

LE MAHALLE OTTOMAN

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SOME QUESTIONS ON THE LEGAL IDENTITY OF NEIGHBORHOODS IN THE OTTOMAN EMPIRE

A multitude of monographs, written in the past two decades, has greatly enhanced our vision of life in Ottoman cities. Interest in various aspects of everyday life has also unraveled several manifestations of the collective identity of the neighborhoods. Moral and administrative integrity and responsibilities of the neighborhoods constituted important facets of this collective identity. The latter also had a legal dimension that was integrally related with moral and administrative issues, and informed the daily experience of the inhabitants. Yet, the legal identity of the urban collectivities is also one of those aspects of urban living about which we know least, particularly when it comes to rights and liabilities distinct from those of the constituent members of a collectivity. No doubt, received knowledge about the lack of corporate identity in Ottoman/Islamic towns has informed our research agenda on the matter. Ultimately, this question boils down to a formalist search for the presence or absence of charters that set, once and

for all, the terms of rights and liabilities. This paper proposes to focus, instead, on rights and liabilities themselves as observed in daily legal practice at a given time. Daily practice, when examined against the backdrop of the relevant legal maxims, reveals a set of interesting questions pertinent to the urban sociology and legal history of the Ottoman Empire.

Ottoman court records abound in practical manifestations of collective identity, whether at the all-comprehensive town level or neighborhood level. Particularly important for my purposes in this essay are the instances of legal action in which the neighborhood was involved as a party, such as collective purchases, debts, certain kinds of waqf acts, penal liability and acquittal. Except for penal liability, all these instances appear to pertain to the realm of contractual rights and liabilities, and contracts, by definition, presuppose the presence of a legal person. Can the neighborhood be considered as one? Present state of research on this matter would not justify an affirmative answer. However, as I

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***) To retain consistency in spelling, Arabic legal terms are rendered in Turkish transliteration.

hope the discussion below will reveal, the question itself is legitimate and has no easy answers. Further, the distinction between "legal personality" as a technical term denoting the capacity to perform legal acts and legal identity in the double sense of legal recognition as an entity and collective presence in the legal sphere should be clear. In the first part of the paper where I discuss collective penal liability as an aspect of collective identity, I will be dealing with legal identity and its historicity. In the second part, where I focus on neighborhood waqfs as an example of collective contracts, legal personality will come in as a question, and a question it will remain.

The cases referred to in the essay are drawn from 'Ayntâb court registers from the second half of the 17th-century. Most of these cases are not unique in any way; similar ones can be found in several recent studies based on Ottoman court records. I discuss the legal framework of the cases at hand with reference to three fatwa compendia by contemporary *şeyhü'l-islâm*s: Minkârîzâde Yahyâ Efendi (1662-1673), Çatalcalı 'Alî Efendi (1673-1686, 1692) and (1688, 1695-1703)¹. The terms in office of these *şeyhü'l-islâm*s cover much of the period in question. Further, as is common in such collections, these compendia include fatwas from major classical works from the pre-Ottoman period as well as fatwas by earlier Ottoman jurists. Examined together, these fatwas allow preliminary observations about the historicity of the legal perceptions concerning neighborhood identity.

PENAL LIABILITY

Both in pre-Ottoman Islamic law and in Ottoman legal codes, the neighborhood had penal liability as a collective unit. The basis of this liability was the Islamic law of compensation (*diyyet*; Ar. *diyya*). *Diyyet* was the monetary (or in some cases, in kind) compensation offered to the victim of a physical assault or his/her family (*'aşabe*) in cases

where the offence was proven to be unintended and not admitted by the defendant. The group of people who shared the responsibility to pay the blood money with the defendant was called the *'âkile* (*'âqila*)², whose *raison d'être* was mutual help and protection. This collective responsibility, which was originally defined in terms of tribal solidarity, began to be based on different principles with the expansion of Islam and the diversification of the fabric of Islamic society. Hanafis led the way in offering diversified definitions of the *'âkile* from early on in Islamic history. Military garrisons stationed in a city, professional associations, bonds of clientage, and finally, city-based or neighborhood-based spatial bonds were all proposed as groups of liability by different jurists, and some even rejected the idea altogether. There emerged no consensus either among the various law schools or the Hanafis themselves, and legal practice remained diverse³.

Collective liability, together with blood money, was incorporated into sultanic law in Ottoman practice. Penal codes from the 16th and 17th century provide clear references to the *şer'î* system with regard to blood money⁴. However, the fatwa collections consulted for this paper point to a new interpretive twist.

'Âkile as a unit of solidarity responsible for the payment of the blood money no longer appears in the fatwas issued by Minkârîzâde, 'Alî Efendi and Feyzullâh. Here, the blood money appears as a distinctly individual responsibility. Pre-Ottoman fatwas quoted by the compilers, however, refer to the *'âkile* frequently⁵. Furthermore, some jurists of the Ottoman period continued to use the term. For example, according to a fatwa we find in Feyzîyye, if a child killed someone and did not have the means to pay the blood money, the plaintiff had to wait until the child acquired enough wealth to pay⁶. Right underneath this one, we find a quote from *Al-Durr al-Muhtâr*, by the 17th-century jurist al-Ḥaşkafî, according to which the blood money was to be paid by the *'âkile* of the child⁷.

1) Minkârîzâde Yahyâ Efendi, *Fetevâ* (Harvard Law School Library, MS # 5779); Çatalcalı 'Alî Efendi, *Fetevâ-yi 'Alî Efendi* (İstanbul: Maḥbâ'a-yi 'Amîre, A. H. 1311); Erzurumlu Feyzü'l-lâh Efendi, *Fetevâ-yi Feyzîyye* (İstanbul: Dâru'l-ḥabâ'at el-âmîre, A.H. 1266).

2) Baber Johansen, "Eigentum, Familie und Obrigkeit im hanafitischen Strafrecht. Das Verhältnis der privaten Rechte zu den Forderungen der Allgemeinheit in hanafitischen Rechtskommentaren," in *Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim Fiqh* (Leiden: Brill, 1999), 358-59; H. N. Bilmen, *Hukukî İslamiyye ve İstidâhat Fikhiyye Kamusu* (İstanbul, 1969), 3: 54.

3) Bilmen, *Kamus*, 3: 54, 57-58; Johansen, "Eigentum," 359.

4) Uriel Heyd, *Studies in Ottoman Criminal Law* (Oxford: Clarendon Press, 1973), 106, 115-18, 131, 308-11.

5) See for example, *Feyzîyye*, 521, 523, 537; Minkârîzâde, *Fetevâ*, 142b, 143a.

6) *Feyzîyye*, 521.

7) *Feyzîyye*, 521, 523.

A different set of fatwas concerning victims of assaults who die without an heir indicates a parallel discrepancy in the conception of the *'âkile*. For example, according to a 12th-century fatwa (from *Hidâya*), blood money is due to the *imâm* and incumbent on the *'âkile* of the offender. According to Feyzullâh Efendi's fatwa given in the same context, the blood money is incumbent on the neighborhood in a similar situation⁸. Thus, the unit of social solidarity appears to be decidedly spatial. In all the three *seyhü'l-islâm* compendia, neighborhood and the village seem to have practically replaced the *'âkile*. Notably, even in cases where the blood money had to be paid by a tribe, liability was not defined in tribal terms but in terms of spatial responsibility⁹. Nor do we see any reference to craftsmen associations as *'âkile*. Craftsmen associations attained unprecedented organizational sophistication and vigor under the Ottomans. Thus, judging by classical standards of the *'âkile*, i.e., the capacity to provide mutual help and protection, one would think that they could have assumed greater penal liability than their predecessors.

To put it in a nutshell, the discrepancies pointed out above pose two questions from the perspective of legal history. One of them is more generic and technical, and pertains to the ways in which legal compendia that collated different points of view were used in practice. The other one is substantive: how can we explain the transformation/disappearance of the *'âkile*?

This leads to further questions. First, can we speak of a move towards a more individualistic conception of legal liability? Since we should expect some form of affinity between fatwas and social practices, what would such a move tell us about the society in/for which the fatwas were conceived? In this regard, we have to take into account locality as well as temporality. Second, the replacement of the term *'âkile* in relevant cases with a spatial unit, the neighborhood or the village, may be seen as a simple matter of language, at least in some instances. Hence, one would conclude, the Turkish fatwas at hand display no particular novelty considering the fact that spatial bonds had been

recognized as a constituent of *'âkile* by classical jurists as well. The fact that al-Ḥaṣkafî (d.1677), who was a contemporary of 'Alî Efendi, or Ibn 'Âbidîn (d.1836), who wrote more than a century later than the three *seyhü'l-islâm*s consulted here, also used the term may lend support to the idea that we are faced with a simple translation problem here. It remains an enigma, however, why Turkish-speaking jurist-consults who used all the key terms of Islamic law in their original Arabic form did not deem it necessary to retain the *'âkile*. That the works of al-Ḥaṣkafî and Ibn 'Âbidîn represent a different genre (*furû'*), one step further removed from actual legal practice as compared to fatwas, may only partially explain the discrepancy. Finally, we also have to explore the relationship between the legal ethos of the territorial state and the dissolution of all the non-spatial units of liability. It may be significant that the three compendia where the term *'âkile* does not appear belong to *seyhü'l-islâm*s working in the center of the empire. Their position is completely in line with that of an earlier *seyhü'l-islâm*, Ebu's-Su'ûd, who had graphically stated in a fatwa: "[T]here are no *'âkile* in these lands"¹⁰. However, the question remains: Was this a factual statement as much as it was prescriptive? And what were the boundaries of "these lands" to start with?

It is clear that none of these questions can be answered definitively without systematic comparisons between contemporaneous *furû'*s and fatwas, *seyhü'l-islâm* fatwas and local fatwas, Turkish and Arabic compilations, and finally, between court practices in different regions. Such comparisons would tell us, respectively, whether discrepancies may be due to genre-related conventions, to problems of translation, or to regionally different social and political customs and conceptions¹¹. Incidentally, in the case of the works contrasted above, all these factors may be simultaneously at work.

While *'âkile* disappeared — in certain situations nominally, in others substantively, collective penal liability did survive in Ottoman legal practice in a different form: the *kasâme*. When the offend-

8) *Feyziyye*, 537.

9) *Feyziyye*, 541. According to pre-Ottoman jurists, non-urban communities were subject to "classical forms of liability," i.e., as *'âkile*, as agnatic groups, unions based on clientage and oath or as a simple community of legally competent people. Johansen, "Eigentum," 359.

10) Colin Imber, Ebu's-Su'ûd, *The Islamic Legal Tradition* (Stanford: Stanford University Press, 1997), 247.

er in an assault case was unknown, the plaintiff's right to compensation did not elapse, and in certain situations, people of the neighborhood or the village where the crime was committed had to take a collective oath (*kasâme*) to declare their innocence in the matter. This spared them a demand for retaliation (*kıssâs*) on the part of the victim's family but not the blood money, which they had to pay collectively. Judging by *kânûnnâmes*, fatwas, and court practice, *kasâme* was also incumbent only on two collectivities: the neighborhood and the village when it was not incumbent on individuals.

The liability for the payment of blood money in the absence of an offender was predicated on a clear conception of responsibility and legitimate control over a given space. Private property was clearly one of the most important factors that defined spatial responsibility. The owner of a house was responsible for the oath of *kasâme* and the blood money if an assault requiring *diyyet* was committed on his property while he was resident there. He could be liable even when he was not present at the site of the offence when it was committed. Possession or the right of disposal functioned like ownership; in fact, it had precedence over ownership. Thus, the tenants' liability (commercial or residential) came before that of the property owner¹². Significantly, both ownership and possession had precedence over physical presence at the site of the crime: even if there were others at the site, the owner or whoever enjoyed rights of disposal was bound to pay the blood money¹³.

In other instances, if the crime was committed on public space, the responsibility to pay the blood money was incumbent on the state (*beytî'l-mâl*), which was a corollary of the fact that the state also claimed the blood money for victims with no heir¹⁴. Thus, the neighborhood was an intermediate legal

agent between the individual and the state. The area where the people of the quarter was responsible for was "no one's property" (*mülk*), such as the quarter mosque or roads¹⁵. Although this space belonged to no one, it was not public space either in the sense that the state was not the major agent to maintain its security. According to classical jurists, it was the right of use and the profit that people drew out of a given space that entailed a responsibility to maintain security there¹⁶. Further, given the moderate size of the neighborhoods, it was practically possible for them to interfere when an assault took place within the neighborhood, or so it was thought. Thus, the two criteria, moral responsibility and feasibility of access and control reinforced one another in defining collective neighborhood liability.

Access and control, hence the ability to intervene in an incidence of crime, as criteria entailing liability meant that the neighborhood (like the village) was responsible for crimes outside its territory as well. Any crime committed at a distance from a settlement from which a human cry could be heard implicated the inhabitants. This simple criterion also distinguished the realm of public liability from that of the private subjects, either as individuals or collectivities. Thus what transpired beyond the reach of audibility was a state liability¹⁷. The latter included offences committed in central mosques, main roads and interregional routes, bridges, major market places (where the shopkeepers did not own the shops) and prisons. For these places, the reasoning was different: "the management and welfare/authority/affairs of these places belonged to the public (*'amme*)." All these spaces were used by an indefinite number of people, were not privately owned and could not be controlled by private individuals¹⁸.

Thus, a consideration of collective liability both

11) For instance, bringing in Ankaravî, al-Ramlî and Shaikh-zâda would be a good start for the period in question.

12) Minkârî-zâde, *Fetevâ*, 143b. See also Haim Gerber, *State, Society, and Law in Islam: Ottoman Law in Comparative Perspective* (Albany: State University of New York Press, 1994), 97.

13) 'Alî Efendi, *Fetevâ*, 2: 318; *Feyziyye*, 541; Minkârî-zâde, *Fetevâ*, 142b, 143a; Bilmen, *Kamus*, 3: 165. The relationship between property ownership and penal liability is scrupulously discussed by Johansen, "Eigentum", 370-72. That mere presence at the site of the crime did not entail liability is illustrated in the following fatwa: when a group of passers-by stopped at an abandoned school building (*mu'allimhâne*) to have coffee, and one of them was found dead, none were liable to take the *kasâme* oath or pay the blood money "unless they lived there". Minkârî-zâde, *Fetevâ*, 143a.

14) Bilmen, *Kamus*, 3: 161.

15) Minkârî-zâde, *Fetevâ*, 143a.

16) Johansen, "Eigentum", 369.

17) Ebu's-Su'ûd in Minkârî-zâde, *Fetevâ*, 144a.

18) However, it appears that there was some uncertainty in practice as to the applicability of the "audibility principle" at these sites as well. This was also recognized by Ebu's-Su'ûd himself. His view and that of Minkârî-zâde converge on this matter. Thus, according to these two jurists, "the audibility principle" was applicable also for main roads (*şâri'a'zâm*), public markets (*esvâk-ı 'amme*), state land (*arâzî-yi memleket*) or public endowments (*evkâf-ı 'amme*). Minkârî-zâde, *Fetevâ*, 144a-b.

from the perspective of the notions of *'âkile* and *kasâme* also points to their importance in understanding the boundaries between the public and the private. It is noteworthy that the audibility principle, which implies a given technology of control, gives a practical twist to the matter. On the other hand, the changes in these boundaries potentially also hinge on the process of modern state formation, and need to be further studied diachronically. For example, it is noteworthy in this regard that as compared to earlier jurists, the three *şeyhü'l-islâm*s I have consulted, as well as Ebu's-Su'ûd before them, appear to assign greater spatial responsibility to the state (*beytü'l-mâl*) with regard to the maintenance of security, hence, to the payment of blood money. The same applies to al-Ḥaşkafî and Ibn 'Âbidîn as well¹⁹.

One last important point to be emphasized regarding the penal liability of the neighborhood is that it is embedded in personal law and the "rights of men" (*ḥukûku'l-'ibâd*). In other words, the collective identity that materialized in penal responsibility was not defined by the state as an administrative measure — though it was enforced by the state. Within the described legal framework, the neighborhood could be, and in practice, was regularly exonerated just by an acknowledgment (*ikrâr*) to that effect by the victim or his/her family. Liability of the neighborhood was part of a moral economy through which individuals also related to the various communities in which they lived. More importantly, it was this individual and communal aspect of the penal liability that could form a basis for new social contracts enacted by collective will.

A case in point is the contract drawn up by rebels in the aftermath of an urban revolt that took place in Jerusalem in 1703 and brought together various segments of the population. The terms of the contract they had drawn up by the notables and registered at the court revolved around the responsibility to pay the blood money. Namely, if a Jerusalemite, from whatever religious community, was to kill an outsider in self defence, all the people of Jerusalem pledged to pay collectively the blood money due to the victim's family. Likewise, if a Jerusalemite was to be killed by an outsider, the blood money was to be exacted by the people of Jerusalem as a whole. With this text, the rebels

were constructing a new *'âkile*, a new unit of collective responsibility not based on current practice or legal norms. Notably, the text involved the collective enactment of a new social and political contract meant to bind the whole city. Its resemblance to the compact the prophet Muhammad made with the inhabitants of Medina (the Constitution of Medina) is also noteworthy, and one can at best speculate whether the former was consciously taken as a model²⁰.

THE NEIGHBORHOOD WAQF

Legal debates concerning collective penal responsibility are as old as Islamic law itself. Therefore, a cursory look at Ottoman penal codes as well as fatwa collections reveal a considerable amount of relevant material, itself drawing on a centuries old tradition. However, there are other collective acts one encounters in the court registers whose legal status is more difficult to identify. As an example, I will now discuss the neighborhood waqfs as a form of contract (*'aḳd*), yet another source of legal liability.

The phenomenon of collective contracts in Ottoman cities (and Islamic cities in general) has not received much scholarly attention due to the fact that Islamic law does not recognize institutional legal personality other than that of the waqf. When we try to penetrate the everyday fabric of social relations, however, we do encounter collective contracts, ranging from those with a distinctly moral basis to those encased in legal rules. Neighborhood waqfs, (*'avârız* waqfs) provide an interesting example of the latter.

Neighborhood waqfs were common funds established to meet various expenses of the neighborhood (above all, the tax burden). Among the stipulations of the waqf founders or the donors, one often finds the clause that s/he be exempted from the *'avârız* tax share of the neighborhood as long as s/he lived. In two instances I have encountered in 'Ayntâb court registers, the neighborhood appears not as an automatic beneficiary but a party in a contract with the founder. When the founder comes to the court to get the waqf registered, not just the waqf custodian alone, but the "people" (*ahâlî*) of the neighborhood are present, and they promise

19) For Ebu's-Su'ûd, Imber, *Ebu's-Su'ûd*, 247; for al-Ḥaşkafî and Ibn 'Âbidîn, Johansen, "Eigentum," 370-71, fn. 94, 95.

20) Adel Manna, "Eighteenth- and Nineteenth Century Rebellions in Palestine", *Journal of Palestinian Studies*, 24/1 (1994), 55.

(*ta'ahhüd*) that they will abide by this condition²¹. Thus, through this contract, the neighborhood acquires certain rights (access to endowed resources) and assumes a responsibility in return. In other words, the neighborhood acts as a collective agent, and I will return to this point later. This legal act, however, raises a number of questions when examined in light of relevant fatwas.

One does find quite a number of fatwas in *Minḳârî-zâde* about the '*avâriḳ*' waqfs and two of those concern situations partly similar to the cases at hand. In one of those, Zeyd endows his house for the '*avâriḳ*' of the neighborhood, and in the other one, he endows cash for the same purpose. In the first one, he further states the condition that no '*avâriḳ*' (tax) should be exacted from his house (*menzil*), and in the second case, the same condition is extended to his descendants (*evlâd*)²². According to the jurist-consult, neither waqf is valid (*ṣahîh*); consequently, the legatees can disregard the waqf act. In the first case, however, it is further explained that Zeyd's wish can be considered as his will, thus, dispensed from the one third of his probate. This appears to be a common solution also in '*avâriḳ*' endowments that involved the selling of the waqf property²³. Evidently, earlier jurists had disagreed on whether the waqf itself or its condition (sale) alone would be void under those circumstances²⁴. It appears that according to the three Ottoman *seyhü'l-islâm*s, the condition was void — since they tried to validate the waqf by redefining (or accommodating) the condition²⁵.

Be that as it may, it is clear that the practical status of the endowment during the donor's lifetime remains unclear in all these fatwas. More importantly, neither of the two fatwas that apply most closely to the court cases at hand involves anything about acceptance (*ḳabûl*) of the endowment by the

beneficiaries. One of them mentions only handing over the endowed property to the custodian. Furthermore, they offer no insight into the role of the neighborhood in the act. As I see it, the major ambiguity arises from the legal definition of the '*avâriḳ*' waqfs. The question of whether or not the founding of a waqf involves a contract, or '*aḳd*' in the narrow sense of the term, has a long history²⁶. Particularly in Hanafî law, the founding of a waqf was a unilateral legal act and not a contract; thus it did not require consent of the beneficiaries to become valid. If the endowment was a "public" ('*amme*') endowment, i.e. if the beneficiaries were a sizeable group of people or if the beneficiaries were a category of people (such as "the poor"), under no circumstances their consent was needed. If there were a limited number of beneficiaries (*ḳavm-i maḥṣûr*)²⁷, however, such as a given group of descendants etc., each descendant would express his/her consent, if only by silence, in order to benefit from the endowment²⁸. The expression of consent would turn the waqf act into a contract.

Thus, one would think that the '*avâriḳ*' waqf was considered more like a family waqf (*ehlî waqf*), whose beneficiaries were limited and known (*ḳavm-i maḥṣûr*). By the same token, the neighborhood was not conceived as a public space. Physical evidence on the organization and size of the neighborhoods in late 17th-century 'Ayntâb suggests that this might be a valid reasoning. If the notion of *ḳavm-i maḥṣûr* set the limit between social familiarity and anonymity, and if it was conceived as one hundred people at all times, then it should be noted that the beneficiaries of an '*avâriḳ*' waqf in an average neighborhood did not exceed the limit. The size of the neighborhoods varied widely, but the majority had less than 100 households²⁹. Furthermore, the neighborhood (*maḥalle*) does not appear to be

21) ACR, 25/28/1, 1067/1657; 39/165/1, 1101/1690.

22) "[M]enziliniñ '*avâriḳ*' almamaḳ şartıyla;" "[Evlâdından '*avâriḳ*' aḳçası alınmamaḳ şartıyla." *Minḳârî-zâde, Fetevâ*, 166a-b.

23) More specifically, the property was to be sold after the primary beneficiaries (the descendants of the founder) ceased to exist. *Feyziyye*, 182, 186; 'Alî Efendi, *Fetevâ*, 1:210. Also Bilmen, *Kamus*, 4:322/155 (from *Tâtâr-khâniyya*).

24) From *Tâtâr-khâniyya* (14th-century) in *Feyziyye*, 182, 186.

25) The solution was applicable if the one third of the legacy (as allowed for wills) was big enough to match the price of the property to be sold. *Feyziyye*, 186; *Minḳârî-zâde, Fetevâ*, 169a.

26) Hüseyin Hatemi, *Önceki ve Bugünkü Türk Hukuku'nda Vakıf Kurma Muamelesi* (İstanbul: İÜ Hukuk Fakültesi, 1969), 41-43.

27) If the beneficiaries were *ḳavm-i maḥṣûr*, i.e., less than 100 persons, the waqf in question was called a private waqf (*ehlî*). Bilmen, *Kamus*, 3:170, 4:316/136; 4:286-87/17; Ahmed Akgündüz, *İslam Hukukunda ve Osmanlı Tabikatında Vakıf Müessesesi* (İstanbul: Osav, 1996), 242-3, 271, 303-304, 119.

28) Ahmed Akgündüz, *İslam Hukuku*, 99-104, 120-21, 261-62, 266-67.

29) Majority had less than ten tax-houses, and each tax-house in 'Ayntâb seems to comprise ten households at most. See, Hülya Canbakal, "'Ayntâb at the End of the Seventeenth Century", 28-29. According to a fatwa paraphrased by Bilmen (unfortunately, the

