contracts appear to have reverted to stricter pre-Mecelle requirements for foreclosure. Indeed, Article 158 was revised in 1932, with an added clause that requires an irrevocable right of attorney given to the creditor for forced expropriation in rahn and bayʿ bi'l-wafāʾ contracts.[58] Based on a communication between Gennardi and the inspector of real estate services, Amine Mouchawar, the revision of the law does not seem to have been brought by complaints against the earlier extension of foreclosure. After the revision of Article 158, Mouchawar asked Gennardi about its implications on rahn and bayʿ bi'l-wafāʾ contracts drafted before the revision (MAE251/2/Real Estate/13), many of which did not include such a power of attorney. Mouchawar wondered whether forced sales on these contracts should be allowed, given that at the time of their drafting, the power of attorney was not required and forced sales were allowed without such a power. Gennardi explained that the revised laws did not add any new requirements; they only made explicit old provisions of Ottoman law. Gennardi continued by clearly stating that for both these contracts, forced sale is possible only if the debtor gave the creditor the right to execute such a sale. Gennardi presented Ottoman practice as the basis of the law, implying that the absence of a requirement of a power of attorney in the 1930 code was just an oversight because it was taken for granted. Gennardi implied that the right of attorney was necessary before the French Mandate, when in fact the Mecelle did not require it, which is confirmed by Mouchawar's observation that many rahn and bayʿ bi'l-wafāʾ contracts did not include such a clause. Was Gennardi not aware of the new requirements of the Mecelle? Why was he trying to present the reinstatement of the power of attorney requirement for foreclosure in rahn and bayʿ bi'l-wafāʾ as a restoration? My data does not allow me to answer;[59] however, the revisions of the law and the questions

58. This clause remains in effect today. However, in practice, it is not enforced. There must be some other legislation that annuls it, but I have not been able to determine what it is.

59. An examination of foreclosures at the civil court archive of Beirut, of noteworthy court decisions about foreclosure in legal journals, and of newspaper articles about speculation and foreclosure in the Mandate press would definitely yield some results, but that is unfortunately beyond the scope of this book.

addressed to the French Mandatory government by citizens point to continued contestation around foreclosures.

That the questions of indebtedness and foreclosure, which we encountered in the late nineteenth century, continued unabated in the decades of the French Mandate reflects the disastrous economic situation of Lebanon and Syria after World War I. Lebanon was ravaged by the 1915–1918 famine and the war effort that conscripted able-bodied men. As Elizabeth Thompson notes, "Stories were told of peasants selling their homes and fields for a simple loaf of bread, and of speculators expropriating entire districts" (2000, 28). These were not simply rumors, and indeed, the French "decreed a law to dispossess Lebanese war profiteers who had amassed vast amounts of land" (2000, 29). Given these large-scale dispossessions, and considering these events in light of Ottoman questions around debt and foreclosure, we might wonder whether intent takes importance in the Mandate period as well. To do that, let us examine the way intent plays out in some of French Mandate legislation on debt and foreclosure.

French Mandate legislation enshrined some of the concerns with meaning and intentions stated in Article 3 of the Mecelle, as the civil law tradition allows investigations of intent in contract law. Indeed, a valid contract in the French Civil Code requires a "lawful cause" (Philippe 2004, 364). This requirement was present in the Lebanese Code of Obligations and Contracts (Article 177). The causes of contracts are standard: the cause of the obligation of the seller is the conveyance of the price and the cause of the obligation of the buyer is the conveyance of the merchandise. Motives are not relevant to the law, *except in as much they fit with "the conception of public policy or morality*" (2004, 382, italics mine). Thus Article 198 of the Code of Obligations states that an illicit cause is one that contravenes "public order, morals, and the obligatory rules of the law." In this framework, subjective intent is not scrutinized, but ulterior motive is. The "illegal or immoral intention of one of the parties must be known to, if not actually agreed [*convenu*] by the other" (Markesinis 1978, 70). Thus leasing a house to open a brothel was considered invalid if the owner knew of the intentions of the tenant.[60] Such a concern with ulterior motives echoes the concerns of the Mount Lebanon governor, for whom the family waqfs were questionable because of their ulterior motive of escaping foreclosure and the law.

Concern with the intent of debtors rears its head in French Mandate regulation of foreclosure. The Civil Procedure Code, promulgated in 1932, overrode the articles of the Real Estate Property Code dealing with foreclosure. The Civil Procedure Code regulated expropriation (*naz' al-milkiyya*) more broadly, including the impounding of money, movables, and immovables. Article 725 in the section

60. Arabi discusses the introduction of the notion of *cause* (*sabab*), which he renders as the "subjective determining motive" or "ulterior motive," in the Egyptian Civil Code of 1949 by the Egyptian "master-jurist" Sanhuri (1997, 201–2). French Mandate legislation seems to have introduced this notion in Lebanon and Syria earlier.

on immovables addresses the intent of debtors after an executive order for seizing real estate property: "Starting with the date of registration [of the seizing order?], the seized upon debtor [*al-maḥjūz ʿalayh*] cannot rent the immovable [*al-ʿaqār*] slated for seizure, nor can he promise future rents, with the purpose of harming the interests of the creditor seeking seizure [*iḍrāran bimaṣlaḥat al-ḥājiz*]." The article is very clear that it is the illegal intent behind these actions that makes them prohibited. Protection of creditors against stalling debtors also appears in the very strict procedure for bidding at public auction: Articles 785–793 punish winning bidders who fail to pay, charging them with the costs of the new auction and any difference in price were the new auction fail to reach the amount they bid for. Thus, such legislation seems to discourage "fake" bidding, most likely with the assumption that such bidding is used to give the debtor some time to pay off.

The question of intent behind the actions of debtors also arises in queries, as in the case of family waqfs done to escape foreclosure, and here too it is tied to the suspicion of giving to the family. One such query (MAE251/2/Real Estate/14) in 1933 from the same general inspector of the real estate office, Amine Mouchawar, to Gennardi utilizes the modern grammar of intent, and although the contract in question is a rental and not a waqf, the case highlights the deep suspicion of contracts that benefit the family. Mouchawar asks Gennardi about lease contracts on a foreclosed immovable, without specifying any particulars. He explains that, because they are less than three years old and not registered in the real estate registry (*livre foncier*), these contracts were contracted either during the auction of the forced sale or during the mortgage (*hypothèque*, or what the Real Estate Code calls *taʾmīn* [security]). Should the executive bureau delay seizure (*mise en possession*) or should he consider such contracts, which "evidently have no other *aim* than to hurt the interests of the third-party buyer [*tiers acquéreur*]," null and void, independently of their end date or their beneficiaries? asks Mouchawar.

Mouchawar appears quite concerned with the intent of the debtor and finds proof of the debtor's bad faith in the attempt to benefit the family. Indeed, after having explained the case in all its legally relevant details, Mouchawar ends his letter by pointing out that "by the way" (*en passant*), some of these contracts are between the debtor and his wife. The "by the way" introduces a piece of information that is supposed to be unnecessary to the case, but that nonetheless vindicates Mouchawar's interpretation of these leases as dishonest stratagems, implying that the two contracting parties conspired in an illicit cause. From Mouchawar's description, we do not get any of the details that were essential to the Ottoman late Ḥanafī canon. What was the financial condition of the debtor? Was he trying to shield his family from homelessness? Can the attempt to hurt the new debtor be interpreted as a moral critique of a person willing to make profit from the financial difficulties of a fellow citizen, and, more broadly of unrestrained foreclosures? We will not know, but, for Mouchawar, the debtor was simply attempting to forestall

and cause injury to the new owner. During these precarious and transformative times, with the changes in the property regime and new distributions of the economy of legal knowledge, suspicion abounds.

Gennardi ignores Mouchawar's inquiries into the ulterior motive of debtors and replies with technical clarifications: a mortgage (*hypothèque*) leaves the debtor with the right to dispose of his immovable. Contracts done before the due date of the loan are valid. However, if at the end of the mortgage contract, the debtor has received notification of a forced expropriation, and the leases were contracted after that, they are null and void. The new owner (the winning bidder) can expel the tenants. Gennardi thus does not engage in the new grammar of intent and its scrutiny of ulterior motive in contracts. It is difficult to gauge why Gennardi does not follow Mouchawar's lead, questioning the legality of the cause of these contracts. As we discussed, Gennardi himself questioned the very institution of the family waqf and its charitable intent, and not only in relation to its use by indebted founders to escape foreclosure. The French expert on waqf can be seen applying an argument using the notion of "illicit cause" of escaping Islamic inheritance laws within a tradition (the Ḥanafī) that did not take such intent into consideration. With regard to debt, however, he seems to have stuck with the formalism of Ḥanafī law, and I wonder if that might be caused by his reading of the economic situation.

In sum, French Mandate regulations formalized the possibility to peer into the ulterior motives of contracting subjects, while continuing with the liberalization of foreclosure through the introduction of security (*taʾmīn*) as a real right. This eventually became the most used instrument to guarantee a debt, because it left the property in the hands of the debtor and did not involve the complexity of negotiations of use and usufruct under rahn and bayʿ bi'l-wafāʾ contracts. Nonetheless, because waqf foundation still fell under the jurisdiction of shariʿa courts, it was still subject to the formalism of Ḥanafī law. Let me turn now to the contemporary moment to see how these different grammars of intent intersect in discussions I have had with waqf practitioners.

POSTCOLONIAL SUSPICION AND THE PERSISTENCE OF AN ETHIC OF ABSTINENCE

It had been quite difficult to get a hold of Salim Harb. Even though his name was mentioned on the waqf deed of the Karama Foundation, and even though I had already interviewed the lawyer of the organization and had gotten Harb's number from that lawyer, my attempts at scheduling a meeting kept failing. When he finally agreed to meet me, he remained suspicious. I drove to the suburb where he lived and parked on what looked like a very quiet street, with barely any pedestrians or activity. We were in a residential neighborhood. We met in a large office, furnished sparsely with a desk and its chair, facing two chairs. I sat across from him, but he

averted his gaze. I started with some broad questions about his life history and encounter with waqf.

This was one of my early interviews and I was trying to understand the importance of the *qurba* intent from a legal perspective: "How does the Karama waqf fulfill the legal requirement of getting close to God?" From the expression of disbelief on his face to his long pause, I felt that Harb was saying, "Did you come all the way to the suburbs of Beirut to ask such a futile question? Are you taking up my time for that?" The answer came a few seconds later, ending the conversation and sealing my failure as an ethnographer: "You see us and what we are doing." It certainly is true that, although the Karama Foundation does not share the more common charitable purposes of waqfs of the day (supporting a mosque or an Islamic center), it could count among waqfs that immediately serve a charitable purpose. Indeed, the waqf mostly helped Islamists detained because of their views rather than because of any misdemeanor, vindicating "Islam" in the face of opponents. But I was asking about "subjective intent," which, as I detailed in the discussion on intent in the Ottoman Ḥanafī fiqh canon, belongs to the conscience of the believer and his or her relation to God. In the same way that praying is an act of worship in and of itself and that endowing a mosque was a *qurba* in and of itself, a waqf that "defended" Islam and Muslims was a *qurba*. Whether one is praying to show off to others or building a mosque to acquire fame and political clout, these are subjective intents between a Muslim and God, which will be accounted for on the Day of Judgment. Who was I to delve into Harb's "real" motives?

My question about the *qurba* intent of the waqf was triggered by my interview with the Karama waqf lawyer, who had explained, as detailed in chapter 1, that making Karama a waqf served legal purposes because it afforded this foreign NGO a legal personality and the possibility of operating in Lebanon without clearance, long delays, and supervision from the Ministry of Interior. My question stemmed from an assumption that the presence of external goods (here, practical advantages of the waqf) cast a shadow on the internal goods and the pious purpose of the waqf. It presumed that a charitable donation was to be completely disinterested, an ideology whose rise Jonathan Parry traces in parallel to the emergence of the "ideology of a purely interested exchange"—that is, commodity exchange in a capitalist market (1986, 458). However, here, the internal goods of the practice were not jeopardized by its legal advantages.

I surmise that Harb's incredulity, however, did not stem from my questioning of his "real motives." In our discussion, he had hinted a bit earlier to his life history: he had been the victim of arbitrary detention and enforced disappearance for being a Muslim engaged in charitable giving. Given that context, his disbelief might have stemmed from what he saw as my questioning his commitment to Islam when he has been so clearly associated with Islam, identified as an Islamist. On the one hand, he was being accused of being too Muslim, and here I was asking him whether he was a sincere Muslim.

Although my own questioning of Harb's intent might suggest that suspicion of intent had become naturalized to some, especially given the new property regime's deep entrenchment, other conversations brought up the question of intent in a different grammar. In an interview with a regional mufti, I asked about cash waqfs and their validity. The mufti explained how, in the 2000s, there had been a sudden burst in waqf foundation, where the object endowed was not land and immovable property, but movables and cash. "Ten personal computers from here, $100 from there," he explained. While I was listening intently, he noted that some of the founders had good intentions and the means to found waqfs. Others, he continued, had good intentions but no means. And finally, "Some others . . ." and then he paused, as if stopping himself from making a hasty accusation. "We can't tell because this is in the realm of the *ḍamāʾir* [sing. *ḍamīr*]." He was referring to a person's inner life and thought, the *forum internum* (Johansen 1999). As a scholar versed in the tradition, the mufti, in his refusal to attribute bad intentions to founders seems to follow the grammar of intent in the Ḥanafī fiqh. Intent cannot be known or directly accessed; all that judges have available are external actions that can be assessed for their legality based on following the requirements of a waqf foundation deed. And it is to such external signs that the mufti turned. He noted that the sudden abundance of waqfs is dubious (*tuthīr al-tasāʾul*), especially given the kinds of objects endowed for an everlasting endowment: ten personal computers are outdated in a very short while, so why are they made into a waqf, he asked. In these questions, he did not attribute dubious intent to the founders, but simply noted the "consumability" of the endowed objects and the questions it raised.

While the mufti refrained from passing judgment on the intent of these founders, the *question* of intent and ulterior motive arose unsolicited. Suspicion permeates the realm of waqf making, even when it follows the Ḥanafī fiqh in the sharīʿa courts. This generalized suspicion that accompanies waqf foundations and practice echoes what Hussein Ali Agrama has proposed as an important particularity of the modern rule of law (beyond state monopoly over violence and bureaucratic legal rationality): an "overall disposition," an affect of "organized suspicion that continues to suffuse social life" (2012, 130). Furthermore, Agrama argues that when it operates under modern rule of law, sharīʿa becomes subject to the same modality of suspicion. The suspicion of the mufti towards the founders seems to confirm Agrama's analysis. Furthermore, Abu Samah of al-Irshad wa al-Islah explained to me that it was the grand mufti's suspicion about cash waqfs and their misuse by some to collect donations and then disappear that prompted the mufti to issue a memo requiring his approval of all waqfs. Such generalized suspicion, as Agrama observed in Egypt, leads to the exercise of sovereign power to control manipulations of waqf foundation.[61]

61. In Egypt, for Agrama (2012), who is interested in thinking about secularism, the intervention of sovereign power produces questions about religion and politics and is therefore very closely tied to questions of secularism. In the case of the waqfs, the question of secularism does not arise in this

The generalized suspicion about waqfs and their manipulation by ill-intentioned founders and even by the DGIW is so prevalent that suspicion was itself the subject of commentary during the waqf exchanges in the reconstruction of downtown Beirut at the end of the Lebanese Civil War (1975–1990), which I will discuss further in chapter 5. Some members of parliament associated with the Jamaʿa Islamiyya criticized the plan to exchange waqfs for shares in the company in charge of the reconstruction of the city center (Sawalha 2010, 38). An article in *Annahar* reports that these MPs noted the "obscurity and vagueness surrounding the fate of the waqf parcels in downtown Beirut is the reason behind the turmoil around them, regarding the good intent, vigilance, or the 'aim in Jacob's desire' [*al-ghāya fī nafs yaʿqūb*]" (14 January 1994, 6). The expression "al-ghāya fī nafs yaʿqūb" is a variation on the Qurʾanic "ḥāja fī nafs yaʿqūb" (12:68), an expression explaining why Prophet Jacob directed his sons to enter Egypt from different gates. This advice, this verse states, could not avert what God had written for them, but it satisfied a desire in "Jacob's heart." Qurʾanic commentators generally agree that Jacob's desire was to protect his sons from the evil eye. The expression mentions a desire that is "in Jacob's heart," his *nafs*, that locus of interiority and intent, which is usually inaccessible. The article thus reflects the suspicion over the DGIW's intent in handling the waqfs, while also putting the blame on the DGIW's own actions for this suspicion.

It is important to note here that such accusations are not done in the context of the judiciary where, in the Ḥanafī tradition, intent alone is not the object of scrutiny. Nonetheless, many traditions enjoin Muslims in their daily lives, even more than in the judicial context, not to impute bad intent to others. Revelation clearly advices Muslims to "avoid most guesswork [about one another], for behold, some of [such] guesswork is [in itself] a sin" (Qurʾan 49:12). As Muhammad Asad explains, guesswork, *ẓann*, in this context "may lead to unfounded suspicion of another person's motives" (2003, 904n14).[62] Such injunctions, along with

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particular context of suspicion towards intent, although it does arise in the circulation of waqf revenues and people between the state and foundations as I mention in chapter 2 and further elaborate in the conclusion.

62. Another important series of verses on accusation and guesswork appears in chapter 22, Al-Nur (The Light), especially verses 11–20, which commentators take as a response to accusations of adultery against the wife of the Prophet, ʿAʾisha, in what is known in Islamic history as the "Account of the Lie." She was accompanying the Prophet to a battle, and as the troops decamped returning to Medina, she was inadvertently left behind. She was found and brought back by one of the Companions, and so gossip about her spread, causing much distress to the Prophet, with some Companions even suggesting that the Prophet should divorce her, since the Prophet's wives' moral probity should be above any doubt. Revelation cleared her of these accusations and promised her slanderers suffering. The greatest suffering was promised to the person "who takes it upon himself to enhance this [sin]" (Qurʾan 24:11). Muhammad Asad argues that such people are those who stress "in a legally and morally inadmissible manner, certain 'circumstantial' details or aspects of the case in order to make the slanderous, unfounded allegation more believable" (2003, 596n14).

substantial traditions discouraging presumptions about others and related issues, like gossip, encourage an ethic and disposition of abstinence and avoidance of discussing others' intents and their actions (as we saw in the above discussed hadith about "splitting believer's hearts"). Even more, as Islamic legal historian Ahmed El Shamsy shows, "Subjecting the faults of others [with respect to the rights of God] to public view" was strongly condemned in various traditions as it infringes upon the right to privacy of the individual, who was encouraged to hide sins and repent and work on developing the right dispositions through practice (2015, 243). These condemnations and dispositions, along with attempts to avoid gossip and rumor, necessitated some finesse during my interviews discussing the actions of and rumors surrounding founders, the DGIW, and the grand mufti, with pious subjects—and sometimes to no avail. This abstinence was compounded by my being a researcher affiliated with an American university, whose political affiliations were not very clear, especially since I come from a very small family with diverse political views. Interlocutors would dodge my questions about the accusations the grand mufti's corruption or answer in some very elusive language.

CONCLUSION

In this chapter, I have shown how, starting in the mid-nineteenth century, new debt and property regimes in Mount Lebanon and Beirut were associated with increased scrutiny of intent in some transactions like waqf. Until then, waqf operated under a different debt and property regime, where formalism dominated transactions: intent was judged though actions, leaving subjective intent to God in the hereafter. Furthermore, debt was socially productive and coupled with injunctions of forgiveness. The new debt regime instated by the Ottomans in the nineteenth century sought to guarantee the rights of creditors, who in Mount Lebanon were mostly merchants tied to global capital. It allowed foreclosure for debt on private property and allowed the mortgaging of lands considered up to then inalienable (*miri* and waqf). This new debt regime brought up a heightened scrutiny of intent, particularly the intent to escape debt, because the old debt regime allowed an escape from the new, more systematic foreclosures.

The development of a new debt and property regime was an important crucible for the development of ideas that ulterior motive and inner intent reflect the "true" self. This modern idea that the true self is the inner one, which awaits to be discovered and which is the only way to achieve certain capacities, has usually been explored throughout religious and philosophical texts. For instance, Charles Taylor (1992) discusses the way philosophers and social and political theorists (from Plato to Descartes, Locke and Kant, Augustine and Montaigne) have approached the self. He traces, in their theorizations of the self, the rise of these new inner depths. In the history of waqf in Lebanon, we see the development of this novel form of subjectivity in response to material conditions. By animating

suspicion over the intent of founders, this new form of subjectivity allowed the curtailing of waqfs and became crucial to the reproduction of new debt and property regimes.

This new suspicion towards the intent of founders and waqf administrators permeates contemporary debates on waqf foundations, academic studies of the waqf, and even my own sensibilities. Yet, despite this suspicion, the older grammar of intent, which tied it to expressions in the here and now and left it to God in the hereafter, with its ethic of abstinence from guesswork, continues to inform practitioners' discussions of waqf founders' intent and of intent more broadly. Suspicion towards founders' intent dovetails with the demands that charitable giving should be selfless, a conception that arises with the conceptualization of the free market as a sphere of pure self-interest. In this bifurcated world, waqfs that serve the founder and their family, in addition to protecting from foreclosure, came to be seen as not charitable. We turn in the next chapter to the project of distinguishing between truly charitable (for collective benefit) as opposed to self-interested (for private benefit) family waqfs. This distinction was crucially enabled by the new conception of the self and its "real" intent discussed in this chapter.