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The rarity of crime,  
the phantom of the victim, and the triangle of debt

Crime cases were rare in nineteenth-century Ottoman sharia courts. Their rarity, in conjunction with what seems like a batch of fictitious litigations, ought to prompt the modern reader at looking beyond what such documents have to offer at face value. Based on a number of court records from Beirut and Damascus, this essay attempts to combine textual and anthropological methods at reading court documents and fiqh texts from the Ottoman era. The aim would be to respect the inner logic of texts in conjunction with their legal meaning, while presenting a theoretical framework for handling Ottoman Islamic texts.

*Fiction is the perfect crime*

A man rushes out from a house with a knife in his hand, he is covered with blood, moving swiftly, and signs of fear are visible [*zāhir*] [on his face.] People then entered the house immediately at that time, and found a slaughtered human being at the same time [*bi-dhalika al-hin*]<sup>1</sup> who was stained with his own blood. And there was no one in the house except that person who was [leaving and] caught in that situation: he becomes a suspect [*yu'khadh bi-hi*] since there are visible indications [*huwa zāhir*] [of his culpability.] No one would dare [*lā yajtari aḥad*] claiming that he did not kill [the man in the house], and assume that the dead person slaughtered himself, or some other man [other than the suspected one] killed him, then climbed the wall, and ran away. That is a remote possibility which is not acceptable because it was not created by some

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<sup>1</sup>Probably meaning as soon as they entered the house.

evidence [*dalil*] such as the possibility that the witnesses might have lied.<sup>2</sup>

This passage, by a leading Egyptian jurist of the first few decades of Ottoman rule (d. 1562), strikes by how little is required prior to declaring a suspect guilty. In effect, it is fair to say that the suspect was declared guilty instantaneously: the knife, blood, fear, movements, and above all, the presence of a slaughtered body in the vicinity of a running away suspect, were more than enough to move swiftly from the status of suspect to that of culprit. *Zāhir*, or “the external manifestation” of an “event,” a term repeated twice in the passage, is a key component in the context of crime: evidence and indications of guilt [*adilla*] must be visible to the eye; and it is the eye of the beholder that discovers the links between the object of crime and the subject who committed it. A shari‘a court hearing would in all likelihood leave little room for direct- or cross-examination since no “investigations” per se were ever conducted. But if no homicide investigation did progress much beyond an elementary process of witnessing and accumulation of evidence, it was more because “penal law” would have no interest in the “motive” of the crime as such. In effect, the “motive” would come into the picture only through the tool-of-killing. In other words, the suspect would not be subject to obscure motives and hidden passions created by a troubled psyche, but an individual who either committed the crime or not. What therefore pushed for a final decision making were external indications (signs or signifiers): the tool of the crime was one of them; and a knife, as the one in the hand of our suspect, being a sharp metallic object not designed specifically to kill but at least to cut, is one of those objects which, all by itself, could easily inflict guilt upon a suspect (a wooden stick was less reliable for that matter). The same Egyptian jurist, Ibn Nujaym (d. 1562), noted on another occasion, when discussing the Ḥanafi “general rules (*al-qawā‘id al-kulliyya*)” that,

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<sup>2</sup>Zayn al-Din Ibn Nujaym, *Rasā‘il Ibn Nujaym* (Beirut: Dār al-Kutub al-‘Ilmiyya, 1980), 357.

punishment is in relation to the killer's intent to kill. But they said: since intent [*qaṣd*] is an internal motive [*amr-an bātini-yan*], then it is the tool [of killing] that should be considered as [an indication for] motive [*uqimat al-ālat maqāmi-hi*]. So that if the culprit killed his victim with an instrument that dismembers the bodily parts [*yufarriqu al-ajzā'*], then the killing is looked upon as premeditated. But if he killed his victim with something that does not dismember the bodily parts, it would then be looked upon as quasi-intentional, and, as the great imām [Abū Ḥanifa] stated, there should then be no punishment. As to error [*khata'*], it consists at targeting something lawful [*mubāḥ*: permissible], but a human being was wrongly aimed instead.<sup>3</sup>

Interestingly, Ibn Nujaym was discussing on that occasion the first of his “general rules,” the one stating that “rewards come only with good intentions [*lā thawāb illā bi-l-niyya*].”<sup>4</sup> Considering that the “general rules” constituted the most ambitious attempt by several generations of jurists up to the Majalla (1877) to establish abstract legal rules that would tie up the various branches of Ḥanafī fiqh together, from the religious rituals, *‘ibādāt*, and pecuniary transactions, *mu‘āmalāt*, up to torts and crimes, the crime example brought up in the above passage would represent a “case” for the more general “rule” regarding *niyya*. Having first stated that for all branches of Ḥanafī practice, *niyya* was an integral part of any practice, be it a contract, a transaction, or a crime, Ibn Nujaym then argues that when a crime does occur, intent could only be detected from the weapon itself: since the intention behind an action is by definition something hard to pin down and assess because it is “hidden” and “internal,” the only way to bypass such a difficulty

<sup>3</sup>Zayn ad-Din b. Ibrāhīm Ibn Nujaym, *al-Ashbāh wal-nazā'ir* (Damascus: Dār al-Fikr, 1986), 20.

<sup>4</sup>Ibn Nujaym, *al-Ashbāh*, 14.

would be in associating the act and its meaning with the instrument of the crime: that should all by itself constitute enough evidence, and the weapon becomes the objective signifier that establishes whether an act was intentional or not.

*The tool-of-killing as corpus delicti*

Homicides, therefore, rather than forming a category of their own, shared a similar dynamic with property and contract cases common in the Ottoman religious courts, that is, once we begin to look at homicides as “private torts” whose “compensation” ought to be settled between the various parties, then the similarities with contract become more visible.<sup>5</sup> In fact, once cases are looked upon in terms of their relation to their object (property, contract, succession, crime and tort), and how a case constructs itself around that object, the similarities become even more evident. For one thing, in the Islamic and Ottoman legal practices, the “object” itself is not what is open to investigation: judges did not care much about the current status of a disputed property, or a body found lying in the street, since “evidence” did not come from the object itself (as would be the case in modern scientific research or police investigation) but from the constructed evidence as presented by the disputants, their representatives, and witnesses.

*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.<sup>6</sup> In fact, the number of homicide related cases typically varied between zero to two per sijill (comprising on average at

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<sup>5</sup>See my forthcoming *Grammars of Adjudication* (Beirut, IFPO), chapter 3.

<sup>6</sup>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 Muḥammad ‘Ali, goes back to 1829-30.

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 anything like an “investigative procedure” did exist at all, and, if anything procedural followed, in which domains 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<sup>7</sup> was to be found guilty, the *diya*’s nature and amount (that is, blood money) had to be evaluated and specified prior to any 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 (*tarikha*), in return for the plaintiff(s)’s indirect acknowledgment that the accused (defendant) was indeed innocent.

Working with shari‘a courts crime cases is indeed a different experience,<sup>8</sup> but the similarities with the great majority of land and property cases, whose purpose was to bypass a rigid notion of contract, is also striking. 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

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<sup>7</sup>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.

<sup>8</sup>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.

context of shari‘a courts needs to take account of all those limitations: rarity of cases, their conciseness, the lack of investigation,<sup>9</sup> and the fictitious form of the hearings.

This study on crime is based on a three-pronged démarche that juxtaposes fiqh texts with the shari‘a courts, and the local city councils;<sup>10</sup> and the overall aim is to associate all textualities around a set of premises: 1) Homicides (and more generally crimes) were a private affair: there was no public prosecution office—or a *niyāba ‘amma*, as they are referred to today—and a crime—or its repercussions—could receive the mild attention of a judge’s court only when one of the victim’s “relatives” filed for a lawsuit. A culprit was not supposed to have a public persona either: the “public” had no power to decide whether a crime was moral or immoral, good or bad; in short, crime stories were not disseminated into society and remained private, and criminals were kept invisible and their narratives were not shared in public. 2) Judges were never concerned with punishments but only with the “repercussions” of a crime that became the subject of litigation: generally speaking, either the accused (defendant) had to be cleared out, that is, found not guilty, or in case he was found guilty, a settlement had to be worked out—usually in the form of an acceptance of a blood-money payment by the killer, or his *‘āqila* (“professional milieu”), or the “next of kin” (*wali al-dam*) of the victim. 3) Since judges never punished, and since an “investigation” was limited at most to sending an “explorer [*kashshāf*, or *mustakshif*]” to study the depth, size, and nature of the wound(s) on a victim’s body, it is quite possible then that the only authority that punished was the *wāli* or a body of associates close to him (the *diwān*, for example). Such a possibility is reinforced by the minutes of the Damascus majlis in 1844-45<sup>11</sup> which adjudicated over few crime and tort cases and decided on specific punishments; however, no thorough “procedures” seem to have been followed. 4) Since crime cases were not processed by

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<sup>9</sup>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 *cadī* n’a à aucun moment de pouvoir d’enquête.”

<sup>10</sup>The majalis records are not included here: see my *Grammars*, chapter 11.

<sup>11</sup>See my *L’économie politique de Damas* (Damascus: IFPO, 1993), chapter 3.

means of formal investigative procedures, the guilty or not guilty verdict was solely based on the basic rule of “evidence is on the plaintiff, and oath is on the denier [*al-bayyina ‘ala al-mudda‘i wa-l-yamin ‘ala man ankara*]”; this implied, in practice, that the accused (defendant) took oath to establish his innocence, and this only in case the plaintiff made a formal request for his opponent to do so, but for reasons that will become evident later, plaintiffs usually refrained from doing so. 5) Many such cases established the innocence of the accused; indeed, it does seem possible—even though such cases were brought up by one of the victim’s “kin”—that the whole ritualized “hearing” was staged so as to bring forth the defendant’s innocence—probably as part of a “deal” between the two parties; moreover, at times, a time lag of several months up to a few years between the alleged crime and the hearing itself marks some cases: that could be an indication that the sole purpose of such hearings was one of honor: we need to keep in mind that the “accused” was not associated with a particular murder the day of the lawsuit, but probably much earlier—he became an “accused” by the relatives of the victim, and, at some point, a common decision was made to clear his name out—in court, of course. Finally, 6) what all this amounts to is a process of redemption of the accused—a settlement of honor—so that he is not targeted anymore by the victim’s relatives for revenge or blood money, and, in some cases, the plaintiff(s) establish themselves as the sole inheritors of the victim’s succession.

### *The body, its parts, and their value*

To understand crime procedures in the shari‘a courts, a very different fiction needs to be imagined—both in its cognitive and normative values—from what we are accustomed to.<sup>12</sup> We have to imagine a system whose truth value was not axed on a subject-object

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<sup>12</sup>For a survey of shari‘a penal law, albeit one that is flawed in terms of its historical evolution, see Muḥammad Salim al-‘Awwā, *Fi Uṣūl al-niḡām al-jinā‘i al-Islāmi*, 2nd ed. (Cairo: Dār al-Ma‘ārif, 1983 [1979]). This survey, like many others that addresses itself to a contemporary Arab and Islamic audience, does not debate the complex issue of the historicity of penal law. It rather seems to “update” penal law to

paradigm; hence a “crime” did not constitute an “object” open for inquiry; and finding out the criminal was not a major obsession; indeed, the system was more concerned at assessing damages in terms of the normative expectations of the parties involved, and left the latter, in case they wished to do so, to retaliate on their own, or to seek peace, or else request blood money. Since the Ḥanafī tradition neither operates within a precise concept of penal law, nor does it separate between offences committed against a person’s body and those against a property—both would be classified as “usurpation (*ghaṣb*)”—the body itself, as long as the soul (*nafs*) has remained unharmed, metamorphoses into an object for compensation. Each part of the body, therefore, has a “price,” that is, is subject to damage assessment, and as such legally achieves the status of *māl mutaḳawwam*, a tangible object whose exchange is legally protected. In a classical case of property usurpation, the usurper must return that property to its owner. This is why when it is a question of malicious damage only, such as theft, Ḥanafīs request restituting the loss, but without penalty, as it falls under usurpation. In the case of a body, however, since the damaged part cannot be returned, an equivalent *māl* must be compensated to the victim. In Ḥanafī literature, the bulk of the chapters on penalties, delicts, usurpation, and punishment, address mostly the issue of compensation: primarily its value, and by whom and to whom it should be paid.

Strangely, once the crime in its totality ceases to be an object of investigation with the purpose of finding out the perpetrator and the motives behind the act, the legal literature becomes overburdened with the smallest possible details over the nature of the weapon used in the act of aggression, or the damages inflicted upon the victim’s body, or who among the “relatives” should enjoy the right to retaliate, or else to receive the corresponding blood money. Thus, the weapon itself as an instrument—or rather the *use* of a specific weapon (whether of a metallic or more malleable substance)—could in itself

constitute enough evidence that establishes the *motif du crime*, or rather the intention of killing, the *qaṣd*. Similarly, the body is not abstracted from its constitutive parts, that is, perceived in its functionality, but divided into unequal regions with unequal parts and organs so that each part could be assessed differently in relation the specific nature of the damage.

You should know that there is a second kind of *māl* [*res in commercio*] as compensation [*badal*] for the human body or the meanings [*ma‘āni*]<sup>13</sup> associated with it, such as blood-money value [*māl al-diya*]. The [body’s] members are of four parts: [1.] three that are single: the nose, the tongue, and the penis; in addition to the meanings that act singly on the body [*afrād fi al-badan*]: the brain, the soul, smelling, and tasting; [2.] members in pairs: the eyes, the ears that stick out, the eyebrows, the lips, arms, woman’s breasts,<sup>14</sup> the labia [*untha-yān*],<sup>15</sup> and the legs—all [could be subject for compensation for] blood money; one of them, [the eye, is compensated for] half [the blood money] and equivalent to each of the four edges of the eye, so that each edge [*shafir*: edge of the eyelid] is one-fourth of the blood money; [other organs should be divided into] ten parts [*a‘shār*]: the fingers of the hands and those of the legs, so that each one is equivalent to one-tenth of the blood money.<sup>16</sup>

Rather than subsume all “damage” under one broad category, the Damascene nineteenth-

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<sup>13</sup>In the fiqh, meaning (*ma‘na*) is the “mental image” associated with an utterance/statement (*al-ṣūra al-dihniyya li-l-lafz*). In this case, the body is associated with meanings such as blood money.

<sup>14</sup>By contrast, men’s breasts were not categorized: could it be because they were perceived as of no specific “utility”?

<sup>15</sup>The male organ was referred to as a single organ, as *dhakar*, literally “male” (still used in modern Arabic as an alternative to the more direct *qadīb*); by contrast, the woman’s labia were classified, like the lips, as “an organ in pairs” and referred to as the *untha-yān*, literally the “two females.”

<sup>16</sup>Ibn ‘Abidin, *Radd al-muhtar* (Mecca, 1966), 6:575.

century jurist Ibn ‘Abidin (1784-1836) assesses instead the blood money for each categorized organ separately. Besides the broad division of organs into singles and doubles, thus implying that doubles should always be evaluated in terms of their parts, the remaining organs follows a case-by-case installment: that is, each individual organ is evaluated in terms of its function and importance. Thus, in case the nose is damaged, it does make a difference whether the damage is purely aesthetic and hence does not affect the function of smelling, or whether the cutting of the edges (*al-mārin*) with the nosepiece has damaged the function of smelling: in the former case, only “one blood money” should be paid, while in the latter, it is twice the same amount; the reason being that the victim would have lost all or part of her nose, in addition to the faculty of smelling: these are two different things because “smelling is not in the nose,” but rather “the nose is designed to absorb the smells and transfer them to the brain,”<sup>17</sup> so that smelling is associated with a second organ—the brain. Similarly, since the penis combines several functions, the *diyya* has to be assessed accordingly. There are therefore organs designed for one specific thing—smelling—but whose functionality is linked to another organ, while others share several functions: in both cases, blood money could be doubled or tripled.

#### *Weapon determines intent*

In the same way that the body is not perceived in abstraction from its organs (individualized parts) and each organ is in turn assessed differently, similarly, the “weapon” of the crime is not an abstract object since each “weapon” represents for jurists a different set of problems. In fact, and in contradistinction to modern procedures that do not automatically associate *how* a person was harmed or killed with the crime’s telos, Hanafis had to establish graded scales for the weapon used, the damaged part of the body,

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<sup>17</sup>Ibn ‘Abidin, *Radd*, 6:575.

and the blood money to be refunded. This is particularly true of “homicide [*jināya*, pl. *jināyāt*],” “due to its importance and because of its connection with the souls [*nafs*, pl. *anfus*].”<sup>18</sup> This in itself is enough to pose *jināya* as one of the greatest sins, practically within the same category as blasphemy, even though the act of killing as punishment (for example, stoning), which is legal, does not fall within the category of sin.

In homicides (and more generally, crimes), what the legal system was concerned with was whether the act of killing was deliberately planned or not, that is, was the act ‘*amd*? The notion of ‘*amd* as premeditation and deliberately planned action is associated with *qaṣd*, intent(ion), purpose, and design. The 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 the jurists on the basis of 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 subjective motivations were of no real concern for “penal law.”

Premeditation is [identical to] purpose [*al-‘amd huwa al-qaṣd*] and the association is made only in relation to its evidence [*dalil*],<sup>19</sup> 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-dalil*

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<sup>18</sup>Ibn ‘Abidin, *Radd*, 6:527.

<sup>19</sup>Broadly speaking, *dalil* could be a sign, an indication, a mark, or denotation; in short, it is what the science of semiology refers to as the “signifier.” In this context, however, *dalil* 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.

*maqāma al-madlūl*: evidence replaces intent].<sup>20</sup> What points to evidence [*dalā'il*] therefore becomes a legal proof whose knowledge is based on assumptions [*al-ma'ārif al-zanniyya al-shar'iyya*]. [Thus, shar'i law] makes it plainly clear that punishment [*quṣāṣ*] should be applicable even if the witnesses did not mention a premeditated purpose.<sup>21</sup>

Ḥanafism 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 could 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 are 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 ‘Abidin goes as far as to suggest that judges should refrain from asking witnesses whether the crime they witnessed was premeditated or not).

### *The perfect crime*

Documents covering criminal cases were very rare and very short. In fact, in a milieu fully dominated by land cases and contractual settlements, crimes and torts look by contrast insignificant. Their rarity and shortness is partly explained in the shortcomings of shari‘a law regarding procedures, thus limiting it in practice, as most cases below show, to privately crafted contractual settlements. Such rarity applies for most of the

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<sup>20</sup>*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.

<sup>21</sup>Ibn ‘Abidin, *Radd*, 6:527.

nineteenth century (and probably for earlier periods as well)—at least until the nizami courts became operational by the 1870s.

*Pre-trial settlements*

So 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 “some” 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 solution to; such cases, because of the fatwā’s matter-of-factness, were also very brief. Other cases argued about *diyās* in terms of their amount, time, and conditions of delivery. That, however, was not enough to create long and complex cases because court procedures made the assessment of *diyās* even simpler than estimating the value of a defunct’s properties and belongings.

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 formula that required 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] Yūsuf the son of ‘Ali and his wife ‘Aysha, the daughter of ‘Abdullah, from the village of Bakh‘ūn in qaḍā’ al-Ḍinniyyeh, were both present at the honorable shar‘i majlis that held its session in the province of Sidon. They claimed that Shaykh Milḥim b. Ra‘d from the village of Sir, in the same qaḍā’ above, had, on Saturday 20 Dhul-Qa‘da 1266 [27

September 1850], premeditatedly [*'amd-an*] killed their son Ḥasan 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 *diyya*]. When questioned about the complaint, the defendant denied that he murdered the plaintiffs' son Ḥasan 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.<sup>22</sup>

This type of case was 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 varies between several months up 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 in general. Yet, the extreme brevity of the document forces us to question directly its points of silence and its ambiguities, and, above all, the long delay—nine 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.<sup>23</sup> 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 that came without any

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<sup>22</sup>Beirut shari‘a courts, unnumbered register and pages, 6 Ṣafar 1276 (4 September 1859). (Notice the nine-year difference between the alleged crime and the date of the complaint.)

<sup>23</sup>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).

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.<sup>24</sup> Still, even though inheritance was neither the main nor the only issue, the text confirmed 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 a confirmation 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, considering that the two plaintiffs decided to present their case in court nine years later, with no evidence in their hands, 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 chosen, 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

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<sup>24</sup>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).

*wali 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—and at any moment, the mediation of the shari‘a courts. Thus, choosing or avoiding the courts was part of the strategies deployed by the social 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 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 likely due to the delegation of powers.

Even though all the Beirut cases below present on their own distinct variations from the first one above, they nevertheless all share common features: 1) the plaintiff(s) decided on their own who the accused was, and they were not helped in this task by any official institution; 2) the plaintiff(s) often introduced himself (themselves) as the (or one of the) inheritor(s) 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 he<sup>25</sup> did, the blood money had to be divided among the plaintiff(s)-inheritor(s), that is, it was to become an integral part of the *tarika*; 4) because the plaintiff(s) litigated with no evidence, the common procedure was for the accused to take oath and deny (*al-yamin ‘ala man ankara*); however, many were not even summoned to take oath by the plaintiff(s)—since this was his/her/their own exclusive right to make such a request—and were thus cleared on the basis that no evidence was furnished and no one requested them to take oath; finally, 5) since it is highly improbable that the same weak point repeats itself from one case to another—namely, that plaintiffs accuse others of manslaughter

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<sup>25</sup>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.

with no evidence— “litigation” therefore sounds from beginning to end 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 make more sense than proposing that a crime did not occur in most cases, or that the accusations were purely fabricated; or, worse, naively assume that all those litigations were “genuine.” Thus, within this perspective, not taking oath—with the plaintiffs’ approval—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.

[C-2] Muḥammad b. Ibrāhīm ‘Abbās from the locality [*qaḍā’*] of Tibnin introduced himself to the shar‘i majlis meeting in the liwā’ of Beirut, as representative of Maryam bt. ‘Alī al-Juzaynī, mother of the murdered Mūsa b. Ja‘far, mentioned below, and of Khadija bt. Ḥājj Muḥammad Zaydān, the wife of Mūsa. His right to represent them has been legally approved regarding the following lawsuit and what is related to it. The inheritance of the aforementioned Mūsa has been legally limited [*ithbāt inḥiṣār irth*] by the actual deputy of the city of Tyr, ‘Abdul-Muḥsin Efendi, based on a document he signed and sealed, to Mūsa’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 [*khaṣm jāḥid*] in order to represent [the plaintiffs] and [follow up] on the inheritance; all this was

certified by [two witnesses]<sup>26</sup> who know the two clients [plaintiffs] very well.

[The representative] complained against Shiḥāda b. Aḥmad b. Ḥājj Sulaymān, from [‘*ashirat*] ‘Arab al-‘Uwaykāt, all of them subjects of the [Ottoman] state [*jami’uhum min tabi’at al-dawla al-‘ulya*], and present with him in the majlis. [The plaintiff-representative] asserted in his lawsuit against [the accused] that on Friday afternoon, the third of Rabi‘ I [1284, 5 July 1867], over the bridge of al-Qāsima, Shiḥāda had hit Mūsa b. Ja‘far b. Ibrāhīm, 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 Ṣūr [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], 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.<sup>27</sup>

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

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<sup>26</sup>Names and places of residence included.

<sup>27</sup>Beirut shari‘a courts, unnumbered register, case 422, 28 Rabi‘ II 1284 (August 29, 1867).

litigation seem even more obvious). What this case, however, emphasized 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 already been 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 in particular are some of the document’s more “marginal” sentences: the core of the text is supposed to be an accusation for manslaughter and, following some of the Ḥanafī opinions discussed above, 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 the beneficiaries from the victim’s inheritance. The case could therefore well have been designed for that specific purpose: namely, clear out 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 present 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 mutaḡawwam* sanctioned by the court.

[C-3] In the Beirut majlis and in presence of all its members, Yūsuf Efendi b. Aḡmad al-Qawnawi introduced himself as a representative of the woman Amina bt. Ḥusayn al-Şaydāwi from Tripoli, the maternal aunt of Aḡmad, 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 requested to follow up the lawsuit, and to introduce her legally [*al-ta'rif al-shar'i 'an-hā*], and assert the fact that she is the aunt of [the murdered] Aḡmad, and his only inheritor as well; all this as part of a valid lawsuit.

The representative Yūsuf complained against the Greek Estillo b. Kirbāqū al-Yirāwi, present with him in the majlis, and claimed in his lawsuit that on Saturday night on 13 Ramaḡān 1283 [19 January 1867], in the café located in maḡallat Burj al-Kashshāf outside the city of Beirut, and in which was present Mitri al-Sāqisli,<sup>28</sup> the defendant Estillo did hit Aḡmad b. Khalil al-Abyaḡ, from Tripoli, the son of Fātima, the client's sister, and who was an officer [in the Ottoman army],<sup>29</sup> 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].<sup>30</sup> When the defendant was questioned on

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<sup>28</sup>Unclear why that name in particular was mentioned since the person was not involved in the case, not even as witness.

<sup>29</sup>The full grade and rank was recorded in the document.

<sup>30</sup>Who should have provided such an acknowledgment—the court or the accused? Strange as it

[the plaintiff's allegations] he denied hitting and killing [the victim] Aḥmad. The plaintiff Yūsuf was then asked to furnish evidence to prove his claims, but he failed to do so, even though he was given ample time. He was then presented with the option to request from Estillo to take oath, but he refused to ask him to do so. The plaintiff had thus his case dropped because of lack of evidence.<sup>31</sup>

This case underscores 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 procedures. First, the plaintiff 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 inheritors); only then, as a second step, did the plaintiff *also* introduce herself as the sole inheritor, 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 when 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—became one of acknowledging the status of the plaintiff: “And since the inheritance of [the deceased] is limited to his aunt, her representative would like to

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may seem, the totality of the cases presented in this chapter do suggest that the acknowledgment was granted either 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 inheritors and be acknowledged as such. But without the legal prerequisites, judges were unable to grant them such rights. Plaintiffs thus exchanged this recognition from their opponents—and that was the main purpose of those 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 closely blood related: the accused becomes also sort of witness), the acknowledgment was only implicitly established whenever the paperwork was absent, as in this case: claimed by the plaintiff, and left without proof, but never denied by anyone, hence *de facto* accepted.

<sup>31</sup>Beirut shari'a courts, unnumbered register, case 343, 18 Rabi' I 1284 (20 July 1867).

request a legal [acknowledgment].” Even though such an acknowledgment was never and could not have been made explicit by the court, it was an *implicit* part of the contractual settlement: the court neither denied such a right to the plaintiff, nor did the judge 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 genuine as part 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 all heirs with an “uncertain” or “weak” status—those that might not have been included among *aṣḥāb 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 inheritor; not only the victim’s parents were left unmentioned (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 compensates 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 the idea of a possible peaceful settlement with blood-money compensation; and finally, she ends up, with the court’s *implicit* approval, 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 assumed an administrative conflict, turns out, upon closer inspection, to have been a fictitious litigation in order to confirm the status of the properties in question 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, a final ruling that acts as a waqfiyya and which assumes 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 of the homicides: their cases were brought 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 inheritors. 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 Ḥājj Ḥusayn b. Ibrāhim al-Shumaysāni from the village of Jubā', part of the *qaḍā'* 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 Kulthūm 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 'Ali, the defendant, of killing her on purpose with the edge of a sharp weapon; and since her father is her sole inheritor and there is no inheritor but him, it is requested that this be legally confirmed by his son, the defendant. Upon investigation, and after it was confirmed that Kulthūm's inheritance is restricted to her father, the plaintiff, the defendant was asked to reply to his father's allegations. He did so acknowledging that the

inheritance of Kulthūm 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 [*fā-ta 'arrafa bi-anna la-hu al-yamin al-shar'i 'ala 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].<sup>32</sup>

This parricidal case, even though very similar in its form and structure to the 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,<sup>33</sup> 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

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<sup>32</sup>Beirut shari'a courts, unnumbered register, case 548, 4 Jumāda I 1283 (14 September 1866).

<sup>33</sup>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.

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 inheritor—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 a reason 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 accepted clearing his name in exchange for the totality of the inheritance. Some of the previous cases could also be read along the same line of thought: namely, that they were the outcome of settlements on the basis of “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 differently. In the first case (C-1), “the parents of the deceased are his only inheritors,” but with no formal proof 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 been left unchallenged by both defendant and court, achieved ipso facto a 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 came up with 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 noted 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 request was confirmed by the defendant. But what was common to all four was that the judges made no formal request for the plaintiffs to prove their inheritance rights. One would have expected, say, the usual corroborative witnesses. Such "lapses," however, were probably intended since the court's main concern was in principle at least solely focused in knowing whether the defendant was guilty or not. 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, and thus indirectly confirm the plaintiffs' right to inherit, or, as we shall see later, their right for the *diya*.

A closer look at the fourth text reveals several common features to both the fiqh literature and the three previous cases. The "sharp weapon" whose "edge" was allegedly used by the criminal constituted enough objective evidence, as required by canon law, establishing that the traces of stabbing, beating, and hitting were indeed intentional. As to the description of the damaged body, it barely touches upon superficialities, and is limited to a single statement: "Stones were thrown over with traces of beating and a wound." The father's right of inheritance was then formally requested, and as with the previous case (C-3), the plaintiff's right to inherit his deceased daughter was not pre-confirmed by a mufti or judge: that would have been impossible because the succession would have to be shared between at least both parents (in case the mother was alive) and brother (assuming that the victim had no other brother or sister). But that was precisely what the plaintiff did his best to deliberately avoid, probably as part of a pre-trial arrangement: bringing forth the strange conditions of his daughter's alleged disappearance and murder was an unavoidable step to insure his sole right to inherit her without sharing her succession with anyone else. That request was made for the first time after identifying the crime's metallic weapon; and was very soon followed by a statement that "upon investigation" the court confirmed the plaintiff's claim for inheritance (on

what basis, and based on which factual evidence?); no word, however, on how the court conducted its “investigation.” An additional acknowledgment came from the accused himself—and that constituted the strangest part of the hearing, enough to draw a line between that case and all previous ones—probably more as a kin member who now acted as a “witness” than an accused. Indeed, the combination of son-witness-accused keeps pushing the text into new directions to the point that traditional borderlines have already been transcended by the time the ruling was announced: the quintessential moment was obviously when the accused turns into a witness and confirms a statement uttered by the plaintiff. In other words, the space of the court did not create new roles for the parties involved, and left them with the strategies they were accustomed to in their social life; the only thing that it did impose on them, however, was a *form of litigation*, essential for the court in order to proceed with adjudication.

*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” 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 Ḥājj Ḥusayn b. ‘Ali b. Ḥājj ‘Isa al-Kurāni from the village of Yāshir in muqāta‘at Tibnin, [in his function] as guardian of the two minors, ‘Ali Mūsa and ‘Isa sons of Ḥusayn 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 Aḥmad, an officer in the [Ottoman] army, who are all inheritors of their murdered brother Muḥammad: his inheritance being restricted to [all three], and has no legal inheritors but them.

The guardian complained against Ḥājj Ḥasan b. Aḥmad b. ‘Ali from the village of Majdal Zūn 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 gave him the right to represent them [with the formal approval of] deputy [judge] Muṣṭafa 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] ...<sup>34</sup>

[The plaintiff] claimed in his lawsuit against [the elders’ representative] that the brother of the two minors and the mature one, Muḥammad b. Ḥusayn b. ‘Ali, was found dead in the property of Mārūn in the lands of the village of Majdal Zūn, 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

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<sup>34</sup>The document was also certified by two witnesses.

voice heard in the village. The aforementioned people [of the village] killed him on purpose with a sharp weapon, so they are requested, based on the shar‘ [to confess their crime]. When [the representative of] the defendants was asked to reply [over his opponent’s allegations], he did so acknowledging the existence of the dead body of Muḥammad b. Ḥusayn b. ‘Ali in the property of Mārūn 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, or has any knowledge as to who did so. 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 were 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 [*ṣulḥ-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 the other, and allowed themselves to take oath on their own.<sup>35</sup>

Even though this case shares many similarities with all previous ones—a private party claims that a homicide took place against one of its “relatives [*ahl*],” and 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 placed against them—that is not enough,

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<sup>35</sup>Beirut shari‘a courts, unnumbered register, case 475, end of Jumāda I 1284 (September 1867).

however, to deprive the case of its uniqueness: 1) an entire group—vaguely introduced as the “elders” of the village—were accused of murder; 2) a cash “compensation” (was it a *diya*?) was handed in 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: a collectivity was accused of murder—which is unusual, considering that it does not take the entire population of a village to kill a single person—and their representative acted on their behalf. Beyond that, the accused-as-collectivity did not prompt for different court procedures and were looked upon as if one person. Could it be then that accusing a collectivity was symbolic: a single person committed the murder but a collectivity knew about it and approved the act, probably even helped? Be that as it may, the text did not distinguish between alleged murderer(s) and accomplice(s). If we understand by accomplice someone who did not commit the crime *per se*, but knew about it beforehand and possibly participated in its preparation and helped in its execution, what was then the notion of *sharik* in the *fiqh*, and what kind of punishment was an accomplice subject to? The plaintiffs’ representative, acting on behalf the three brothers (two of which minors), did not, however, frame his case within such distinctions, and their absence could well be that from a legal perspective the difference between murderer and accomplice, whenever a settlement was within reach, was not that relevant: the defendants as a rule turned not guilty.

The right of guardianship (and inheritance?)<sup>36</sup> was approved by a deputy judge prior to the hearings so that the case does not seem to have necessarily established anything new 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

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<sup>36</sup>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.

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 was not in that respect that different 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 his 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 could not legally refer to as *diya* simply because the accused denied all charges.

Regarding evidence, the plaintiffs, thanks to their representative, only suggested that their victim having been killed with a sharp weapon, should have screamed, and he *must* have 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 to 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 said/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 customary).

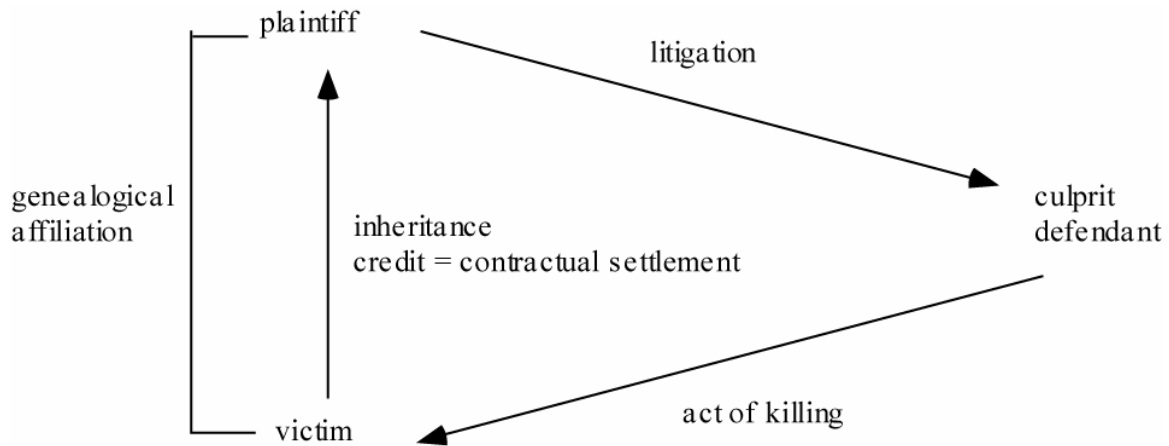
Since evidence-as-inquiry (or as “knowledge”) had little place in the penal system, each statement and each correlative step—accusations, rebukes, testimonies, rulings—imposed themselves in their matter-of-factness. To begin, the murder itself was an act of violence that the documents depicted as an incident caused by a “sharp weapon,” also causing deadly wounds on the victimized body. As noted earlier, the “sharp weapon” was the objective signifier, powerful enough all by itself in establishing the deliberate nature of the act. The text thus never bothers to mention the intention of the killer: no motives, but only an accused, and besides a naming of the weapon (albeit in a general way—sharp—and without specifications), the text typically provided scant details of the damaged bodily parts: the purpose behind describing the *atrāf*, as they are referred to in the fiqh, was to assess the *diyya*’s *māl*, in case the court hearing reached that kind of settlement, which it never did in all the cases dealt with thus far. The accusation, always from the plaintiff’s side, and with no evidence to support it, was, like the murder it was supposed to “denote,” also an act of violence that transcended itself through another act of violence: the accused’s oath, if it ever materialized.

Because the judicial apparatus delegated the use of violence to the parties themselves, it failed to absorb the violence that disputants brought to court as part of their bargaining strategies. This would have required substituting the matter-of-factness of the actors’ strategies with an abstract legal reasoning combining facts with motives, investigative procedures, codes that handled court procedures, and normative values not restricted to custom. Indeed, the judge’s “voice,” already problematic in the less violent land litigations, is totally absent in this kind of criminal hearing: it is as if the judge’s *majlis* that served as a medium for “arbitration” was deprived of the familiar tools of legal reasoning—it simply “recorded” what norms “imposed” on facts. In the last case (C-5), the accusation of an entire group made explicit what was contingent in other cases: namely, that for both parties, decision making was influenced by the group-as-kin. As to

the ambiguity of “compensation,” and in light of the preceding cases (in particular the one between father, son, and daughter [C-4]), it only makes sense to speculate that such “compensations” would not have been proposed in the first place had some of the defendants not participated in the crime. Hence, the *quid pro quo* between the two parties regarding not forcing the accused to take oath, since doing so might have implied lying under oath. Thus, the last case (C-5) established three *de facto* truths: 1) the plaintiffs were the sole inheritors; 2) the defendants were not guilty, but nevertheless accepted to compensate the plaintiffs; and 3) a cash compensation was added to the plaintiffs’ inheritance. In other words, what all these cases were concerned with had nothing to do with solving the nature of the crime, its mystery, motives and intentions, or even finding out who the criminal was. The real concern was perhaps more related to Ibn ‘Abidin’s prescription that “the parts enjoy the status of exchangeable things [*al-atrāf fi hukm al-amwāl*].” In fact, each case was concluded with a *contractual settlement* between the two parties: the body in exchange with inheritance, or rather the body was exchanged with *māl*, and in case some extra cash as compensation or *diyya* was also granted, this was an additional *māl* to be added to that of the inheritance. In short, the legality of the judge’s *majlis* enabled *māl* to achieve the status of *māl mutaqaawwam*, that is, of an exchanged commodity that was legally protected and whose “value” would be refunded in case of a problem: the courts thus gave the disputants the opportunity to metamorphose their blood feuds into contractual settlements.

#### *The murderous triangle and the cycle of debt*

All five cases are structured in a triangular form—the cycle of debt: (1) the plaintiff and potential inheritor who initiates the suit; (2) the culprit-defendant who denies all charges; and (3) the victim whose wealth will 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 effect, 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 his or her 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, has 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.

Before closing this section, it should be noted that some crimes were simply reported: no plaintiff, no accused, and hence no settlement.

[C-6] On Thursday at nine, 19 Rabi' II 1283 [August 31, 1866], following an order from the government [*al-ḥukūma*], an inspection [*kashf*] was performed that included Aḥmad Efendi al-Asir, an official from the shari'a court, Khalil Aghā al-Nimr, first lieutenant in Beirut's gendarmerie, and Aḥmad Efendi Iskandarāni, a surgeon. They checked upon the Egyptian Raḍwān b. Muḥammad al-Baltaji, now in his father's home, located in Zuqāq al-Blāt, outside Beirut. Upon inspection, he was found wounded in parts of his stomach caused by a sharp weapon. When his father was asked on the cause of the wound, he said that [his son] had a fight with 'Ali b. Aḥmad al-Dālāti in the home of Ḥajja Warshāniyya, located in zārūb the small bath inside the city, and was hit with a weapon that wounded him. He died on Saturday, 21 Rabi' II, and his father requested a second inspection. The same team, with Antūn Efendi Naṣrallah, one of the members of the lawsuits majlis,<sup>37</sup> came back to his father's home and

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<sup>37</sup>The lawsuit majlis, *majlis al-da'āwi*, could well be one of those regional councils created by the reforms. By that time, in the 1860s, the councils became much more professionalized than the early ones in

found Raḍwān dead, with no indication that he died from something other than his wound.<sup>38</sup>

A number of entries were restricted to that simple form. What was the purpose of inspecting without litigation and investigation? Since the above observations were recorded on the day of decease, and only two days after the team completed its first visit, there was no room for litigation yet (the other cases point to a minimal two-month lag). Yet, a person was accused of committing a crime, in a way identical to all previous cases: that is, without any shred of evidence; but what differentiated the non-litigious cases from the others was that the accused did not show up as defendant, and hence was not even asked to accept or deny allegations (by taking oath). Since the victim's next of kin (the father in this case) made no request for a *diya*, or any other form of "compensation," one possibility for recording the murder was that of a follow up in the future (in the event, say, that a *diya* would be requested). Yet, even though the father—as a potential plaintiff—had, compared to previous plaintiffs, all the "elements of crime" ready, he did not file for a lawsuit, which is perfectly logical since the previous cases mostly show not much of a judge's final ruling, but contractual settlements, and this has not been worked out yet here. Moreover, the period in question—the 1860s—was one of judicial reforms, and it could well be that registering a murder *as soon* as it occurred was not an option anymore (even though it was not to be expected that the victim's kin comply to such rules), rather than wait for months or even years until a settlement had been reached. The presence of a member from the "lawsuit majlis" upon the victim's death could be an indication that such cases were forwarded to one of the specialized regional councils

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the 1840s, at the time the reforms had just begun to be implemented, right after the Egyptian withdrawal from Greater Syria. In that case, the above entry, in a shari'a court sijill, could be an indication that a homicide had to be reported first to the regular courts, and the crime certified by a team of experts (a novelty all by itself), prior to its transfer to the more specialized councils.

<sup>38</sup>Beirut shari'a courts, unnumbered register, case 503, 21 Rabi' II 1283 (September 2, 1866).

created by the reforms policies of the 1840s and later (the 1860s were looked upon as the second period of reforms), rather than wait for a peaceful settlement mediated by the shari‘a courts. Within such a perspective, the homicide was recorded first in a shari‘a court, only to be investigated later, following the newly drafted 1858 qānūnnāme, in one of the regional councils. But such a requirement, supposing it did exist, did not contribute in any way in raising the number of reported homicides to the shari‘a courts, which brings us back to the previous hypothesis that those “descriptive” cases should be looked upon in terms of contractual settlements they might engender in future bargains. A final note: recording a murder names a particular person as legally dead, and hence clears the way for his inheritance, and it could well be that such neutral records had no other purpose but to declare a person dead.

#### *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-7] In the court of deputy judge Muḥammad Ṭāhir Efendi whose signature appears above, the two brothers, Shaykh Zayn and Ḥusayn sons of Yāsin al-Shay‘āniyya, from the village of Bayt Suḥm, complained against the noble Amin Aghā son of the deceased noble Darwish Aghā al-Shaḥrūr. They claimed that the defendant had beaten, eleven months ago, their mother, Ṣafiyya bt. Ibrāhim Dūdāra, 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. Ibrāhīm, brother of the deceased, and Muṣṭafa b. Muḥammad '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 *qaṣr*<sup>39</sup> inside the home of Muḥammad, the Shaykh of the aforementioned village. And when they were inside the *murabba*<sup>40</sup> of the *qaṣr*, 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 [*tahrir ṣūrat al-da'wa*] in order to request a fatwā.

A draft was prepared and sent to the greatest of all '*ulamā*', Ḥusayn Efendi Murādi, the actual mufti of Damascus, and after reading it to both

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<sup>39</sup>Literally, a "palace," the *qaṣr*, in Aleppo, Damascus, and Cairo, was a "living room" located in the upper floor. In Damascus, the percentage of homes containing a *qaṣr* rose from around 6% in the middle of the eighteenth century to 19% 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 Midān à Damas à l'époque ottomane. Espace urbain, société et habitat (1742-1830)* (Damascus: Institut Français de Damas, 1997), 235.

<sup>40</sup>Literally, a "squared place," denoted in Damascus a squared or slightly rectangular room, usually located in the lobby floor, see Marino, *Le faubourg*, 229.

parties and letting each one present his case, the reply came back on a sheet of paper [*qirt, ās*] from the *amin 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*, Aḥmad Efendi Ḥusayn Zādah.<sup>41</sup>

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,

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<sup>41</sup>Damascus 344/133/32-33/18 Ramaḍān 1252 (27 December 1836).

which all by itself proved enough to prompt 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 “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. 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 by what means should 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 been unauthorized.

Interestingly, a similar problem to that of the above case, questioning the value of evidence, was raised in Ibn ‘Abidin’s *Radd*:

A man complained against another for having beaten his mother on her stomach, and she died as a result of his beating. If the defendant says in

the process of presenting counter-arguments [*al-daf'*] that she went out to the market after the beating, the counter-argument is invalid; but if he presents evidence that she improved after the beating, [this is considered as] a valid argument. And if one evidence was presented that [she was in] good health [*al-ṣiḥḥa*] and another that she died [as a result of the beating], the evidence of good health should be given priority. This was stated in [Kardari's] *Bazzāziyya*, and *Mushtamal al-aḥkām*,<sup>42</sup> and Abū-l-Su'ūd [Ebu's-su'ūd]<sup>43</sup> recommended it in a fatwā.<sup>44</sup>

If going out for a walk in the marketplace was not enough evidence for good health, the other alternative for the defendant was to prove that she *was* in good health after the beating: in other words, good health cannot be proved by means of indirectly related external signs such as walking around or running; it must be proved all by itself through “direct” evidence. But how is this possible? (Further confusion is created by the use of “improved”: What ought to be considered as an indication of “improvement” after a beating?) Should it be based on a medical report? Or on witnesses who were able to testify that they saw the victim in good health during a specific period of time? In all cases, criteria for establishing what good health is need to be specified, whether for medical experts or witnesses, but the fiqh manuals stop short in establishing such criteria. Furthermore, the opinion is stated without much explanatory arguments, but solely in assortment with earlier opinions.

So the case, together with the mufti's fatwā and Ibn 'Abidin's opinion, did not thoroughly elucidate what would have been looked upon as decisive evidence: some kind

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<sup>42</sup>The closest title to this non-identified work is Qāsim b. Qutlūbughā's *Mūjibāt al-Aḥkām*.

<sup>43</sup>Abū-l-Su'ūd [Ebu's-su'ūd] al-'Imādi (1493-1574), Turkish faqih and mufti known in particular for his fatāwā, also drafted a monumental *tafsir* treatise, *Irshād al-'aql al-salim ila mazāyā al-Qur'ān al-karim*.

<sup>44</sup>Ibn 'Abidin, *Radd*, 6:541.

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. In effect, 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 reflects 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.

I say:<sup>45</sup> This is in conformity with what has been said when conferring on intent [*al-‘amd*] which consists in the intention of beating [a person] with a weapon that destroys the [bodily] parts [*yuta ‘ammad ḍarbi-hi bi-ālat tufarriq al-ajzā’*]. So that if the intention was to beat him with a sword, based on what we said, [the offender] should be punished because the wound was caused by a tool of killing [*ālat al-qatl*] with the intention of beating. Moreover, regarding what we conferred on the perpetrator [*al-jāni*] at the beginning of the [*jināyāt*] book, that an intent [to beat or hurt someone] does not necessarily imply an intention to kill, the meaning of

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<sup>45</sup>In the fiqh manuals, the “I say” stage comes after quoting a line of jurists on a specific issue and adjudicating among their opinions. In principle, it thus reflects more the outcome of an adjudicative process than a purely “personal” opinion. Questions (*masā’il*) left non-debated among jurists were looked upon in the “epistles [*rasā’il*]” genre that reflected the most personal style a jurist could get to.

this is that the intention to beat someone with a sharp object [*muhaddad*] does not all by itself [necessarily] imply an intention to kill. Thus, as long as the stipulation [*shart*] is an intention to beat without killing [then the culprit should not be held guilty]. Even if a killing took place while using a sharp object, the act might not have been intended because it might have taken place accidentally. This is why I stipulate the [deliberate] intention of beating with [a sharp object for the purpose of killing before accusing the offender of deliberate homicide]. So, in this case, if the [perpetrator] had no intention of hitting [his victim] with the sword, the act is [legally looked upon] as non-intentional even if a killing took place with [a sharp metallic object such as a sword].<sup>46</sup>

That's one of those rare passages where the use of a metallic object that led to a killing does not constitute *per se* evidence of premeditation. But how would then a court establish premeditation? The culprit could have killed someone simply by using the "wrong" weapon: he could have for instance only meant to intimidate a person by hitting her on the neck but wrongly killed her because he used a knife instead of a stick; or he could have used a knife, killed the woman, but with no intention to do so in the first place. Thus, the two conditions proposed by Ibn 'Abidin, taken jointly, look much forceful than previous ones encountered earlier that gave more focus to the weapon *per se*. In fact, if the victim died because she was hit with a sword, it still needs to be known whether the use of the sword, and the act itself, was deliberate or accidental. But how could this be known? Such requirements might lead to the wrong impression that what shari'a penal law was looking for were subjective criteria that would determine the intentions of the killer-as-subject. Such a decisive step, however, would have required an

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<sup>46</sup>Ibn 'Abidin, *Radd*, 6:543.

important epistemological shift similar in many ways to that assumed by modern penal systems by scrutinizing the accused's "state of consciousness." But the fiqh shows no interest in associating acts with a phenomenology of consciousness; on the contrary, it would like to reduce all actions to objective criteria that would determine whether the killing was intentional. So the two requirements above should be read in light of passages quoted earlier that insisted upon the objective nature of, say, metallic weapons versus more malleable ones in determining intent. Whatever the requirements were, what it all amounted to *in practice* was an association of intent with the weapon itself. Thus, all the Beirut cases create a direct association between a "sharply edged weapon [*ālat ḥādda*]" and deliberate intent (*'amd*), even though each one was concluded with a non-guilty verdict. But, as the Damascus case shows (C-7), when "the weapon was not meant to kill," the defendant was left unpunished. Even if the act of killing did not involve the use of a specific weapon, such as strangulation or drowning by hand, the objective criteria were transferred into something else. Thus, for example, in the case of drowning, the level of water was the most decisive criteria in determining intent: "What applies to strangulation is also valid in drowning: [the level of] water should be high [*'azim*] so that [the victim] cannot escape; and is enough [evidence] to [Abū Yūsuf and Shaybāni] to assume [the drowning incident] as intentional and subject to punishment. But if [the level of water] is low, it usually does not kill, or it might be high but was [nevertheless] possible to survive because of [an ability] to swim [well]: thus, if [the person] was not tense [*ghayr mashdūd*] and he knew how to swim, as stated in the *Tātrākhāniyya* and other manuals, these are [examples] of quasi-premeditation [*shibh 'amd*]."<sup>47</sup> Knowing that someone could be pushed to be drown in a high- or low-level water, what is the significance in insisting on drowning when "the water is high"? The text soon withdraws into skepticism: the level of water could be high, yet it is possible to survive in case one

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<sup>47</sup>Ibn 'Abidin, *Radd*, 6:543.

knows how to swim. What the text subtly attempts to marginalize, simply because it knows too well that it has no foreseeable solution to, is that the level of water cannot be simply described as “high” or “low” due to an infinite number of variations in measurements, in the same way that a person could get drowned in an unlimited number of circumstances, or die for a number of reasons that modern law manuals usually bypass due to their conjectural character. All that is too well known, yet the text insists in limiting the infinite and unpredictable to a few hypothetical cases: the courts cannot possibly deal, under any circumstances, with all those possibilities—such a step would require placing the system under different epistemological foundations—so it limits factual evidence to a few hypothetically absurd and unconvincing conjunctures; and if defendants rarely did get punished, it was because of the encountered difficulties in reducing the factuality of the alleged crime to the few hypothetical conjunctures.