Writing Qadis:
How crime cases are constructed in the late Ottoman sharia courts of Greater Syria

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The bulk of Ottoman historiography has for decades been mulling over the trope of social history, as studies of populations, cities and their countryside, their merchant and landowning classes, trade and land tenure patterns, have become pretty much standard and normative for the last half century. This has led researchers to look for specific data in Ottoman records, be it the qadis sijills, the imperial registers at the Başbakanlık and elsewhere, or the regional archives kept in private and religious domains (monasteries, synagogues, and awqāf registers). Even the high literature of fiqh and sufism—the two predominant cultures of the Ottoman centuries—and the *tarājim* local biographies of the a'yān and ulama, not to mention historiographies of cities and regions, personal diaries and belles-lettres, have not escaped the sad fate of being factualized for the sake of well crafted social history narratives, whose links to the original texts remain obscure at best.

Undeniably, Ottoman social history represents a step forward from an earlier generation of historians, epitomized by the work of Fuat Köprülü, whose vision of Empire was determined more by a combination of chronology (the question of the "origins" of the Ottomans), diplomacy and policy, and less by an eye on social structure. Moreover, with the likes of Ömer Lutfi Barkan and Halil İnalcık, the influence of Fernand Braudel's *Annales* tradition was plainly visible: social history matters for the simple reason that it dealt with the lives of common people, and was not to be limited to élite groups, the sultan's household and harem, or the fate of diplomacy.

When I began my work on Ottoman Greater Syria in the 1980s my main point of reference was indeed social history. Yet, there was something missing in that great tradition. For one thing, when I started working on the qadi's registers of nineteenth-century Damascus, the documents were hard to decipher and contextualize within the legal traditions of jurists and judges, and made little sense once confronted with the broader issues that social history has been accustomed to handle. In fact, all such documents were primarily concerned with the micro-management of the daily lives of common people (and at times those of élites)—not with price inflation, land tenure, trade, capitalism, the world economy, or the Empire's decline or prosperity, at least not as broad historical topoi. The movement, therefore, between the micro and macro levels of the lifeworld was not that obvious, a problem that social history often concealed, for the simple reason that it was not that much concerned with the *reading* of documents, and the difficulties that such an *analysis of texts* would pose.[1]

[1] A parallel problem in the works of Halil İnalcık, Roger Owen, and André Raymond, as examples of the social history canonical works since the 1980s, is an absence of sociological and anthropological

Such difficulties were threefold. First, a document in order to be properly understood must be treated as a text endowed with meaning, and whose construction is of prime importance. Second, a proper reading of the document-as-text should be primarily concerned with *how* the text is constructed, and its *internal* meaning would be set relative to that construction. Strictly speaking, therefore, it makes little sense to assume that all meaning should come from a postulated "outside," for instance, from broader historical trends affecting the Empire's economy and policies. Third, the assumed links between the reading of texts and the broader trends cherished by social history must remain suspended for the sake of a better understanding of texts. Moreover, once we establish the primacy of texts for their own sake, *any* text, be it a sharia court document or a fiqh manual, would be processed with similar interest. In other words, we would not disfavor a text simply because it was a product of élite groups (e.g. the ulama), or because in its very nature it was in essence prescriptive (e.g. a fiqh manual) rather than descriptive and informative. In a strange way, therefore, a textual history of the Ottoman Empire would free social history from its most common inhibitions, bringing it closer to some of the concerns that the old traditional historiography had mastered, such as concerns with text and meaning.

I want to test such hypothesis in the reading of sharia courts crime records. For some reason crime records were notoriously rare in the qadis sijills. I will not address here the causes behind such paucity in the number of criminal records, as I would prefer to concentrate on a close reading of the documents themselves. Ideally, a reading of such documents would require a parallel reading of specific chapters in the fiqh manuals that concentrate on homicide (*jināya*), crime and theft, and blood money (*diya*), which I did elsewhere.[2] For lack of space, however, I will assume that the reader is already familiar with such notions, and will only bring them whenever necessary.

Findings of fact

Crime cases were at face value different from the contractual cases common to the Ottoman religious courts. First, they were very rare—so rare that one might think that cities like Beirut and Damascus lived in complete peace.[3] In fact, for most of the nineteenth century, until the nizāmī courts came into effect by the 1870s, the number of homicide related cases typically varied between naught to two per sijill (comprising on average at least 500 to 600 cases). Second, not a single case either prompted for an "investigation" from a judge or local authority, to the point that one wonders whether

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reasoning, in particular in their assessments of social groups, and the relations that they nurtured towards one another.

[2] See my *Grammars of Adjudication* (Beirut: Institut Français du Proche-Orient, 2007), Chapter 11.

[3] By contrast, Cairo, in that respect at least, was much more vibrant, see Rudolph Peters, "Islamic and Secular Criminal Law in Nineteenth Century Egypt: The Role and Function of the Qadi," *Islamic Law and Society* 4, no. 1 (1997), 70-90. Cairo enjoyed much more impressive penal procedures and had majālis specifically devoted to that purpose. The first modern penal code, under Muhammad ʿAli, goes back to 1829–30. See also the study on nineteenth-century Cairo registers by Khaled Fahmy in this volume.

anything like an "investigative procedure" did exist at all, and, if anything procedural followed, where was it applied? Third, since investigations were out of question, homicide cases (or others with a minor or major physical damage) were primarily meant to "reconcile" people and collect damages (often in the form of an inheritance) rather than punish the culprits, either by accepting the defendant's innocence, or in case he[4] was to be found guilty, the *diya*'s nature and amount (that is, blood money) had to be assessed and specified prior to reconciliation. In other words—and that's the main point—the basis of such cases was primarily *contractual:* that was indeed an unusual form of coming to terms with a murder's mystery, which by all means did not simply led at establishing the *diya'*s value. In effect, and this applies to the Beirut cases in particular, a settlement was reached whereby the plaintiff(s)—that is, the victim's "kin"—would be acknowledged as the sole legitimate inheritors of the victim's succession (*tarika*), in return for the plaintiff(s)'s indirect acknowledgment that the accused (defendant) was indeed innocent.

Working with crime cases is altogether a different experience,[5] even though the similarities with the great majority of land and property cases, whose purpose was to bypass a rigid notion of contract, is also striking.[6] In fact, the lack of independent investigation, the way witnesses testified in court, and the overall theatrical (fictitious) démarche of those cases, makes them quite familiar. The reconciliatory nature of crime cases transformed hearings into short episodes that on average were not much longer than sale or tenancy contracts. An understanding, therefore, of the nature of homicide in the context of shari'a courts needs to take account of all those limitations: rarity of cases, their conciseness, the lack of investigation,[7] and the fictitious form of the hearings.

Weapon determines intent

In homicides (and, more generally, crimes), what the legal system was concerned with was whether the act of killing was premeditated or not, that is, was the act *'amd*? The notion of *'amd* as premeditation and planned action is associated with *qasd,* intent(ion), purpose, and design. Purpose is what pushes an individual towards a premeditated act of killing, but since purpose is usually taken to be "subjective" or "hidden [*bātin*]," the jurists were more concerned with the "externality" of *'amd.* This does not mean, however, that premeditation is necessarily "objective" or "visible [*zāhir*]"; it is rather the association of premeditation with the weapon used (*ālat al-qatl:* the machine of killing) that determines whether the act was premeditated or not. In other words, the objective criteria were established by jurists based on the weapon used: this was enough in itself to determine the "degree" of premeditation in an actor's action to the point that the internal

[4] Even though women in principle were not ruled out from committing a crime and hence showing in the role of defendant, I never came across such cases. The reason will become more obvious as our discussion on crimes progresses.

[5] On the Islamic law of homicide in general, see J. N. D. Anderson, "Homicide in Islamic Law," *Bulletin of the School of Oriental and African Studies* 13 (1951), 811–28.

[6] See my *Grammars of Adjudication,* Chapter 3.

[7] This seems to be the case in the Moroccan Shari'a courts, see Jacques Berque, *Essai sur la méthode juridique maghrébine* (Rabat, 1944), 105: "Le cadi n'a à aucun moment de pouvoir d'enquête."

subjective motivations were of no real concern for "penal law." Thus, in the words of the prominent Damascene jurist Ibn ʻAbidin, reflecting a common view of crime among late Hanafis,

> Premeditation is [identical to] purpose [*al-ʻamd huwa al-qasd*] and the association is made only in relation to its evidence [*dalīl*],[8] and the latter is furnished by the killer's use of his own weapon [*ālat-ahu*], so that evidence stands out in lieu of what needs to be proved [*uqima al-dalīl maqāma al-madlūl:* evidence replaces intent].[9] What points to evidence [*dalā'il*] therefore becomes a legal proof whose knowledge is based on assumptions [*al-maʻārif al-zanniyya al-sharʻiyya*]. [Thus, sharʻi law] makes it plainly clear that punishment [*qusās*] should be applicable even if the witnesses did not mention a premeditated purpose.[10]

Hanafism thus plainly distances itself from intention altogether and from the "subjectivity" of the killer's motives, as no visible interest is manifested towards the *motif du crime*. Instead, what is looked upon are external signs of premeditation that are directly associated to the weapon of the crime. In fact, those external signs—such as the use of a specific weapon—are enough per se to override testimonies of witnesses that would not determine for sure the deliberate nature of the act. Hence, unlike other areas (such as contracts and obligations), the distancing is even from what witnesses have to say: it is thought that witnesses would be unable to determine for sure whether the alleged criminal act was premeditated or not, and what they effectively saw would at best only *document* the crime (Ibn ʻAbidin goes as far as to suggest that judges should refrain from asking witnesses whether the crime they witnessed was premeditated or not).

Pre-trial settlements

What did a nineteenth-century criminal case contain? Not much. Either a plaintiff accused his defendant of a crime he had no evidence for—such cases came rapidly to an end and were as short as the acknowledgment of a contract—or else scant evidence was furnished but whose status remained problematic: witnesses, for example, heard something but did not see it—the kind of evidence that only a mufti's fatwā would find a resolution to; such cases, due to the fatwā's matter-of-factness, were also very brief. Other cases argued about *diya*s in terms of their amount, timing, and conditions of delivery. That, however, was not enough to create long and complex cases because court procedures made the assessment of *diya*s even simpler than estimating the value of a defunct's properties and belongings.

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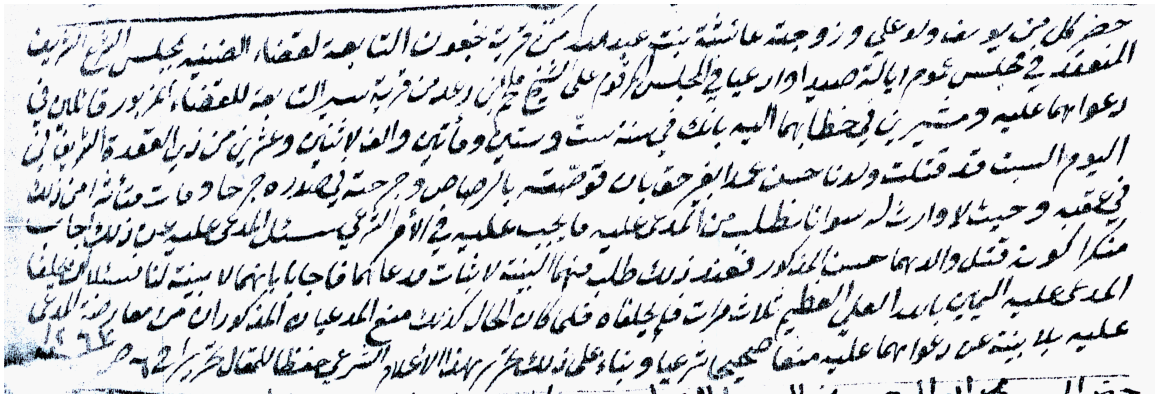
[8] Broadly speaking, *dalīl* could be a sign, an indication, a mark, or denotation; in short, it is what the science of semiotics refers to as the "signifier." In this context, however, *dalīl* is closer to evidence and proof (*bayyina*) since the use of a particular weapon is enough proof in itself to establish whether the act was deliberate.

[9] *Madlūl* has several equivalent terms that all cluster around "meaning": sense, signification, intent, and denotation. In this context, it is the meaning of the act in its totality which also includes the (subjective) intention of the killer.

[10] Ibn ʻAbidin, *Radd al-Muhtār* (Mecca, 1966), 6:527.

By far, the most common criminal hearings belonged to the first category: plaintiffs without evidence, and defendants that denied all allegations either on oath or even, because no explicit request was made, without oath. Such strategies intended to vindicate a defendant's name from any wrongdoing by creating a fictitious litigation—sometimes years after the alleged crime—through a specific formula that would require the complacency of both parties; some cases, however, were a bit stronger in that they pushed for an acknowledgment of the plaintiff(s) right over their kin-victim's succession.



> **[C-1]** Yusuf, son of 'Ali, and his wife 'Aysha, daughter of 'Abdullah, from the village of Bakh'un in qadā' al-Dinniyyeh, were both present at the honorable shar'i majlis that held its session in the province of Sidon. They claimed that Shaykh Milhim b. Ra'd from the village of Sir, in the same qadā' above, had, on Saturday 20 Dhul-Qa'da 1266 [27 September 1850], premeditatedly [*'amd-an*] killed their son Hasan by shooting him with a bullet and wounding him in his chest; he died from the repercussions of his wound. Since the parents of the deceased are his sole inheritors, they requested that the defendant pays his compensation [that is, the *diya*]. When questioned about the complaint, the defendant denied that he murdered the plaintiffs' son Hasan and summoned them to prove their allegations. They replied that they are unable to furnish the required evidence. They were then asked whether they wished the defendant to take oath three times in the name of God the Almighty. But since they did not solicit him to do so, the plaintiffs were forbidden to complain against the defendant without any substantial evidence.[11]

Such cases were by far the most common, even though the time lag between the alleged crime and the hearing itself—almost nine years—was indeed unusual, as it usually flip-flopped from several months to a year or two at most. Considering the extreme rarity of crime cases in the nineteenth century, homicide hearings seem to have been even much more tightly controlled than those related to land or contractual settlements. Yet, the extreme brevity of the document forces us to question directly its points of silence and its ambiguities (what it doesn't say, but only alludes to), and, above all, the long delay—nine

[11] Beirut shari'a courts, unnumbered register and pages, 6 Safar 1276 (4 September 1859). (Notice the nine-year difference between the alleged crime and the date of the complaint.)

years—between the date of the hearing and that of the alleged crime. This long delay, which repeats itself with slightly different time frameworks in other similar documents, could be looked upon as the *punctum* of the document-as-text.[12] First, inheritance in this case, unlike some cases below, was only part of the issue. The text in fact mentions that "the parents of the deceased are his only inheritors," a statement delivered without any legal evidence, in the form, say, of a confirmation from a judge or mufti, probably because the plaintiffs' right of inheritance was more or less well established.[13] Still, even though inheritance was neither the main nor the only issue, the text underscored it indirectly: in declaring the accused's innocence, the judge also made the point, *en passant,* that the victim's parents were his sole inheritors. Could it be that such an acknowledgment was necessary to proceed with the inheritance? Or did the victim leave a succession that had problems? Be that as it may, the case does suggest that it was not only about inheritance, and, considering that in nine years the plaintiffs could not accumulate any evidence against their accused, their case was not about the *diya* either, since they expected no compensation whatsoever. The other alternative, however, was that the passing of the inheritance to the parents was indeed a form of compensation, a quid pro quo between plaintiffs and defendant. Second, the fact that the two plaintiffs decided to present their case in court nine years later, with no evidence at hand, and without even requesting from the accused to take oath, suggests only one thing: that the purpose of this fictitious litigation was precisely not to accuse the defendant of any crime but rather to clear his name of any wrongdoing. In fact, what is known for certain is that the defendant was only nominally an "accused," and the lawsuit might well have been intended as a redemptive process. My assumption is that the plaintiffs received their son's inheritance in return—otherwise, why bother and mention it in the judge's ruling?

Since the apparatus of justice did delegate considerable powers to the parties in criminal litigations, it was left to the victim's kin to decide who was the murderer, then opt for the right punishment, and, in case the *diya*-as-settlement was the option, its "price" had to be worked out between the two parties. The "next of kin," who often posed themselves as the sole legitimate heirs to the victims (even though the two categories of *walī al-damm* and *wārith* were legally very different, one involving property rights, while the other assumed blood-relations), could have requested—except for associating a murderer with the victim's body—at any moment, the mediation of the shari'a courts. Thus, choosing or avoiding the courts was part of the strategies deployed by the actors. In the above case, the "accused" might have had this title imposed by the other party for as long as nine years; he might also have been summoned to compensate in terms of blood money; but, for reasons impossible to guess, the final settlement came as a gesture in court to possibly clear his name—an indication that disputants use the legitimacy of the court system and its prestige to push for an optimum settlement in their own terms and conditions. The other alternative—courts imposing their normative rules on the litigants—seems less

[12] On the notion of *punctum* in "reading" photographs as texts, see Roland Barthes, *La chambre claire. Note sur la photographie* (Paris: Éditions de l'Étoile, Gallimard, Le Seuil, 1980).

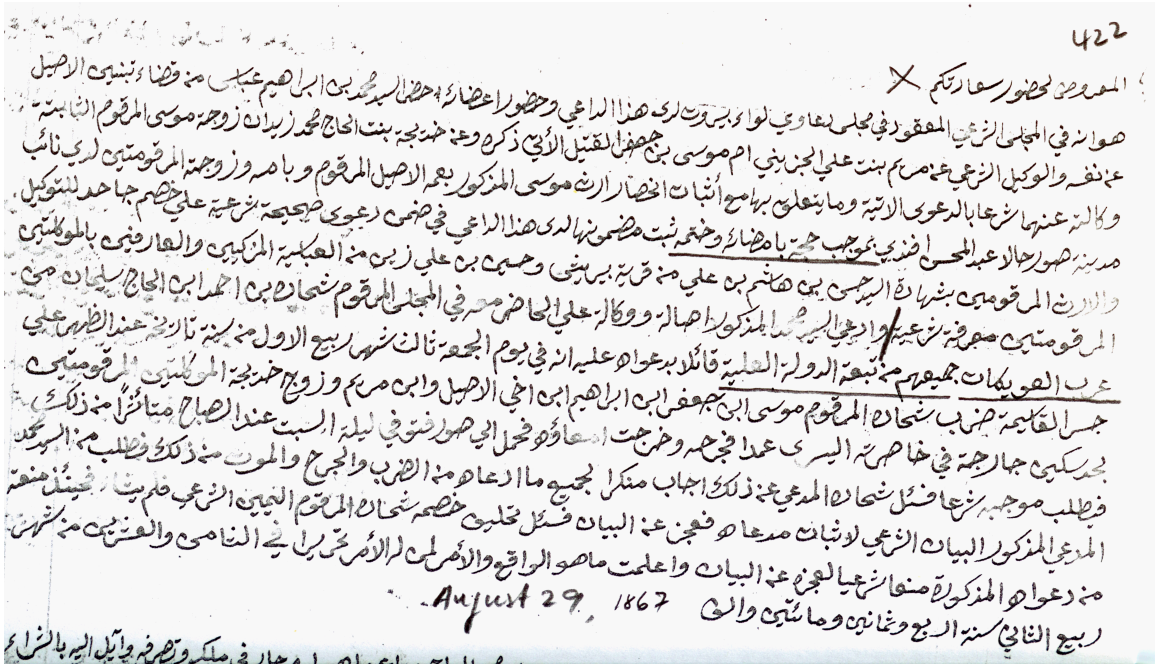
[13] Inheritance would have been less obvious had the victim been married with children: in that case, his parents would have been among several possible inheritors, and their right for their son's succession, including the *diya,* would have had to be established either by means of a legal order or through a strategy of negotiation with the other kin members and with the defendant himself (see cases below).

likely due to the delegation of powers.

Even though all the Beirut cases below manifest distinct variations from the above model, they nevertheless all share common features: 1) plaintiffs decided on their own who the accused was, and they were not helped in this task by any official institution; 2) plaintiffs often introduced themselves as de facto heirs of the victim's succession; 3) it should therefore be known once and for all whether the accused shared any responsibility in the crime; in case they[14] did, the blood money had to be shared among plaintiffs-cum-inheritors, that is, it would become an integral part of the *tarika;* 4) because plaintiffs litigated with no evidence, the common procedure was for the accused to take oath and deny (*al-yamīn 'ala man ankara*); however, many were not even summoned to take oath by their plaintiffs—since this was their own exclusive right to make such a request—and were thus cleared on the basis that no evidence was furnished and no one summoned them to take oath; finally, 5) since it is highly improbable that the same weak point would repeat itself from one case to another—namely, that plaintiffs accuse others of manslaughter with no evidence— "litigation" therefore sounds purely fictitious—a procedure to settle on friendly terms rather than accuse anyone with wrongdoing.

My assumptions regarding all homicide procedural fictions are therefore based on two main presuppositions: 1) that a crime did in fact occur—even though no independent investigation was ever pursued to confirm or disprove the alleged homicide; and 2) that the defendant must have been related to the alleged crime in one way or another. Again, those are only assumptions, but which nevertheless make more sense than proposing that a crime may not have occurred, or that the accusations were purely fabricated; or, worse, naïvely assume that all those litigations were "genuine." Thus, within this perspective, not taking oath—with the plaintiffs' consent—was a device that prevented defendants from lying under oath, in case they did commit what they were accused of, as we have been assuming all along.

[14] While the plaintiffs could have been either men and/or women, the defendants were always male. Thus, women were never accused of committing a crime.



[C-2] Muhammad b. Ibrāhim ʻAbbās from the locality [*qadāʼ*] of Tibnin introduced himself to the sharʻi majlis meeting in the liwāʼ of Beirut, as representative of Maryam bt. ʻAli al-Juzayni, mother of the murdered Musa b. Jaʻfar, mentioned below, and of Khadija bt. Hājj Muhammad Zaydān, the wife of Musa. His right to represent them has been legally approved regarding the following lawsuit and what is related to it. The inheritance of the aforementioned Musa has been legally limited [*ithbāt inhisār irth*] by the actual deputy of the city of Tyr, ʻAbdul-Muhsin Efendi, based on a document he signed and sealed, to Musa's paternal uncle, his mother, and wife. The content of the document has been approved [by the court in favor of] the plaintiff-representative as part of a valid lawsuit against a denying opponent [*khasm jāhid*] in order to represent [the plaintiffs] and [follow up] on the inheritance; all this was certified by [two witnesses][15] who know the two clients [plaintiffs] very well.

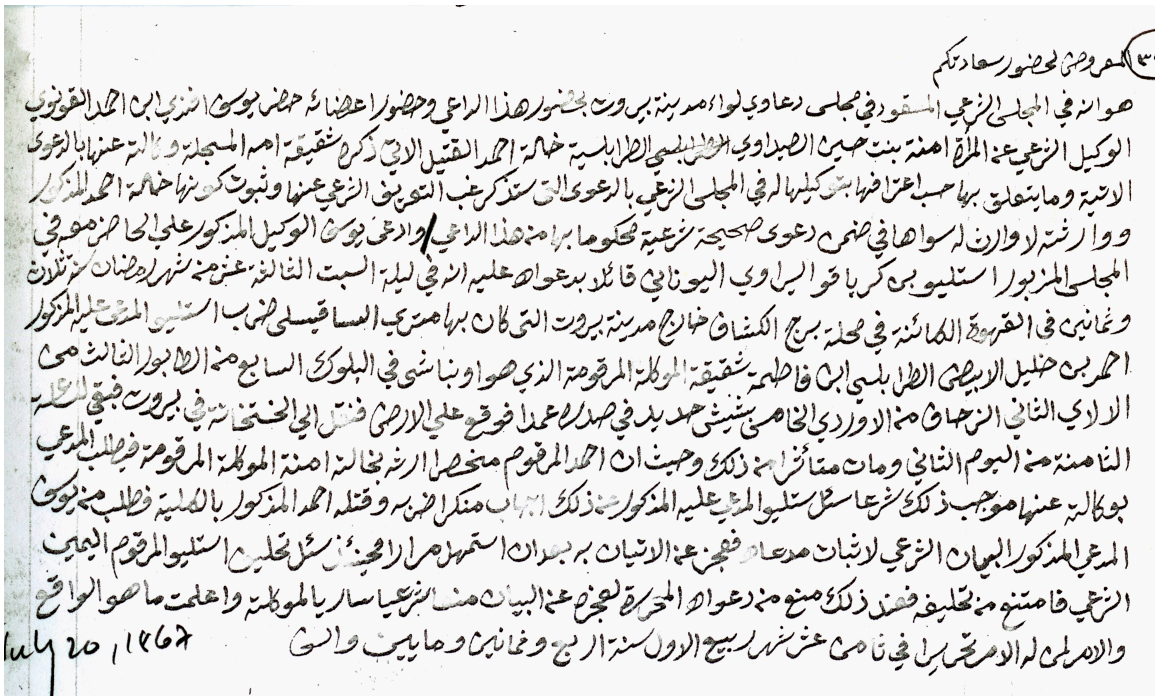
[The representative] complained against Shihāda b. Ahmad b. Hājj Sulaymān, from [*ʻashirat*] ʻArab al-ʻUwaykāt, all of them subjects of the [Ottoman] state [*jamiʻuhum min tabiʻat al-dawla al-ʻulyā*], and present with him in the majlis. [The plaintiff-representative] asserted in his lawsuit against [the accused] that on Friday afternoon, the third of Rabiʻ I [1284, 5 July 1867], over the bridge of al-Qāsima, Shihāda had hit Musa b. Jaʻfar b. Ibrāhim, my brother's son [nephew], son of Maryam, and the husband of Khadija, both of them being [my] aforementioned clients, with the sharp edge of a cutting knife on the left side of his waist, thus wounding him: his intestines became all visible. [The victim] was brought to Sūr [Tyr] and died there on Saturday morning as a result of his wounds. When [the accused] was asked to delve into [the representative's claims],

[15] Names and places of residence included.

> he denied all allegations: the hitting, wounds, and death that resulted from the beating. The plaintiff was then summoned for evidence, but was unable to furnish any, and when he was asked whether he would like his opponent to take oath, he replied that he does not wish to do so. He was then legally forbidden to accuse [the defendant] of any [wrongdoing] because he was unable to provide any evidence.[16]

This case does not differ much from the preceding one (C-1) except that the two dates—that of the alleged crime and the court hearing—are much closer (a couple of months only; in the first case, the nine-year gap made the fictitious character of the litigation seem even more obvious). What this case, however, underscores more thoroughly was the desire of the "next of kin"—the plaintiffs—to settle for the status of the inheritance, since, it was believed, that by settling first the issue of the accused and then the blood money that he ought to pay, the inheritance would come next. Thus, the plaintiffs's representative (who was himself a "next of kin"—the victim's nephew—and also a plaintiff alongside the other two) was given mandate not only to confront an "opponent denying his crime," but, more important, to take care of an inheritance whose beneficiaries had been already identified by a deputy judge (even though the identification of beneficiaries, through a previous court order, was not all too common). Since such a demand was explicitly stated in many crime cases, there is a serious possibility that with defendants strongly denying committing manslaughter, and with absolutely no evidence presented against them, such cases were designed to 1) clear up the accused's name; and then 2) proceed with the distribution of the inheritance among the beneficiaries. What strengthens this second alternative are some of the document's more "marginal" statements: the core of the text is supposed to be an accusation for manslaughter and, following some Hanafi opinions, only the wife was supposed to benefit from the right to retaliate (since the fiqh privileges matrimony); but the text soon managed to move from a restricted "next of kin" to one that was more general, that is, to all beneficiaries from the victim's inheritance. The case could therefore well have been designed for a specific purpose, namely, to clear off the way to proceed with the inheritance. The specific task of designating all beneficiaries was common to many crime cases. Moreover, some repetitive elements are already visible in both cases (C-1 & 2): sharpness of the weapon, denial of the accused, who was not even asked to take oath, and, finally, plaintiffs with lots of claims but no evidence. Considering that plaintiffs were, in the final analysis, granted their victim's inheritance, such cases ought to make more sense when looked upon as contractual settlements rather than judges' rulings over homicides. The idea here was that what was accorded as a compensation for the brutalized *nafs* was a *māl mutaqawwam* (legally "exchangeable commodity") sanctioned by the court.

[16] Beirut shari'a courts, unnumbered register, case 422, 28 Rabi' II 1284 (August 29, 1867).



[C-3] In the Beirut majlis and in presence of all its members, Yusuf Efendi b. Ahmad al-Qawnawi introduced himself as a representative of the woman Amina bt. Husayn al-Saydāwi from Tripoli, the maternal aunt of Ahmad, the murdered person [whose case will be discussed below], and the sister of his mother. The representative's right was certified by his own client in the majlis itself, and, beside representing her, he was prompted to follow up the lawsuit, and to introduce her legally [*al-ta'rīf al-shar'i 'an-hā*], and assert the fact that she is the aunt of [the murdered] Ahmad, and his only inheritor as well; all this as part of a valid lawsuit.

The representative Yusuf complained against the Greek Estillo b. Kirbāqu al-Yirāwi, present with him in the majlis, and claimed in his lawsuit that on Saturday night on 13 Ramadān 1283 [19 January 1867], in the café located in the locality of Burj al-Kashshāf outside the city of Beirut, where was present Mitri al-Sāqisli,[17] the defendant Estillo did hit Ahmad b. Khalil al-Abyad, from Tripoli, the son of Fātima, the client's sister, and who was an officer [in the Ottoman army],[18] with an iron clad on his chest in a premeditated act [*'amd-an*]. He fell on the floor and was taken to the hospital in Beirut where he survived until the following day at eight [in the evening] and died affected [from his wounds]. And since the inheritance of [the deceased] is limited to his aunt, her representative would like to seek a legal [acknowledgment].[19] When the defendant was questioned on [the

[17] Unclear why that name in particular was mentioned since the person was not involved in the case, not even as witness.

[18] The full grade and rank was recorded in the document.

[19] Who should have provided such an acknowledgment—the court or the accused? Strange as it may seem, the totality of the cases presented here do suggest that the acknowledgment was granted either

> plaintiff's allegations] he denied hitting and killing [the victim] Ahmad. The plaintiff Yusuf was then summoned to furnish evidence to prove his claims, but he failed to do so, even though he was given ample time. He was then given the option to demand from Estillo to take oath, but he refused to do so. The plaintiff thus had his case dropped because of lack of evidence.[20]

This case underscores once more the fact that the sole purpose might have indeed been the inheritance. In other words, the fictitious litigation *fixes* the identity of the inheritor within a specific set of parameters. The plaintiff first posed herself as the victim's next of kin (in this case, it should have been the mother and/or father, but since the document did not specify that they predeceased their son, it is not clear why they were not the sole beneficiaries); only then, as a second step, did the plaintiff *also* introduce herself as the sole heir, so that the whole case looks as if the main concern was murder and that inheritance was a contingent effect. The plaintiff, however, would not have made such unsubstantiated claims had it not been for the quid pro quo involving her inheritance. But since the judge proceeded with his ruling, and since the plaintiff-inheritor had no evidence against her accused, the real purpose—besides clearing the defendant from manslaughter—the ruling de facto acknowledged the status of the plaintiff: "And since the inheritance of [the deceased] is limited to his aunt, her representative would like to request a legal [acknowledgment]." Even though such a recognition was never and could not have been made explicit in court, it was an *implicit* part of the contractual settlement: the judge neither denied such a right to the plaintiff, nor did he ask her for any evidence regarding her alleged inheritance rights. Moreover, having refrained from furnishing the court with any evidence, either oral or written, regarding her right to inherit her deceased nephew, that right was legally assumed as a genuine outcome of an overall settlement. Yet, it was precisely because such evidence seems to have been problematic, that such fictitious litigations might have posed themselves as an alternative. In fact, fictitious homicide litigations were ideal, among others, for heirs with an "uncertain" or "weak" status—those who, for instance, might not have made it to the *ashāb al-farā'id*—and that this case (C-3) exemplifies well enough: the maternal aunt poses herself both as a next of kin and sole heir; not only the victim's parents were left out (and if they predeceased their son, why was this not mentioned?) but no evidence—on the right to inherit, and on the crime itself—was ever supplied. Only a two-step procedure would compensate for such deliberate flaws: the plaintiff first introduces herself as a next of kin, as the "closest" to the victim with an eagerness to retaliate; she then posits herself as the sole beneficiary and muses with a possible peaceful settlement with blood-money compensation; and

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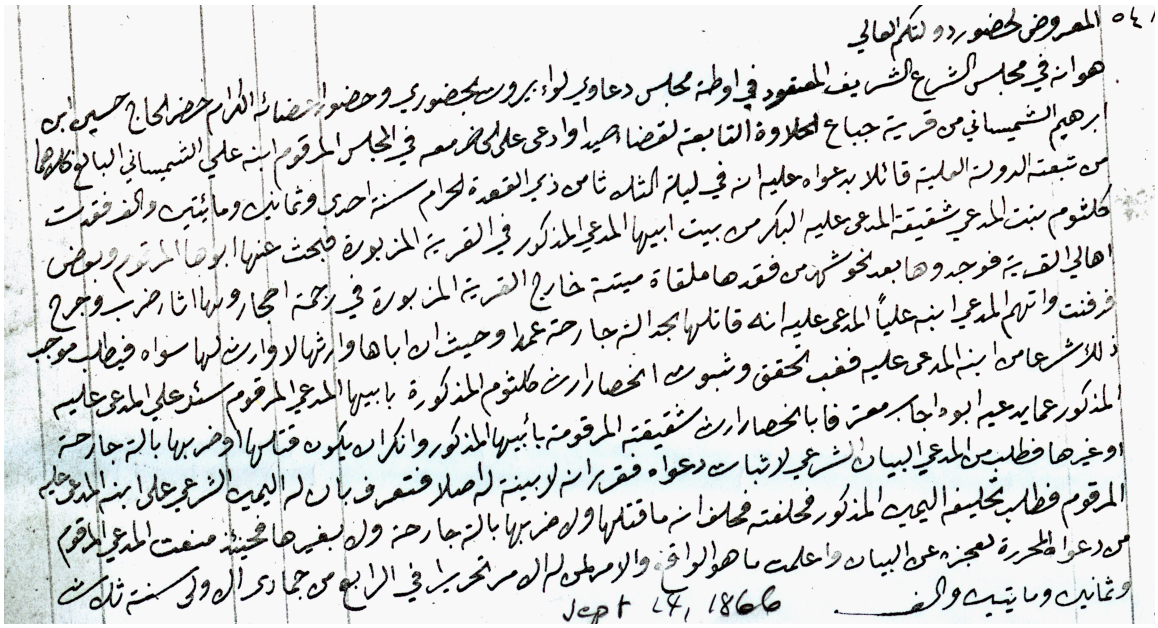
implicitly or explicitly by the accused themselves. Whenever plaintiffs were short of official documents proving their right to inherit, that did not prevent them, however, to pose themselves as the sole heirs and be accepted as such. But without the legal prerequisites, judges would have been powerless to grant them such rights. Plaintiffs thus exchanged this recognition from their opponents—and that was the main purpose of such cases—on the condition that they would neither present evidence against them nor push them to oath taking. But since the accused enjoyed no legal powers to confirm a plaintiff's right of inheritance (except in rare cases when the two parties were blood related, whereby the accused would de facto metamorphose into a quasi-witness), the acknowledgment was only implicitly established whenever the paperwork was absent, as in this case: claimed by the plaintiff, and left without evidence, yet not denied by anyone, hence de facto accepted.

[20] Beirut shari'a courts, unnumbered register, case 343, 18 Rabi' I 1284 (20 July 1867).

finally, she ends up, with the court's *implicit* consent, as the only legitimate heir. This case thus presents us with procedures similar to those in property litigations. For example, a waqf whose litigation was *in appearance* over who should be administrator, and whose ruling was at face value over an administrative conflict, turns out, upon closer inspection, to have been a fictitious litigation in order to confirm the status of the properties as waqf. Thus, even though the ruling itself pondered solely on who should be administrator, it indirectly approved 1) the status of the properties, and 2) the distribution of revenues among beneficiaries. In other words, the final ruling would itself act as a de facto waqfiyya and which would assume several other implicit pre-rulings that often constitute the *raison d'être* of the lawsuit. And since no waqfiyya would ever be furnished, the litigation-as-text would pose itself as the de facto foundational act of the waqf, one that included all the bequeathed properties, conditions, list of beneficiaries, and the administrator's identity and role.

The same principle applies to some homicides, as their cases were passed to court neither to solve a murder mystery nor to acquit an accused with nothing in return for the victim's kin. What in fact the plaintiffs received in return for freeing their accused was an implicit recognition of their status as heirs. At times, the explicit reference to the presumed inheritance took the form of a shameless bargaining—and this was even more so between family members where the transaction costs were minimal.



[C-4] In the majlis of Beirut, responsible for the lawsuits in its liwā', and in the presence of all its members, was present Hājj Husayn b. Ibrāhim al-Shumaysāni from the village of Jubā', part of the qadā' of Sidon. He complained against his son, 'Ali al-Shumaysāni, also present in the majlis, and both of them subjects of the [Ottoman] state, and claiming in his lawsuit against the latter that on Tuesday night of the month of Dhul-Qa'da 1281 [March 1865], his daughter Kulthum disappeared from the village. When her father [the plaintiff] and other inhabitants

> of the village began searching for her, they found [her body] two months later lying outside the village. Stones were thrown over [the body] with traces of beating and a wound. She was then buried. The plaintiff accused his son ʻAli, the defendant, of premeditatedly killing her with the edge of a sharp weapon; and since her father is her sole heir and there is no inheritor but him, this should be legally confirmed by his son, the defendant. Upon investigation, and after it was confirmed that Kulthum's inheritance is restricted to her father, the plaintiff, the defendant was summoned to reply to his father's allegations. He did so acknowledging that the inheritance of Kulthum should be limited to her [and his] father, and denied ever killing or hitting her with a deadly weapon or something else. The plaintiff was then asked to furnish evidence in support of his lawsuit, but he replied that he had none, and was then told that he enjoys the legal right [to request] from his son to take oath [*fa-taʻarrafa bi-anna la-hu al-yamīn al-sharʻī ʻala ibni-hi*]. When he requested that [his son] takes oath, [the latter] swore that he neither killed nor hit her with a sharp weapon or something else. At that point, the plaintiff had his lawsuit dropped since no evidence exists [to support his claims].[21]

This parricidal case, even though very similar in its structure to previous ones (C-1, 2 & 3), nevertheless contains some unique features. First, the victim was too close a family member, and what was unique here was that bloody incestuous triangle between father (plaintiff), son (accused), and daughter (victim). Second, the father wanted to be the sole beneficiary of his daughter's inheritance: thus, besides his desire to obtain an acknowledgment from his own son,[22] his other aim was to ensure that his son be denied any inheritance—and this, with the son's open consent. Of course, it is impossible to speculate over the motivations behind such a willingness; it does seem awkward, however, to accuse one's own son of a parricide the latter denied—on oath—in order to deprive him of a fraction of his sister's succession. What is even more striking is the accused's statement restricting his sister's inheritance to his father only. Considering that the accused enjoyed a full legal right to share with his father his sister's inheritance, his admission of his father's right as the sole heir—especially that he denied any wrongdoing—is the other strange "confession" in this document. We are then left with two possibilities: either assume that the son—for reasons unknown to us—was ready to sacrifice himself and his reputation for the sake of his father and lose his share in the inheritance; or assume—and this is more likely—that the case was an outcome of a bargaining between father and son: the son did commit the hideous crime (this would imply that he lied under oath), but the father nevertheless consented for clearing his name in exchange for the totality of the inheritance. Some of the previous cases could also be

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[21] Beirut shariʻa courts, unnumbered register, case 548, 4 Jumāda I 1283 (14 September 1866).

[22] What was the legal value of such an acknowledgment, and why did it have to come from the accused himself? Why not from a judge or mufti (C-2)? Such questions could only be answered in the context of all the Beirut cases in this chapter, all of which explicitly bring the inheritance issue, as if it was the only thing that mattered, thus suggesting that 1) a trade-in seems at work here between restricting the inheritance to the plaintiff(s) and the freeing of the accused; and 2) acknowledging the plaintiff(s)'s right to inherit was probably in need of a legal confirmation, and that was precisely what such fictitious litigations indirectly (as part of a broader ruling on the murder) brought to the plaintiff(s)—something that apparently was difficult, if not impossible, to obtain by other means.

read along the same lines, namely, that they were the outcome of settlements: "acknowledge that the inheritance is mine/ours and I/we dissociate your name from the blood of our victim."

In fact, and surprisingly, it was the inheritance rather than the *diya* that imposed itself in all four cases, but the plaintiffs, however, claimed the victims' inheritance very differently. In the first case (C-1), "the parents of the deceased are his only heirs," but with no formal evidence whatsoever. In all likelihood, the plaintiffs, who had "lost" their case, opted for that kind of settlement precisely for the sake of the inheritance, and the only statement regarding the latter, having remained unchallenged by both defendant and court, achieved a de facto legal status. The second case (C-2) was more specific since the beneficiaries had already been identified by a deputy judge. The settlement thus only helped to reconfirm the plaintiffs' right, on the one hand, and declare the case close in order to proceed with the inheritance, on the other. In the third case (C-3) the inheritance also came up, and the plaintiff's representative requested "a legal acknowledgment," but neither the Greek defendant nor the judge furnished any explicit statement regarding the status of that inheritance. As in the first case (C-1), the plaintiff's request was probably only intended to be addressed as such in the ruling, and consented as genuine simply because it was left unchallenged. Undeniably, the fourth case (C-4) was the strangest since the plaintiff's demand was confirmed by the defendant. But what was common to all four was that judges made no formal plea for the plaintiffs to prove their inheritance rights. One would have expected, say, the usual corroborative witnesses. But while the text supposedly narrated the crime itself, it managed the inheritance as a side issue while in reality it was at the heart of all four hearings. That was indeed the whole purpose of those procedural fictions: redeem the crime as a private tort, thus indirectly approving the plaintiffs' right to inherit, or, as we shall see in a moment, their right for the *diya.*

Crime settlements metamorphosing into contracts

Peaceful settlements, however, were not always limited to a bargaining in the form of exchanging a redemption with an acknowledgment of an inheritance right; they were not limited to bargains between individuals either. As the following case shows, the defendants—consisting here of a group of elders in a village, hence, a class-action lawsuit—paid blood money to the plaintiffs even though they refused to acknowledge "their" alleged crime in court.

[C-5] To the shar'i majlis responsible for the lawsuits in the liwā' of Beirut, and in the presence of its members, came Hājj Husayn b. 'Ali b. Hājj 'Isa al-Kurāni from the village of Yāshir in muqāta'at Tibnin, [in his function] as guardian of the two minors, 'Ali Musa and 'Isa sons of Husayn b. 'Ali from the aforementioned village. The guardianship was approved in a signed and sealed document by the actual deputy [judge] of Tibnin whose content is confirmed as part of a legal lawsuit against a denying opponent concerning [the status] of the two minors and their mature brother Ahmad, an officer in the [Ottoman] army, who are all heirs of

> their murdered brother Muhammad; his inheritance being restricted to [all three], with no legal heirs but them.
>
> The guardian complained against Hājj Hasan b. Ahmad b. ʻAli from the village of Majdal Zun in the aforementioned muqāta'a, also present in the majlis, as legal representative of the rest of the elderly men in his village, [follows the names of a dozen elders], all of whom delegated him the right to represent them [with the formal approval of] deputy [judge] Mustafa Efendi in the following litigation [and for the following functions]: litigation, cashing, disbursement, settlement, disclaimer, acknowledgment, collecting, acquittal, and other kinds of contributions [*tabarru'āt*]. This was based on a written document signed and sealed by [the above deputy judge] ... on 8 Jumāda I 1284 [7 September 1867] ...[23]
>
> [The plaintiff] claimed in his lawsuit against [the elders' representative] that the brother of the two minors and the mature one, Muhammad b. Husayn b. ʻAli, was found dead in the property of Mārun in the lands of the village of Majdal Zun, in a location close to its built area, on Tuesday the fifth of March of the Gregorian calendar [1867] towards the evening. [The killing was performed] with a sharp weapon [damaging] his neck, head, and right hand, and two of his left-hand fingers. Regarding the location where he was found dead, anyone screaming there would have his voice heard in the village. The aforementioned people [of the village] killed him on purpose with a sharp weapon, so they are summoned, based on the shar' [to confess their crime]. When [the representative of] the defendants was given his right to reply [over his opponent's allegations], he did so acknowledging the existence of the dead body of Muhammad b. Husayn b. ʻAli in the property of Mārun in the lands of the village of al-Majdal, but that location is far from the built areas for about an hour, so had someone screamed, his voice would not have been heard; and no one from the people of the village killed him, nor has he knowledge as to who did it. When the plaintiff was requested to furnish evidence that the voice of the murdered could be heard from the village, and that its people killed him, he said he was incapable of doing so. The two disputants then discussed the case on their own outside the courtroom, and the second day, they came back to court and consented that they reached a settlement based on denial [*sulh-an 'an inkār*] and on two-thousand piasters to be paid by the defendants' representative to the party of the minors. Both parties have fully endorsed this settlement and signed it on behalf of their clients, and allowed themselves to take oath on their own.[24]

This case shares many similarities with all previous ones: a private party alleges that a homicide took place against one of its "relatives [*ahl*]," while the party in question also—and simultaneously—claims the victim's inheritance *in toto;* a group of people were accused of murder by plaintiffs who were claiming their victim's inheritance and who never furnished evidence; and, finally, the accused *as a group* were found non-guilty because no concrete evidence was furnished. Such similarities notwithstanding, depriving

[23] The document was also certified by two witnesses.
[24] Beirut shari'a courts, unnumbered register, case 475, end of Jumāda I 1284 (September 1867).

the case of its uniqueness would be a mistake: 1) an entire group—vaguely introduced as the "elders" of the village—were accused of murder, which stands in conformity with a common fiqh norm that when a crime occurs in the vicinity of an inhabited area, the responsibility would be shared by all; 2) a cash "compensation" (was it a *diya?*) went to the minors even though the defendants denied any wrongdoing and despite the fact that the plaintiffs were short on evidence. The case does indeed look as some kind of class-action suit in reverse, as a collectivity was held responsible of an alleged murder. Beyond that, the accused-as-collectivity did not prompt for different court procedures and were looked upon as if one person.

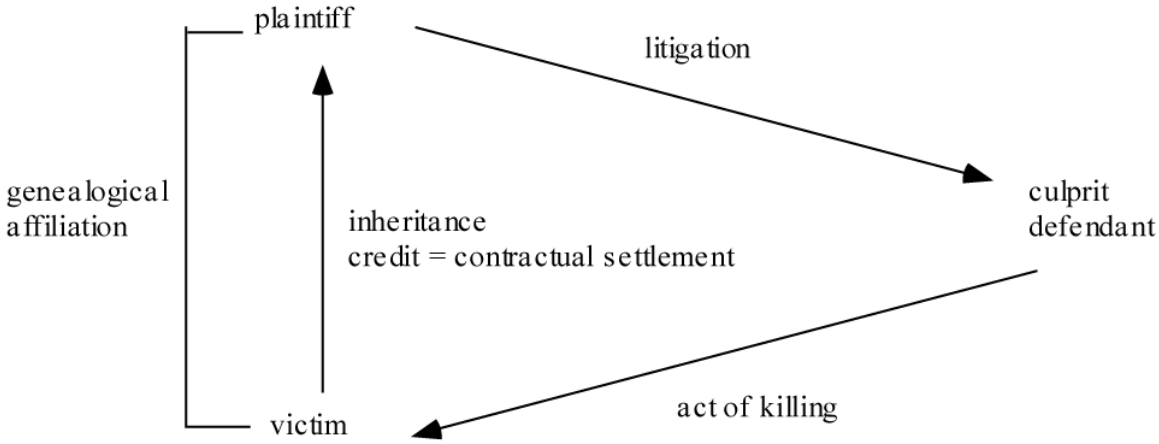
The right of guardianship (and inheritance?)[25] was approved by a deputy judge prior to the hearings so that the case does not seem to have necessarily opened new grounds in this regard, but possibly only reconfirmed the inheritance rights of the two minors and older brother. The elders' representative was granted full power to negotiate and settle, with several functions clearly listed, and that provided him with the authority to propose a compensation despite the denial. So what is a denial *with* a compensation, or a "settlement based on denial"? Upon closer inspection, the case turns not that different in that respect from previous ones: each settlement implied a give and take, a credit and a debt, a lender and a borrower, a contractual settlement—the succession (inheritance) or *diya* in lieu of the defendant's innocence, even if the latter maintained their denial, as all did; all such arrangements, to be sure, were an essential aspect of fictitious litigations—and this case was no exception. Since the inheritance was apparently guaranteed, the plaintiffs also pushed for cash compensation, which they would not legally refer to as *diya* simply because the accused denied all charges. When it came to evidence, the plaintiffs, thanks to their representative, only suggested that their victim, having been killed with a sharp weapon, should have screamed, and *must* have therefore been heard in the neighboring village. Since presumably both things must have happened—the scream and its impact—the alleged murder must have also been a common enterprise; if not, then someone must have come to rescue, but that did not happen. Needless to say, such allegations did not contain much evidence, but that was besides the point: in fact, they were more meant to give a complete scenario of the alleged murder than to bring forth evidence, in the hope of strengthening the ethical over the legal. All "homicide stories" narrate, in a brevity only familiar to the shari'a courts, what "we all know happened, but for which no evidence exists, so let us settle peacefully—honor versus *māl.*" Such a narrative "says it all" even if all is denied. Hence "a settlement based on denial," as the end of the text proposes, meaning that we know it all, all is denied, and we settle. Thus, "denial" here is more legal than actual: outside the space of the court, the parties knew what happened. Similarly, "signing on behalf of the other" and "taking oath on their own" were meant to imply that each party was fully aware of the other's motivations and intentions: I know why you have to deny; and, you know that I have to pay you the compensation you are implicitly requesting. It is in the nature of fictitious litigations to rely on such a double-language—one legal, the other social (religious, moral, and

[25] The phrasing leaves it unclear whether the approval by a deputy judge included both guardianship and inheritance, or whether only the former was legally approved while the exclusive right of inheritance, like some of the previous cases in this chapter, was one of the unproved claims put forward by the plaintiff.

customary).

The murderous triangle and the cycle of debt

All five cases are structured within a triangular formula—the cycle of debt: (1) the plaintiff and potential heir who initiate the suit; (2) the culprit-defendant who deny all charges; and (3) the victim whose wealth would eventually be transferred to the plaintiff.



The murderous triangle

The plaintiff is the one who initiates the lawsuit on the basis that he or she is agnatically related to the victim. On the other hand, the culprit-defendant enjoys no specific genealogical affiliation of consanguinity to either one (except, of course, in the parricidal case, C-3 *supra*). It was the defendant who allegedly triggered *ab initio* all action by depriving the victim of his or her soul. Each case is therefore haunted by the phantom of those victims whose wealth would eventually be transferred to the plaintiff. In fact, the *loss* of the victim would translate into a *debt* whose burden is to be shared between plaintiff and defendant. The defendants were the ones who allegedly committed those crimes, and even though all of them strongly deny such allegations, their coming to court side-by-side to the plaintiffs, in what seems like pre-trial arrangements, only reinforces their "debt" towards the victims's families. In order to be freed from the accusation that hovers around his name, the defendant would have to *"give"* something to the victim's family, that is, his explicit recognition that the plaintiff would indeed be the legitimate heir. Moreover, the plaintiff "owes" something to the victim whose blood has not yet been revenged, and he or she does so through a peaceful settlement with the defendant. It is, however, the victim who will eventually act as a creditor/lender to the next of kin, that is, the plaintiff who will be *permanently* indebted to the latter. As to the act of killing, which whether perpetrated by the alleged culprit or not, would have nevertheless triggered the whole process and placed all three parties in a relationship of debt. Thus, the alleged culprit, even though always in a situation of denial, would not have come to the courtroom were he not interested in clearing his name through a judge's ruling, and he would not have identified the plaintiff as the sole beneficiary had he not been implicated in the crime in one way or another (possibly as the real killer). The alleged culprit thus ends up as a de facto "real" killer who finds himself in a situation of debt not only

towards the victim for having taken his or her life, but also towards the plaintiff as the next of kin to the latter.

Hard cases

Obviously, not all crime cases were "soft," in the sense that neither a "hard" decision-making was required nor the outcome would be unpredictable (settlement through denial). Some, in particular rare ones collected from the Damascus shari'a courts, might be described as "hard"—at least in the sense that the "elements of crime" took judges by surprise and forced them to request fatwās from muftis.

> **[C-6]** In the court of deputy judge Muhammad Tāhir Efendi whose signature appears above, the two brothers, Shaykh Zayn and Husayn sons of Yāsin al-Shay'āniyya, from the village of Bayt Suhm, complained against the noble Amin Aghā son of the deceased noble Darwish Aghā al-Shahrur. They claimed that the defendant had beaten, eleven months ago, their mother, Safiyya bt. Ibrāhim Dudāra, with a stick [*kirbāj*]. He hit her on her right side, arms, and legs. She had been sick for two months and thus died as a result of the beating. They demanded him to pay the legal damages and questioned him on that matter. When [the court did so, the defendant] responded by denying that he did hit her on her side and legs, but only on her palms, five times with a stick. After hitting her on her palms, she lived in perfect health for two months without any signs of sickness that might have been caused by his beating. She thus died a natural death according to God's will and fate. The two plaintiffs were then asked to prove their case and to furnish evidence. [They] thus brought two witnesses, 'Abbās b. Ibrāhim, brother of the deceased, and Mustafa b. Muhammad 'Urmān, one of the inhabitants of the village. They both testified that the defendant had, eleven months ago, brought the now deceased mother of the plaintiffs ... to his *qasr*[26] inside the home of Muhammad, the Shaykh of the aforementioned village. And when they were inside the *murabba'*[27] of the *qasr,* we heard the defendant beating the now deceased mother of the plaintiffs. They did not see the defendant hit her with their own eyes but only heard him doing so. They have no knowledge as to whether the deceased died as a result of the beating or from another cause. At this point, the deputy judge, whose signature appears above, requested to prepare a draft of the lawsuit [*tahrīr surat al-da'wa*] in order to request a fatwā.
>
> A draft was prepared and sent to the greatest of all *'ulamā',* Husayn Efendi Murādi, the actual mufti of Damascus, and after reading it to both parties and letting each one present his case, the reply came back on a sheet of paper [*qirtās*]

[26] Literally, a "palace," the *qasr,* in Aleppo, Damascus, and Cairo, was a "living room" located in the upper floor. In Damascus, the percentage of homes containing a *qasr* rose from around 6 per cent in the middle of the eighteenth century to 19 per cent at the beginning of the nineteenth; an evolution that could be explained by an increase of the more prestigious domains within the city, see Brigitte Marino, *Le faubourg du Midan à Damas à l'époque ottomane. Espace urbain, société et habitat (1742-1830)* (Damascus: Institut Français de Damas, 1997), 235.

[27] Literally, a "squared place," denoted in Damascus a squared or slightly rectangular room, usually located in the lobby floor, see Marino, *Le faubourg,* 229.

> from the *amīn al-fatwā.* [The fatwā stated] that there should be evidence [in the form of] witnessing [of] her death because of [the defendant] beating her, and in case there is no evidence of that, the defendant, having recognized the beating, should report to the judge what he finds convenient for himself [*bimā yaliqu bi-hi*]. The plaintiffs were thus asked, as the fatwā requested, to furnish a formal proof, but they acknowledged that they had no such evidence save [for the statements of] the two witnesses...
>
> At this point, the deputy judge informed the plaintiffs that having furnished no evidence, they do not have a [solid] case against the defendant. The case was then settled according to the terms put forward by the defendant, and the plaintiffs were forbidden to act against the defendant because they do not have a case against him. All this took place in the presence and knowledge of the most honorable *'ālim,* Ahmad Efendi Husayn Zādah.[28]

The novelty here—compared to cases in which the victim either died immediately on the spot, or few hours or days later—was that the victim (the mother of the plaintiffs) lived for two months—"in perfect health," according to the defendant—prior to her untimely death. The other legal problem was that she was not hit with a "decisive weapon," according to both accounts, plaintiffs and defendant. Having established the general rule regarding the "objective" nature of the weapon used, our case here proves to be a "hard" one precisely because of the indecisive nature of the weapon, which all by itself prompted for a fatwā. Evidence had therefore to necessarily move in another direction, that is, other than the tool-of-killing. What the fatwā therefore tackled was the third indecisive element in the case, namely, that all evidence was heard, not seen. The plaintiffs thus lost their case on three grounds: the weapon, time of death, and evidence; and what the fatwā did was simply reject evidence bestowed on the basis of only heard witnessing: unless the event had been directly witnessed, evidence should remain inconclusive. Not much room therefore for either "circumstantial evidence" or a *reconstruction* of the crime. Having thus rejected a plausible reconstruction of the woman's death, the fatwā ruled in favor of the defendant.

But could the fatwā have done otherwise? Could it have, for example, *assumed,* simply as a hypothesis, that the beating did in effect cause the alleged "premature" death two months later? To be sure, that would have required an autopsy, which was unheard of at the time in that society (that would have to wait for the nizāmī courts in the 1870s and later). The autopsy would have *interpreted* any possible link, if any, between the beating and the state of the body. But in the absence of such a diagnosis, the fatwā becomes the interpretive tool par excellence. In effect, had our witnesses seen the event with their own eyes, as the fatwā had requested, would their testimony have been more conclusive? Let us assume that they had witnessed a "harsh" beating—but then how "harsh" is "harsh"? And how would this harshness be linked to a death that occurred two months later? The point here is that even direct (non-mediated) evidence would have required the action of a fatwā simply because the latter was endowed with enough symbolic authority to *interpret,* make assumptions, and create links between facts which would have otherwise

[28] Damascus 344/133/32-33/18 Ramadan 1252 (27 December 1836).

been unauthorized.

In sum, the mufti's fatwā notwithstanding, the case did not thoroughly elucidate what would have been looked upon as decisive evidence: some kind of evidence (such as the non-witnessing of an event first-hand) had to be eliminated. But, had the two witnesses *seen* the event, their seeing would not have necessarily allowed them to link the death with the beating; and the court, in turn, could have—because of the nature of the weapon—classified the death as non-intentional: that is, the purpose was to beat the woman and intimidate her, but not to let her die. A fatwā would in all probability have come at the rescue. Indeed, even by modern standards, the relationship, if any, between the beating and the alleged untimely death two months later, would only be a matter of *interpretation,* primarily by the medical authorities. Had autopsy been available, the medical authorities would have had to *interpret* any possible effects of the beating on the woman's body. The point here is that since any damage inflicted on the body through beating affects in an infinite number of ways, no abstract generalization could be made beforehand. In the fiction of the judiciary, however, only a mufti's fatwā, which enjoyed de facto oracular powers, could decide what evidence implied under such circumstances.