TRANSFORMATION OF WAQF PROPERTY IN THE NINETEENTH CENTURY OTTOMAN EMPIRE

by

Eda Güçlü

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APPROVED BY:

Assist. Prof. Dr. Hülya Canbakal .....

(Dissertation Supervisor)

Assist. Prof. Dr. Y. Hakan Erdem .....

Assist. Prof. Dr. Dicle Koğacıoğlu .....

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ABSTRACT

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Eda Güçlü

M.A. in History

Supervisor: Assistant Prof. Dr. Hülya Canbakal

Waqf; *Icâreteyn*; Property relations; Ottoman law; Modernity; Land; Usufructuary rights; Inheritance; Mortgage

This thesis examines the changing relations of waqf property in the overall transformation of property relations in the nineteenth century Ottoman Empire. It takes the *icâreteyn* system, a form of long-term leasing of waqf assets, as a point of departure. Three fatwa compilations of the late seventeenth, eighteenth and early nineteenth century *şeyhülislâms*, namely Feyzullah Efendi, Abdürrahim and Meşrepzâde Arif Efendi respectively, and the nineteenth century laws and regulations pertaining to waqfs and *mîrî* (state) lands are used as primary sources. In the first place, it will be pointed out that the *icâreteyn* system is central to understanding the transformation of waqf property. Second, it will be claimed that waqf property as a legal category was ever-increasingly assimilated into *mîrî* category in the nineteenth century. Third, it will be demonstrated that legal debates of the eighteenth and early nineteenth century Ottoman jurists had a great contribution to the nineteenth century land codes. In this sense, it will be challenged to the representation of land with limited divisibility and inalienability before the Land Code of 1858 in earlier literature. Finally, the relationship between inheritance laws and property relations will be presented, and it will be claimed that the changes in inheritance laws functioned as a mechanism to create wealth and investment in landed property.

ÖZET

19. YÜZYIL OSMANLI İMPARATORLUĞU'NDA VAKIF MÜLKİYETİNİN DÖNÜŞÜMÜ

Eda Güçlü

Yüksek Lisans, Tarih
Tez Danışmanı: Yrd. Doç. Dr. Hülya Canbakal

Vakıf; İcâreteyn; Mülkiyet ilişkileri; Osmanlı hukuku; Modernite; Arazi; Kullanım hakları; Miras; Rehn

Bu tez, 19. yy. Osmanlı İmparatorluğu'nda mülkiyet ilişkilerinin genel dönüşümü içerisinde, vakıf mülkiyetinin değişen ilişkilerini incelemektedir. Hareket noktası olarak vakıf mallarının uzun vadeli kiralama biçimi olan icâreteyn sistemini almaktadır. Geç 17., 18. ve erken 19. yy. şeyhülislamlarının, sırasıyla Feyzullah Efendi, Abdürrahim ve Meşrepzâde Arif Efendi olmak üzere, üç fetva mecmuası, ve vakıf ve devlet arazilerine dair 19. yy. kanun ve düzenlemeleri birincil kaynaklar olarak kullanılmaktadır. İlk olarak, icareteyn sisteminin vakıf mülkiyetinin dönüşümünü anlamada merkeziliğine işaret edilecektir. İkinci olarak, vakıf mülkünün hukuki bir kategori olarak 19. yy.'da giderek artan bir şekilde miri arazi (devlet arazisi) kategorisine benzeştiği iddia edilecektir. Üçüncü olarak, 18. ve erken 19. yy. Osmanlı müftülerinin 19. yy. arazi kanunlarına olan büyük katkısı gösterilecektir. Bu anlamda, önceki literatürde arazinin 1858 Arazi Kanunnamesi'nden önce sınırlı olarak bölünebilir ve tasarruftan çıkarılamaz olarak temsil edilmesine karşı çıkılacaktır. Son olarak, miras kanunları ve mülkiyet ilişkileri arasında ilişki sunulacak ve miras kanunlarındaki değişikliklerin gayrimenkul mülkiyetinde bir servet ve yatırım yaratma yöntemi olarak işlev gördüğü iddia edilecektir.

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A Note on Transliteration

When Ottoman Turkish is latinized in this study, only long-vowels and ‘*ayn* are indicated. For instance, *vâkıf* is preferred to *vakıf*, and *mîrî* is preferred to *miri*. The Arabic names that are still used, such as Abdürrahim and Arif, have been given as they are used in modern Turkish. The words that are in English dictionaries have not been transliterated, such as fatwa and sharia.

Introduction

Multilayered constructions of modernity that the Ottoman Empire embarked upon in the nineteenth century are today regarded as characterized by the formation of a central state. State centralization, interspersed with more direct forms of domination, replaced the state-centered reward structure of the Empire that was based on subsistence and provisioning by fabricating the image of "the just ruler" through distribution of revenue grants, exemptions from taxation, or protection of peasants by reciprocal and personal relationships.[1] Consolidation of the processes of warfare, taxation and central administration included the development of new mechanisms to reorder persons and things through standardized categories. The transformation from indirect to direct control mechanisms brought with the introduction of population and cadastral surveys, income registers, standardized laws and regulations, expansion of the bureaucracy and intensified documentation. The expansion of the infrastructural power of the state aimed at more solid methods of social control. The development of the state in the nineteenth century marked "the dissolution of the distributive-accommodative mode of state power," which had been styled by territorial expansion and personal bargaining processes between the state and individuals.[2] This also coincided with a transformation from individual negotiations to textual negotiations in the form of generalized laws and regulations, and land cadastres, through which the state sought to impose general administration throughout the Empire.[3] Thus, the nineteenth century state was no longer accommodative, but dominative, in other words, it was a 'modern state' shaped by the "de-moralizing" effects of the period.[4]

Centralization of the Ottoman state also showed itself in new conceptualizations of land, production and taxation. The transformation of property relations in the nineteenth century has been considered as characterized by "the development of individual ownership rights on land along with the ever increasing subjection of land to the control

[1] Huri İslamoğlu, "Property as a Contested Domain: A Reevaluation of the Ottoman Land Code of 1858," in *New Perspectives on Property and Land in the Middle East*. Roger Owen, ed. (Cambridge, Massachusetts, London: Harward University Press, 2000), pp. 16-17.
[2] Ibid, p. 15.
[3] Ibid.
[4] Ibid, pp. 20-21; E. P. Thompson, "The Moral Economy of the English Crowd in the Eighteenth Century," *Past and Present*, No. 50 (Feb., 1971), p. 89.

of the central government."[5] This transformation presupposed a "general taxation claim" of the state and an "absolute control" of revenues derived from land.[6] In this sense, the institution of individual ownership rights refered to a process of elimination of multiple and particularistic claims to both revenues and usage rights. Commercialization of agriculture, growth of trade and interstate competition triggered the conception of land as the main source of revenue. Thus, individualization of property rights was also accompanied with a change in the notion of production from something limited to subsistence to one geared ever-increasing surpluses. From the 1830's onwards, the attempts realized by the central government to increase agricultural production went hand in hand with the efforts to establish a total control of revenues.[7] The state's ultimate aim was to extract more taxes from the resulting increase.

Within this background, this thesis focuses on the transformation of waqf property in the nineteenth century. In particular, it examines the changing relations and notions of waqf property in the overall transformations of property relations from the vantage point of the *icâreteyn* system, the form of double rent paid for waqf immovable assets. *Icâreteyn* as a form of long-term leasing is central to the understanding the changing relations of waqf property.

The importance of the *icâreteyn* system comes from the fact that, in the first place, the practice of leasing for a period of more than three years was itself a very controversial issue in Hanafite waqf law. That it developed was mainly due to practical reasons: recurrent fires demolished not only private buildings, but also sources of waqf revenue, be it a house, shop or warehouse. For those many religious endowments that did not have sufficient revenues for reconstruction and renovation, leasing waqf possessions for a longer period of time appeared as a solution. The purpose of such practice was to cover the cost of reconstruction and regain lost sources of revenue to the waqf. Consequently, based on the justification that "necessity makes lawful that which is prohibited,"[8] long term leasing became an accepted practice. The nature of this

[5] Huri İslamoğlu, "Property as a Contested Domain;" "Towards a Political Economy of Legal and Administrative Constitutions of Individual Property," in *Constituting Modernity: Private Property in the East and West*. Huri İslamoğlu, ed. (London: I. B. Tauris, 2004).
[6] Huri İslamoğlu, "Property as a Contested Domain," p. 24.
[7] Tevfik Güran, *19. Yüzyıl Osmanlı Tarımı Üzerine Araştırmalar* (İstanbul: Eren, 1998).
[8] Ömer Hilmi Efendi, *İthâf-ül Ahlâf fi Ahkâm-il Evkâf* (Ankara: Vakıflar Genel Müdürlüğü, 1977), p. 54.

controversy has something to say not only about changes and contingencies in Islamic law but also the Ottoman tendency towards flexible solutions.

The second important aspect of the phenomenon is the rights of the lessee with regard to the transactions that he/she could conduct on waqf property. These transactions were inheritance of usefructuary rights (*intikâl*), transfer (*ferâğ*), subcontracting, exchange (*istibdâl*) and separation of assets and usage rights (*ifrâz*). Such transactions were applicable mostly in waqfs that were run with the *icâreteyn* system. What makes these transactions important is their relation to different categories of property. An understanding of the relations between waqf property, freehold (*mülk*) and state lands (*mîrî*), on the one hand, and the gradual development towards private property, on the other, is only conceivable by looking at these transactions. An overview of the transactions that could be conducted on waqf property before the nineteenth century is also crucial to question the validity of the assumption that divibility and alienability of land was limited before the establishment of the Land Code of 1858.

These transactions were also crucial for the role played by the *icâreteyn* system in relation to the gradual centralization in waqf administration and the production of modernity in property relations. Changes in the laws and regulations that defined the legal boundaries of transactions suggest that certain steps were taken in the road towards the development of private property replacing waqf property. I am most interested in what caused inheritance laws pertaining to waqfs run by *icâreteyn* to change, because not only these changes altered the patterns of the intergenerational transmission of wealth but also they connected the new conception of family to capital formation since broadened levels of inheritance could be expected to result in an increase in production and, consequently, in investment. The family also emerged as the institution in which perpetuation and prosperity of wealth would be realized if permanent individual rights over waqf property were guaranteed.

There also arises a question as to who had property rights in landed property: individuals, families, waqfs or the state. Given the multilayered structure of property rights, the answer would be all of them in different ways. More important was the changing relationships between them, which evolved into the ever-increasing replacement of waqf by the state in the sense that the state restructured Islamic waqf

jurisprudence by instituting new laws and regulations of a more secular and liberal kind, however, without forgetting and dismissing waqf jurisprudence of ages, and altered the role of the trustee who had been the chief agency in waqf administration, making him/her dependent on state officials. On the other hand, the *rakabe* that continued to rest in the hands of the waqf remained as the bearer of the waqf essence as defined by Hanafite waqf law.

The literature on changes in relations of waqf property usually operates within a kind of decline discourse. Especially beginning with the seventeenth century,[9] histories of the Ottoman Empire had/have long been considered a period of decline not only by contemporary historians but also by Ottoman intellectuals. Decline paradigm has been usually understood as the degeneration of the state, moral corruption of the statesmen or society, collapse of land system, decline of military, impotent sultans, devastation of economy and decadency in education among other things.[10] On the level of moral culture, the representation of recurrent fires as 'divine punishment' in Ottoman literary accounts is an example of literary topoi pertaining to moral decay in society.[11] On the other hand, decline paradigm needs its other which is/was usually in the form of a 'golden age' as is/was the case with the reign of Süleyman the Magnificent, for instance. Both function as "a linearizing and totalizing device[s] in historical narration and analysis."[12] The clear-cut agreement on the decline of the Ottoman Empire has not been interrupted until the 1970's.[13] Although decline paradigm does still appear in Ottoman historiography, after the 1970's, historians have begun to question its validity as a conceptual tool.[14]

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[9] Yet, different decline discourses are not limited to the seventeenth and the following centuries. Earlier examples can be traced back to Aşıkpaşazade in the fifteenth century. See, *Aşıkpaşaoğlu Tarihi*. H. Nihal Adsız, ed. (İstanbul: Kültür ve Turizm Bakanlığı Yayınları, 1985).

[10] For a critical evaluation of decline discourse in Ottoman history see, Cemal Kafadar, "The Question of Ottoman Decline," *Harward Middle Eastern and Islamic Review*, Vol. 4, No. 1-2 (1997-1998), pp. 30-75. For an evaluation of *nasihatnames* (advises for sultans) as a genre, also see, Douglas A. Howard, "Genre and Myth in the Ottoman Advise for Kings Literature," in *The Early Modern Ottomans: Remapping the Empire*, Virginia H. Aksan and Daniel Goffman (eds.) (Cambridge, New York: Cambridge University Press, 2007), pp. 135-166.

[11] Minna Rozen and Benjamin Arbel, "Great Fire in the Metropolis: The Case of the Istanbul Conflagration of 1569 and its Depiction by Marcantonio Barbaro," in *Mamluks and Ottomans: Studies in Honour of Michael Winter*. Edited by David J. Wassersstein and Ami Ayalon (London: Routledge, 2006), p. 138.

[12] Cemal Kafadar, "The Question of Ottoman Decline," p. 34.

[13] Ibid, p. 32.

[14] Ibid.

The topic of waqfs is/was no exception to the decline paradigm. Recent historians, such as John Robert Barnes[15] and Nazif Öztürk,[16] have followed the decline discourse created by Ottoman intellectuals, such as Ömer Hilmi Efendi[17] of the nineteenth century, or European observers, without distancing themselves from their sources. This thesis employs a totally different perspective. Such works written within the decline paradigm consider the changes in waqf administration and some practices, such as *icâreteyn*, as signs of corruption whereas I interpret them as signs of a new process of state building in the nineteenth century, and construction of modernity that materialized in a kind of trial and error process. My perspective is not limited to the nineteenth century either. The development of the *icâreteyn* system from the sixteenth century onwards can also be reevaluated as the product of a state that was pragmatist in shaping laws and responsive to social and economic necessities. In other words, the state employed the *icâreteyn* system not at the expense of the rule that long-term leasing was non-*şer'i*, but by legalizing it on the basis of necessity, usually resulting from fires. In the course of time, the application of *icâreteyn* for reasons other than fires was inevitable. There was no point for the state to control it as long as waqfs continued to benefit from it. Indeed, the mechanisms and state apparatuses to control the transformation of waqfs that derived their income through the single rent system to *icâreteyn* waqfs were outcomes of the changes in state control over waqfs which took place mainly in the nineteenth century. Therefore, the decline discourse is not of much help in explaining changes in state control. My aim is to point out the reasons as to why the state began to need to control such transfers.

My analysis is primarily based on normative texts including fatwas (authoritative legal opinions), laws, regulations and treatises concerning waqfs. To begin with fatwas, I use three compilations from the late seventeenth, early eighteenth and nineteenth centuries

[15] John Robert Barnes, *An Introduction to Religious Foundations in the Ottoman Empire* (Leiden: E.J. Brill, 1986).
[16] Nazif Öztürk, *Türk Yenileşme Tarihi Çerçevesinde Vakıf Müessesesi* (Ankara: Türkiye Diyanet Vakfı Yayınları, 1995); "Osmanlılar'da Vakıfların Merkezi Otoriteye Bağlanması ve Sonuçları," in *Le Waqf Dans le Monde Musulman Comtemporain (XIXe-XXe Siecles), Fonctions Sociales, Economiques et Politiques* (Istanbul: Institut Français D'etudes Anatoliennes, 1994), pp. 19-41; "XIX. Asır Osmanlı Yönetiminde Batılılaşma Hareketlerinin Vakıflar Üzerindeki Etkileri," *İslami Araştırmalar*, Cilt: 8, Sayı: 1 (1995), pp. 13-33.
[17] Information about Ömer Hilmi Efendi will be given in p. ?

by Feyzullah Efendi, Abdürrahim and Meşrepzâde Arif Efendi respectively.[18] I make use of the first two compilations to assess what kinds of transactions involving waqf property were possible before the nineteenth century. The fatwas that I examine provide the general legal framework pertaining to transactions on waqf property according to the dominant Hanafite tradition. These compilations also form a basis to compare and point out what exactly changed in the nineteenth century. The last compilation has a different feature that distinguishes it from others. It exclusively focuses on *icâreteyn* as its title, *Câmi'ü'l-icâreteyn*, also evinces. Moreover, it presents laws that define the legal framework of transactions that could be conducted on state lands. In other words, it also provides the opportunity to make a comparison between *mîrî* and waqf lands.

The fact that this thesis is based on normative texts means that I argue from a legal perspective, but do not touch upon social practice and the application of the legal texts. However, use of legal texts alone as sources inevitably has its drawbacks. Let us consider fatwas as an instance.[19] Conventionally, a fatwa was formed according to the questions received by a mufti, jurisconsult. Questions could reflect the most complicated legal issues of the period in which they were produced. The mufti could base his answers on earlier legal authorities and texts, especially if he was a provincial mufti. The question along with the answer formed a fatwa, which, however, did not necessarily have to be followed. A fatwa compilation was a collection of cases that were deduced from actual problems in daily life, but could also have been drawn up by a scholar who wished to treat legal topics in a certain way. In any way, from the cases presented in a fatwa collection we can not conclude how often a special situation actually took place. Although the space allotted to a particular issue in a fatwa collection may give an idea about daily interest in that issue, (for example, in the fatwas I have studied, a considerable space is devoted to the issues of leasing,) it is difficult to know with certainty to what extent formal law reflected experienced practices. Furthermore, fatwas were most commonly devoid of any specific information about litigants and places where cases occurred. To consider all these and other missing points one has to look at court records and, in the case of this study, income registers of waqfs.

[18] Feyzullah Efendi, *Fetâvâ-yı Feyziyye ma'an-nukûl* (İstanbul: Dâru't-Tabâ'at el-Âmire, A.H., 1266); Abdürrahim, *Fetâvâ-yı Abdürrahim* (İstanbul: Dâru't-Tabâ'at el-Ma'mûre, 1827); Meşrepzâde Arif Efendi, *Fetâvâ-yı Câmi'ü'l-icâreteyn* (İstanbul: Dâru't-Tabâ'at el-Âmire, 1252/1837).

[19] For an inspiring usage of fatwas as sources in a critical way see, Martha Mundy and Richard S. Smith. *Governing Property, Making the Modern State: Law, Administration and Production in Ottoman Syria* (London, New York: I. B. Tauris, 2007).

The scope of this thesis does not allow me to undertake such an extensive study. Instead, this thesis concerns only the law as text embodied in long-established interpretive discourses of Ottoman jurists.

New laws and regulations issued by the state constitute another group of sources I examine. They represent a change in the nature of the law itself, which appeared as a transformation from fatwas to *Düstûr*: the former was gradually replaced by the latter. Waqfs were no exception to the state's intensified endeavors of codification. Beginning with the foundation of the *Evkâf-ı Hümâyûn Nezâreti* in 1826, the state's attempts continued to affect waqfs in the form of new administrative mechanisms, laws and regulations to be applied centrally. They were external to waqfs's functioning which was based on a rich Islamic legal corpus of ages. However, that is not to say that new laws and regulations represented a sharp break in the ways in which waqfs were administered. Rather, the nineteenth century codification in comparison to earlier legal vocabulary implies a state which created new laws by modifying already existing ones, and furthermore, by codifying already existing practices.

Among the new laws and regulations, this thesis particularly focuses on laws pertaining to inheritance and mortgage over waqf and *mîrî* property, which I discuss in the last chapters. The nineteenth century codification of land laws treated waqf and *mîrî* property as almost one and the same category. Especially, waqf lands made out of state lands were subjected to the same rules that regulated *mîrî* lands. This assimilation of waqf property into *mîrî* category makes it necessary to include inheritance and mortgage of *mîrî* lands in my analysis. Apart from waqf lands made out of state lands, inheritance of usufructuary rights on waqfs run with *icâreteyn* was also united with the inheritance laws on *mîrî* property. The expansion of the inheritance levels (*intikâl dereceleri*) and the conception of waqf and *mîrî* property as collateral to establish an alternative money lending system were the main changes. These changes aimed to increase agricultural production and enhance real estate values along with unlimited circulation of waqf and *mîrî* property in the economic sphere. They are closely related to "productionist concerns" of the state in the establishment of individual property rights on land.[20] However, the institution of individual property rights did not result in a

[20] Huri İslamoğlu, "Towards a Political Economy," pp. 12-13.

rapid annulment of state ownership of land in the Ottoman context. To judge from the legal text I examine, the state maintained its title to land, at least in the legal vocabulary. In this context, I argue that the state established new laws of inheritance and mortgage as alternative mechanisms to increase agricultural productivity and profitability instead of withdrawing its title to land.

In the first chapter, entitled "Property in the Nineteenth Century: A General Evaluation," I provide a background for an understanding of the twofold meaning of property, as title to land and title to usage rights. There arises the question of whether the process was the individualization of the title to land or the individualization of the title to usage rights. This thesis tends to interpret the institution of individual property rights in terms of usufructuary rights. However, the meaning of the state's maintainence of its title to land in actual terms can be understood through case studies. Otherwise, this thesis says little about its de facto relevance. This chapter also questions the perception of the Land Code of 1858 as rapture in Ottoman historiography. By using fatwa compilations from the late seventeenth, early eighteenth and nineteenth centuries, I aim to reveal the contribution of legal debates accumulated by Ottoman jurists of earlier centuries to the changes in property relations in the nineteenth century. The third and fourth chapters continue to reveal the extent of the inalienability of waqf property as observed in the fatwas under investigation as opposed to the representation of land with limited divisibility and alienability before the institution of the Land Code.

The second chapter is devoted to the functioning of the *Evkâf-ı Hümâyûn Nezâreti* (Superintendancy/Ministry for Imperial Religious Endowments) founded in 1826 as the main agent of centralizing Ottoman waqf administration. The *Nezâret* (the term translates as "superintendancy" at the beginnings of its existence but then comes to mean "ministry") claimed to control all the waqfs in the empire, and replaced trustees who were the chief actors in waqf administration with state officials. The scope of *Nezâret*'s operations is crucial given the fact that new laws and regulations were initially imposed on the waqfs controlled by the *Nezâret*. The expanding bureaucracy and deepening documentation within the body of the *Nezâret* mark the administrative and institutional constitution of a new waqf regime.

The third chapter examines the controversial development of the *icâreteyn* system as a form of long-term lease, its legal framework and basic definitions. It focuses on the legal consolidation of the *icâreteyn* system with reference to practicality formed around necessities in the fatwas of the late seventeenth and early eighteenth centuries. It also touches upon the perception within the decline paradigm of the transformation of waqf property in the nineteenth century in relation to the *icâreteyn* system. The fourth chapter reviews transactions that could be undertaken in waqfs run through *icâreteyn* and appear as a divergence from the principle of inalienability of waqf property. These transactions were the inheritance of usufructuary rights (*intikâl*), transfer (*ferâğ*), subcontracting, exchange (*istibdâl*) and separation of waqf assets and usage rights (*ifrâz*). This chapter also aims to provide a background for an understanding of changes in the nineteenth century in a comparative perspective. Finally, the fifth and sixth chapters deal with the new laws of inheritance and mortgage over waqf and *mîrî* property, and relate the changes in these laws to developments in terms of commercialization of agriculture, growth of trade, emergence of banking systems and greater economic integration of the empire with Europe.

Chapter 1:

Property in the nineteenth century: A General Evaluation

Before going to dwell on the question of ownership, land management and the individualization of property rights, it is crucial to explain, as suggested by Roger Owen, first the twofold notion of right: right to land and right to its surplus.[21] Although what came to be reckoned as individual private property is the convergence of these two rights into "a single right to both land and surplus" in the course of time,[22] a solid understanding of property lies on the intermingling of processes that reveal different ways in which access to land and access to its surplus evolved into a single body of rights. Moreover, already existing practices before the nineteenth century have the potential to blur the modern categories of land as is the case with the usufructuary rights. It has been argued that transfer of usufructuary rights to heirs or to sell or to mortgage them to others with a continuous state protection resembles a kind of private property.[23] This is also valid for waqf property with regard to the usage rights the lessee had over waqf assets. In short, an investigation of property relations invites an attentive and watchful view on practices that involve intricacy of land classifications, conflictual and diverse claims to ownership, and different configurations of power relations in different geographies, rather than strict legal categories. Moreover, only recently traditional approaches to the field are challenged, which concentrate on Islamic legal categories, and neglect their relationship with actual practice.[24]

The Land Code of 1858 is regarded as the turning point in the transformation of property relations, which is the central focus of İslamoğlu's studies. This transformation was multilayered and complex, and included establishment of new institutions with new policies, creation of new categories, and development of new practices on the one hand, and contested domains in which many different social actors had to negotiate, on the other hand. The basis of her argument is that the institution of private property rights and the development of a centralized state went hand in hand with a constant negotiation process between the state, a state not as a homogeneous body but as

[21] Roger Owen, "Introduction," in *New Perspectives on Property and Land in the Middle East*, pp. xi-xii.
[22] Ibid, p. xii.
[23] Ibid, p. xi.
[24] Ibid, p. ix.

composed of different agencies, and various social actors characterized by "resistance and contestation."[25] She defines private ownership as follows: "[it] was an ordering of property relations on land by the centralized states; it was part of these states' attempt to establish absolute control over revenues from land to meet the exigencies of interstate competition. As such, private ownership belonged to the sphere of power relations that characterized the domination of centralized states."[26] This comprises a move from plural entitlements and various claims to both surplus and land to singular and individualized ownership at the expense of others, from which property relations emerged as "power relations."[27] Reform in the taxation system, for instance, was reciprocated by such a transformation along with the development of other state apparatuses, such as "administrative law," registration, cadastral surveying and mapping.[28] The central place of the state in the picture of transformation of property relations drawn by İslamoğlu brings us to her main challenge to the idea that private property was instituted outside the domain of the state, the assertion held by liberal position by assuming the state and society as separated realms. Her understanding of law as "a form of governance" and "constitutive of the [power] relations" poses again an objection to the liberal formulation of law "as a simple formalization of what has already taken place in the sphere of exchange."[29]

However, the *Tanzimat* reforms in terms of property relations and the Land Code of 1858 did not constitute rapture in the sense that they borrowed a great deal from jurisprudential debates of eighteenth and early nineteenth century Ottoman jurists, though the nineteenth century from the declaration of the *Tanzimat* onwards has long been considered an era of rapture.[30] Among the footprints that debates of the eighteenth century Ottoman jurists had left on land law was the change in the perception of the cultivator's right as constructed upon labour, not absolutely upon possession as traditionally understood.[31] In other words, this was a transformation of the interpretation of the cultivator's lot from "a quasi-office" to "an estate of production."[32] This change

[25] Huri İslamoğlu, "Property as a Contested Domain," p. 3.
[26] Ibid., p. 7.
[27] Ibid.
[28] Ibid, p. 8.
[29] Ibid.
[30] For a critical evaluation of the relevant literature see Martha Mundy and Richard S. Smith, *Governing Property*, p. 3.
[31] Ibid, p. 37.
[32] Ibid, pp. 37-38.

is closely related to the development of the right to lease land. The eighteenth century fatwas confirms the right of a *tapu* holder to rent out land with the permission of the *sâhibü'l-arz* and pay taxes without investing labour himself, but the lessee.[33] This resulted in the conception of land as an object that could not only be cultivable but also transactable. Likewise, there was nothing new in terms of transactions that can be conducted on waqf property in the nineteenth century. The transformation of waqf property showed itself especially in the principle of inalienability to the extent that all the transactions, such as inheritance of usage rights (*intikâl*), transfer, subcontracting, exchange and separation of assets and usage rights, constructed divergences of the eighteenth and even late seventeenth century Ottoman waqf jurisprudence as can be observed in fatwa compilations of the respective periods.[34] The change in the nineteenth century lies in the ever-increasing absorption of waqf land into *mîrî* category in attempts of new codification, especially in the second half of the century. In fact, it is possible to trace the early nineteenth century background of this change in another compilation of fatwas which suggests a great similarity between *mîrî* and waqf lands.[35]

Furthermore, one of the main problems that the reformers of the *Tanzimat* era tackled with even before the declaration of the *Tanzimat* edict in 1839 was the institution of a new land regime along with institutional assurance of property rights. The major difficulty resulted from the tension between the state and the agrarian groups. As we are informed by Karpat, "before the *Tanzimat* and immediately thereafter, the government seems to have been engaged in endless litigation in the courts with private individuals claiming ownership of some *miri* and *vakf* lands. Often it had to issue proclamations stating that the *miri* and *vakf* lands were not the property of those possessing them."[36] The way to reach guaranteed property rights was not to renounce the state's claim to land (*rakabe*). The reformers of the era can not be said to have intended to alter the position of the state as the ultimate owner of land. Rather, they tried to find solutions that can be considered a third way in the sense that they stood in between the state's withdrawal from its title to land and the establishment of absolute individual private

[33] Ibid, p. 38. Their analysis is primarily based of the fatwas of the Damascene muftis, but also includes the fatwas of two *şeyhülislâms*, namely Abdürrahim (d. 1716) and Yenişehirli (d. 1744).
[34] Feyzullah Efendi, *Fetâvâ-yı Feyziyye*; Abdürrahim, *Fetâvâ-yı Abdürrahim*
[35] Meşrepzâde Arif Efendi, *Fetâvâ-yı Câmi'ül-icâreteyn*.
[36] Kemal H. Karpat, "The Land Regime, Social Structure, and Modernization in the Ottoman Empire," in *Studies on Ottoman Social and Political History: Selected Articles and Essays* (Leiden, Boston, Köln: Brill, 2002), p. 346.

property rights. The establishment of the conditions that would result in an increase in production was their primary objective. Individual reformers sought the solution in guaranteed usage rights and unlimited circulation of land. For instance, Sadık Rıfat Paşa, one of the statesmen whose ideas were realized in the *Tanzimat* edict and in the developments thenceforth, suggested that individuals were to be guaranteed that they could maximize the benefits from what they were producing, and consequently could accumulate wealth.[37] The state in turn could gain from this wealth in the form of increased taxes.[38] Another view of Sadık Rıfat Paşa was "the idea of facilitating the circulation of state lands in order to enhance real estate values and also to collect more fees from the resulting transactions."[39]

A similar approach can also be observed in terms of facilities for the circulation of waqf property in the economic sphere. The circulation of state lands as well as waqf property was envisioned to be achieved mainly in the form of modifications in inheritance (*intikâl*) and establishing the right to mortgage the land. The intention in broadening the levels of inheritance was to encourage the lessee to improve the land with the expectation of maintaining it in the hands of the family. The new laws issued in 1847, 1849, 1858 and 1867 introduced major changes in the succession of *mîrî* lands.[40] Not only daughters, like sons, came to have the right to inherit their father's land without payment of the *tapu* fee but also mothers had the right to leave their land to both their sons and daughters on equal basis without any payment.[41] New rules confirmed the rental of land by the *tapu* holder, and the right to divide land between daughters and sons.[42] Moreover, new laws widened the levels of transfer beyond daughters and sons, and entitled even parents to inherit *mîrî* land without payment.[43] But, let us leave the issue of *intikâl* to be discussed in the fifth chapter.

The distinction between the right to use and the right to land, always underlined by the state, also necessitates to remember Ebussuud's justification of state ownership of land instead of individual ownership as he states that "'if it [*arâzî-i memleket* (state lands)]

[37] Kemal H. Karpat, "The Land Regime," p. 345.
[38] Ibid.
[39] Ibid.
[40] Cin, Halil. *Osmanlı Toprak Düzeni ve Bu Düzenin Bozulması* (Ankara: Kültür Bakanlığı Yayınları, 1978), pp. 17-19.
[41] Ibid.
[42] Ibid.
[43] Ibid.

had been given to its owners, it would have been divided on their deaths among many heirs, so that each one of them would receive only a tiny portion. Since it would be extremely arduous and difficult, and indeed impossible to distribute and allocate each person's tribute [*haraç*], the ownership of the land was kept for the Muslim treasury, and [the usufruct] given to the peasants by way of a loan."[44] Indeed, state ownership of land was the point of departure for cadastral surveys, registration and mapping, measures taken to strengthen central control of land and to increase revenues generated from it. State efforts to reassert its control of land also included waqf property that was made out of state lands. Yet, these were not outcomes of the changes in land regime that took place in the nineteenth century. Their roots go back to the reign of Mehmed II as he wanted all arable lands including those of waqfs being belonged to the state in the 1470's.[45]

The same stress on the state ownership of land can also be found in the tax-farming system. Transactions, such as transfer, leasing and mortgaging, were also valid in *iltizâm* (tax-farming) rights. The conversion of *iltizâms* into *mâlikânes* (inheritable life holdings) at the end of the seventeenth century brought some changes in the *iltizâm* system to the extent that lands auctioned to *mültezims* (tax-farmers) came to resemble "a form of pseudo-property."[46] Yet, the new developments did not blur the distinction between the title to use and the title to land as Kenneth Cuno has demonstrated in his study of Lower Egypt:

> Though the ability to be inherited and alienated is a characteristic of property, *iltizam* rights were not rights of landownership. The characteristics of property were located in the *iltizam* itself, not in the land. This distinction between *iltizam*, as a limited set of rights to land, and landownership pure and simple was preserved in the language employed in the legal records. What amounted to the sale of an *iltizam* was recorded using the formula *nazala wa faragha wa asqata*, meaning roughly to "cede, release, and transfer," or a variation on that formula. The object of exchange was designed by various but similar formulae, such as "his right . . . of that which is in his control and disposition" or ". . . in his care/responsibility." Such language kept a clear distinction between *iltizam* rights and rights associated with real property (*milk*). While property was

[44] Martha Mundy and Richard S. Smith, *Governing Property*, p. 15.
[45] Baber Johansen, *The Islamic Law on Land Tax and Rent: The Peasants' Loss of Property Rights as Interpreted in the Hanafite Legal Literature of the Mamluks and Ottoman Periods* (London: 1988), pp. 81-82.
[46] Kenneth M. Cuno, *The Pasha's Peasants: Land, Society, and Economy in Lower Egypt, 1740-1858* (Cambridge: Cambridge University Press, 1992), p. 33.

> recorded in the court records as "sold" to a "buyer," iltizams were recorded as "transferred" to a "transferee."[47]

As it can be concluded from the quotation above, the usage of different terminologies for succession practices of *mülk* and *mîrî* separately is yet another indicator of state efforts to keep the distinction between usufructuary rights and *rakabe*. For *mîrî* and waqf lands, the word that was used was "transfer" (*intikâl*) instead of "inheritance" (*irth*), for the latter pertained to the inheritance of full property according to Islamic law, thus it was avoided.[48] The reassertion of *mâlikânes* by the state was realized by reissuing *mâlikâne* lands to the heirs of the *mâlikâne* holders as lands on which usufructuary rights were held by *tapu* as it was envisioned in a *nizâmnâme* dated 1840.[49] The law permitted the owner to leave *mâlikâne* land to his children without exclusion of female heirs.

As to the Land Code of 1858, as a "rule of property,"[50] it classified land in five types on the basis of access: freehold (*mülk*), state lands (*mîrî*), uncultivated lands (*mevât*), common lands (*metrûke*), and waqf lands (*mevkûfe*). Yet, *mîrî* lands, by and large, were the realm that the Code applied. It also reduced the administration of waqf lands made out of state lands to *mîrî* category.[51] With regard to the individualization of property rights, the Code restricted the usage of *mîrî* lands communally, and enforced individual usage with individual title deeds.[52] Stipulations of the Code required further regulations in terms of registration of *mîrî* land with individual title deeds. The *Tapu Nizâmnâmesi* followed the Land Code in 1859 and defined the administration of transactions on *mîrî* land. Further laws continued to be issued to complete inheritance and mortgage rules over waqf and *mîrî* property. The restriction imposed by the Code on the process of *mîrî* and waqf soil to produce construction materials, such as tile and brick, was invalidated

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[47] Ibid, pp. 37-38.
[48] Ibid, p. 74. Although the term 'inheritance' pertained to the succession of *mülk* property, throughout this thesis, I use it to mean *intikâl* just not to mix it with 'transfer' (*ferâğ*).
[49] Dina Khoury, *State and Provincial Society in the Ottoman Empire: Mosul, 1540-1834* (New York: Cambridge University Press, 1997), pp. 105-107.
[50] Huri İslamoğlu, "Property as a Contested Domain," p. 26.
[51] "*Tahsîsât kabîlinden olan arâzî-i mevkûfenin arâzî-i mîrîye-i sırfa gibi rakabesi beytü'l-mâla 'âid olmasıyla bunlar hakkında bundan sonra zikr ve tafsîl olunacak mu'âmelât-ı kanûnîyye tamamiyle cârî olur*." *Arâzî Kanûnnâmesi, 1274/1858. Düstûr*, 1:1, p. 166. See Ahmet Akgündüz, *Mukayeseli İslam ve Osmanlı Hukuku Külliyatı* (Diyarbakır: Dicle Üniversitesi Hukuk Fakültesi Yayınları, 1986), p. 684.
[52] "*Bir karye ve kasabanın bütün arâzîsi toptan olarak ahâlîsinin hey'et-i mecmûa'sına veyahud içlerinden bi'l-intihâb bir veya iki üç şahsa ihâle ve tefvîz olunamayub, ahâlîden her şahsa başka başka arâzî ihâle olunarak keyfîyyet-i tasarruflarını mübeyyin yedlerine tâpu senedleri i'tâ' olunur*." *Arâzî Kanûnnâmesi*, p. 167. See Ahmet Akgündüz, p. 685.

with the promulgation of a new law involving the usage of waqf and *mîrî* lands in 1913.[53]

[53] *Arâzî Kanûnnâmesi* reads: "*Bir kimse mutasarrıf olduğu arâzîsinin toprağını me'mûrundan izin almadıkça isti'mâl edüb kiremid ve tuğla gibi şeyler yapamaz. Yaptığı sûretde ol toprağın mahallindeki kıymeti, gerek ol arâzî arâzî-i mîrîyeden olsun ve gerek mevkûfeden bulunsun, ol kimseden cânib-i mîrî içün alınur*," p. 168. See Ahmet Akgündüz, p. 686. On the other hand, the mentioned law of 1913 reads: "*Bir kimse mutasarrıf olduğu arâzînin toprağını isti'mâl ile kerpiç ve tuğla ve kiremid yapabilur ve kum ve taşlarını satabilur. Şu kadar ki bu husûsâtta kavânîn ve nizâmât-ı mahsûsesi ahkâmına tâbi' olur.*" *Emvâl-i gayr-i menkûlenin tasarrufu hakkında kanûn-ı muvakkat, 1331/1913. Düstûr*, 2:5, p. 241.

Chapter 2:

Evkâf-ı Hümâyûn Nezâreti

Evkâf-ı Hümâyûn Nezâreti founded in 1826 was the major institution of state domination over waqf property. The *Nezâret* as the main agent of centralizing Ottoman waqf administration was initially to control waqfs founded with state resources or subsidized by the central administration. Its primary task was to transfer revenues derived from waqf sources to the state treasury. It not only controlled the sources of waqf revenue but also created a distinct space of state imposition in terms of both taxation and law. New laws and regulations of the nineteenth century were initially imposed to waqfs controlled by the *Nezâret*. On the other hand, taxation of waqf property was reshaped by the reordering of waqf property. Given the increasing costs of warfare, expenditures of an expanding bureaucracy and the need to finance reforms, the state sought to increase its sources of revenue. Waqfs centralized within the body of the *Nezâret* came to meet the needs of the centralizing state for the consolidation of intensified taxation and control over revenues.

Before the foundation of the *Nezâret*, waqf administration was handled by different offices. *Sadriâlî Nezâreti* was responsible for the waqfs the control of which was in the hands of grand viziers; *Şeyhülislâm Nezâreti* was in charge of waqfs stipulated to be under the supervision of *şeyhülislâms*; and *Bâbüssa'âde Ağası Nezâreti* managed the waqfs founded by the imperial elite. These offices were relatively early examples of decentralized waqf administration.[54] *Bâbüssa'âde Nezâreti* was superseded by *Dârüssa'âde Ağası Nezâreti* that was established in 1586. Eight more offices including *Haremeyn Evkâfı Nezâreti* were instituted over the course of time under the posts of different bureaucrats. During the reign of Abdülhamid I some waqfs comprising imperial and exempted endowments previously directed by other offices began to be controlled by *Hamîdiye Evkâfı Kaymakamlığı*.[55] On the local level, the qadi was the main agent who acted as the inspector.

[54] Seyit Ali Kahraman, *Evkâf-ı Hümâyûn Nezâreti* (İstanbul: Kitabevi, 2006), p. 2.
[55] Ibid, pp. 4-5.

Evkâf-ı Hümâyûn Nezâreti was initially meant to administer the waqfs under the control of the *Darphâne-i Âmire Nezâreti* to diminish its workload which had grown due to the increased number of waqfs.[56] As seen in the *Hatt-ı Hümâyûn* dated 1826 and written for the establishment of the *Nezâret*, its foundation was also related to the efforts to increase sources of revenue needed to meet expenditures of the new army, namely *Asâkir-i Mansûre-i Muhammediye* that was formed in the same year.[57]

Barnes attributes the foundation of the *Nezâret* to Mahmud II's desire to take back what had once been state's property:

> It was Mahmud's intention that the majority of landed property and roofed property revenue which had been diverted by means of icareteynlu semi-familial evkaf into private hands should return to its original condition as property belonging to the state. This was not an idle claim, for the majority of evkaf in the Ottoman dominions was arazi-i emiriye-i mevkufe, miri lands that were made vakıf. As the rakabe remained with the beytülmal, they were evkaf-ı gayr-ı sahiha, canonically unsound; and as they were of quasi-legal status and ultimately held provisionally, they could be revoked. This, in point of fact, is exactly what happened, for the right of control to the evkaf of the empire under Sultan Mahmud II reverted to the state. The principal applied was that property which originally belonged to the state remained with the state.[58]

In general terms, waqfs made from state lands were divided into two: *vakf-ı sahîh*, sound waqfs, and *vakf-ı gayr-i sahîh*, endowments that were not sound according to waqf jurisprudence.[59] The former kind was made from tithe (*öşür*) lands that belonged to Muslims, and *harac* lands which were conquered lands and subject to a tribute.[60] It also involved waqfs made from *mülk* that was assigned to an individual by the sultan.[61] The founder was the person whose stipulations defined the functioning of this kind of waqfs. The latter type was based on the assignment of revenues generated from a piece of state land to a religious or charitable end.[62] It also had three sub-categories: in the

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[56] Seyit Ali Kahraman, *Evkâf-ı Hümâyûn Nezâreti*, p. 6; "*Bir de bir müddetten berü evkâf-ı hümâyûnumuz dahi Darbhane'den idâre olunmakta ise de maslahatın cesâmeti cihetiyle merkez-i layıkında bakılmaktan kalmış, ...*" BOA. Hatt-ı Hümayun, no: 17362. Cited in ibid, p. 109.

[57] "*Bi-hamdillahi ta'âla tertîb ve tanzîmine muvaffak olunup bir tarafdan tevfîr ve teksirine bakılmakta olan Asâkir-i Mansûre-i Muhammediyye'nin masârıfâtı mukâbili karşuluk îrâd tedârik olunmadıkça ne derece usret çekileceği zâhir ve derkâr olduğuna binâen ...*" BOA. Hatt-ı Hümayun, no: 17362. Cited in ibid, p. 108.

[58] John Robert Barnes, *An Introduction to Religious Foundations*, pp. 85-86.

[59] Ömer Hilmi Efendi, *İthaf-ül Ahlaf fî Ahkam-il Evkaf*, p. 39.

[60] Ibid.

[61] Ibid.

[62] Ibid. p. 40.

first category, only the taxes on land were delegated for a charitable purpose while the *rakabe*, the substance of the land or the right to land itself, and usufructuary rights remained with the *beytü'l-mal*, the state treasury.[63] Tax revenues were deemed *mülk*, and as such they were permitted to be endowed to finance public works in religious, educational, and health and social services.[64] Since the state retained the right to use this kind of lands they were treated as state lands and subjected to the regulations of the Land Code, and transferred to individuals with a title deed.[65] In the second category, only the right to use was assigned to the waqf whereas the state continued to reserve the *rakabe* and the right to taxes.[66] In the last category, only the *rakabe* rested in the hands of the state and the right to use and the right to taxes were given away for the waqf.[67] The ordinances of the Land Code did not cover the last two categories, and the renter of these waqfs had the right to leave waqf property as an inheritance to his/her heirs or transfer it to another lessee.[68] The conversion of state lands to endowments as *vakf-ı sahîh* or *vakf-ı gayr-i sahîh*, however, did not result in tax exemptions. These lands were still bound by state taxation even after they were endowed.[69] Furthermore, the legal status of waqfs that were not sound (*vakf-ı gayr-i sahîh*) had always stirred up controversy, and this ambiguity was sometimes used to justify state intervention in such waqfs.[70]

This division according to laws concerning land categories is important to note in view of the fact that not only waqfs that fell under these categories could be rented through *icâreteyn*, except for the first sub-category, but also it reveals that "utility and practicality" could be preferred at the expense of the Hanafite waqf jurisprudence dictating that only *mülk* can be endowed.[71]

The scope of the *Nezâret*'s supervision was to expand rapidly to the extent that by 1832 almost all the waqfs under the control of the above-mentioned offices were transferred

[63] Ibid. p. 41.
[64] Tevfik Güran, *Ekonomik ve Mali Yönleriyle Vakıflar: Süleymaniye ve Şehzade Süleyman Paşa Vakıfları* (İstanbul: Kitabevi, 2006), p. 7.
[65] Ömer Hilmi Efendi, *İthaf-ül Ahlaf fi Ahkam-il Evkaf*, p. 41.
[66] Ibid.
[67] Ibid.
[68] Ibid.
[69] Ibid.
[70] Tevfik Güran, *Ekonomik ve Mali Yönleriyle Vakıflar*, p. 8; Ebul'ula Mardin, *Toprak Hukuku Dersleri* (Istanbul: 1947), p. 22.
[71] John Robert Barnes, *An Introduction to Religious Foundations*, pp. 46-47.

to the *Nezâret*.[72] New offices were added to its administrative structure to cope with its broadened responsibility.[73] The extent of the *Nezâret*'s operations was beyond the capital. The new institution which claimed to centralize all the waqfs in the Ottoman world was to have a broad administrative structure embodying both central and provincial directorships and various offices. The concerns behind the institution of new administrative bodies at the provincial level were mainly to repair ruined waqfs, to centralize and control waqf revenues, and to balance waqfs' incomes and expenses.[74]

The regulations issued by the *Nezâret* together with intensifying documentation and expanding bureaucracy set certain limits to the trustee's scope of operations, and marked more precise state efforts in the establishment of central waqf administration in the form of surveys, continuous records and penalties. In quantitative terms, the total number of the waqfs controlled by the *Nezaret* and its proportion to the overall number of waqfs in the Empire remains unclear due to the lack of studies on this issue. However, it can be clarified that the *Nezâret* was responsible for two different types of waqfs: *evkâf-ı mazbûta* controlled directly by the *Nezâret*, which included waqfs established by the sultans and their dependents, waqfs transferred to the Ministry because of the extinction of the founder's descendants, and waqfs that were under the supervision of the *Nezâret*, but at the same time had trustees paid by the waqf treasury; and *evkâf-ı mülhâka* that were run by their trustees under the supervision of the *Nezâret*, which usually accommodated waqfs the administration of which was assigned to the chief dignitaries of the state.[75]

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[72] Seyit Ali Kahraman, *Evkâf-ı Hümâyûn Nezâreti*, pp. 6-7. Öztürk states that by 1831 the number of the waqfs controlled by the *Nezaret* was 632 in *Türk Yenileşme Tarihi Çerçevesinde Vakıf Müessesesi*, p. 76. However, Kahraman informs that "*Rebi'ülevvel 1247/Ağustos 1831'de Defterdar-ı Şıkk-ı Evvel, Reisülküttab ve İstanbul, Galata, Eyüb, Üsküdar kadıları ve Haremeyn müfettişiyle Saray Ağası nezaretlerinde bulunan 632 vakıf ile ...*" in *Evkâf-ı Hümâyûn Nezâreti*, p. 7. But, he also informs that before 1831 there were other waqfs tied to the *Nezâret*.

[73] Seyit Ali Kahraman, *Evkâf-ı Hümâyûn Nezâreti*, p. 7.

[74] An imperial edict written to the governor of Van to inform him about the appointment of a waqf director in 1847 reveals such concerns as follows: "*... imdi siz ki, Van deftardarı ve kaimmakamı müşarunileyh, kuzat, nüvvab, ... ve azayı meclis-i mumaileyhimsiniz. Cümlenin ma'lumu olduğu üzere ekseri evkaf mütevellileri vakfın gelirlerini yerine sarfetmeyip ekl etmekte, hademe-i hayrat doğru dürüst görev yapmamakta, bunun sonucu olarak vakıf hayrat binalar harap ve perişan olmaktadır. Bu durum, vakıfın şartlarına aykırı ve rızayı alişanıma mugayırdır. Bu başıboşluk ve dağınıklığa bir son vermek, bunların hepsinden daha önemlisi, vakıfların hüsn-ü idarelerini temin etmek, gelir ve giderlerini zabt u rabt altına almak, tamire muhtaç vakıf binaları tamir ettirmek, ehil olmayan ve göreve gelmeyen vazifelileri değiştirmek amacıyla diğer eyalet ve sancaklarda olduğu gibi, Van Sancağı'na da müstakil bir evkaf müdürü tayin olunmuştur."* VGMA 1264: 968/31. This abridged version of the text is cited in Nazif Öztürk, *Türk Yenileşme Tarihi Çerçevesinde Vakıf Müessesesi*, p. 83.

[75] Ali Himmet Berki, *Vakıflar: Vakıf Müessesesi İnsanların Düşünebildikleri Hukuki Müesseselerin en Hayırlısıdır* (İstanbul: Cihan Kitaphanesi, 1940), pp. 291-292; Ömer Hilmi Efendi, *İthaf-ül Ahlaf fî*

As to the qualitative side of the picture, the stress on the importance of waqfs and their rejuvenation closely corresponded to the concerns of the day of reform.[76] The document regarding the budget of the *Nezâret* dated 1909 provides an idea about the need for the improvement of waqfs' condition according to modern principles of architecture and construction, which also took their historical significance into consideration.[77] In the document, the part devoted to repair and construction deserves special attention with regard to both its content and length. Yet, a brief review of such activities before 1909 is in order.

The venture for restoration of devastated and ruined waqf assets with standard rules, and the restoration and rearrangement of mosques' surroundings[78] were in line with the intensive regularization projects in the spirit of the nineteenth century city planning principles, which involved widening, straightening and opening of streets for an efficient transportation network, regularization of city space for a uniform urban fabric, opening of public squares, a preference for brick and stone as construction materials, creation of square-shaped or rectangular building blocks, embellishment, improvement of building methods, and construction of pavements, water and sewage lines.[79] An early example of a restoration movement involving waqf buildings in Istanbul began in 1830 with a modest result including only three mosques and three masjids to be repaired.[80]

Ahkam-il Evkaf, pp. 16-17. In a document concerning the transfer of waqf assets dated 1870 it is expressed that the number of waqfs directly controlled by the *Nezâret* (*evkâf-ı mazbûta*) was less than the number of waqfs that were not controlled by the *Nezâret* (*evkâf-ı gayr-i mazbûta*). Whether the term '*evkâf-ı mazbûta'* that appears in this document includes *evkâf-ı mülhaka* is unclear. "*… evkâf-ı gayr-i mazbûtanın adedi evkâf-ı mazbûtadan ekser ve ...*" *Musakkafât ve müstegallât-ı mevkûfede muvâza't-ı ferâğ hakkında buyuruldu-i sâmî*, 1286/1870. *Düstûr*, 1:3, p. 164.

[76] "*... idâre-i hükümetin her şu'besinde sâye-i Meşrutiyyette her gün yeni bir eser-i terakki meşhûd olduğu halde Evkâf Muhâsebe İdâresi'ni bu hâlde bırakmak hâl-i ma'mûriyetde muhâfazaları esbâbının istikmâline dinen ve insâniyyeten vazîfedâr bulunduğumuz âsâr-ı ber-güzîde-i eslâfı unutarak mu'âmelât-ı evkâfın hâl-i sâbıkı üzerine cereyânına mûvâfakat etmek demek olup hâlbuki vâkıfîn-i kirâm hazerâtının vücuda getirdikleri mü'essesât-ı 'âlîye-i vakfiyyenin memlekete ettiği ve edeceği hidemâtın derece-i 'ulvîyyeti göz önüne getirilince bunların ıslâhı emrindeki vücub ve ehemmiyyetin bir kat daha ta'ayyün edeceği cihetle ...*" "*... ale'l-umûm mu'âmelât-ı devlette bir sûret-i müsmirede teceddüd görünmek lazım gelen şu zamanda ...*" *Evkâf Nezâreti'nin 1909 Yılı Bütçesi Esbâb-ı Mûcibe Mazbatası*. Cited in Seyit Ali Kahraman, *Evkâf-ı Hümâyûn Nezâreti*, p. 132.

[77] "*... fenn-i mi'mârî, kavâ'id-i inşâ'ât ve ba-husus târih-i mi'mârî nokta-i nazarından tanzîm etmek ...*" *Evkâf Nezâreti'nin 1909 Yılı Bütçesi Esbâb-ı Mûcibe Mazbatası*. Cited in ibid, p. 141.

[78] Nazif Öztürk, *Türk Yenileşme Tarihi Çerçevesinde Vakıf Müessesesi*, pp. 193-206.

[79] Zeynep Çelik, *The Remaking of Istanbul: Portrait of an Ottoman City in the Nineteenth Century* (Berkeley: University of California Press, 1993).

[80] Nazif Öztürk, *Türk Yenileşme Tarihi Çerçevesinde Vakıf Müessesesi*, p. 194.

Yet, in the following year it increased to 110 waqf assets.[81] In 1843 and 1845 the repair of waqfs in Damascus and Konya followed these mainly Istanbul-centered activities.[82] However, these examples outside of Istanbul seem to be very rare; in other words, restorations were usually limited to the capital. Actually, the nineteenth century building and street regulations appear to confirm this situation. Until 1864 when the Street and Building Regulation was enacted regularization laws did not comprise cities or large villages other than Istanbul.[83] The capital was a special case as the façade of the Empire in the new city planning programs, and consequently the nineteenth century for Istanbul constituted a new era marked by new urban policies, new institutions, and new regulations. This is not surprising when we consider the fact that even in Istanbul city planning activities were only piecemeal and confined to burnt-out districts.

The document regarding the 1909 budget of the *Nezâret* reveals that to a great extent, waqfs were dilapidated due to ignorance, and thus, there were many more waqfs to be rebuilt.[84] The emphasis on the lack of skilled officials and workers who were knowledgeable in technology, art and the science of old artifacts and rules of construction is recurrent in the text. This lack is explained with a comparison with the situation in European cities, such as Vienna, Paris and Stuttgard in which historical buildings are well protected although their value is far less than many mosques in the empire.[85]

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[81] Ibid, pp. 194-195.
[82] Ibid, p. 197.
[83] *Turuk ve Ebniye Nizâmnâmesi*, 1280/1864. Cited in Gül Güleryüz Selman, *Urban Development Laws and Their Impact on the Ottoman Cities in the Second Half of the Nineteenth Century* (MA Thesis, Middle East Technical University, 1982), Appendix: A47-A64.
[84] "*Âsâr-ı mezkurenin (ekseri enâfis-i âsâr-ı 'atîkadan bulunan cevâmi'-i şerife ile hayrat-ı münîfenin) kâffesi de her dürlü aksâmına varıncaya kadar düşecek ve münhedim olacak derecede harâb ve muhtâc-ı ta'mîr bir halde bulunduğu ve şimdiye kadar ihmâl edildiğinden ve ale'l-husûs ehline tevdî'-i keyfiyyet edilmediğinden nâşi fen ve san'âta ve 'ilm-i âsâr-ı 'atîkaya tevfîkan ta'mîrat yapılmadığı gayr-i kâbil-i inkârdır.*" *Evkâf Nezâreti'nin 1909 Yılı Bütçesi Esbâb-ı Mûcibe Mazbatası*. Cited in Seyit Ali Kahraman, *Evkâf-ı Hümâyûn Nezâreti*, p. 140.
[85] "*Viyana'da, Olm'de, Paris'te, Stutgard'da ve'l-hâsıl târih ve san'at nokta-i nazarından eski binâ'ları bulunan her memleketde bu binâ'ların sûret-i dâ'imâde ta'mîr ve hüsn-i sûretle muhâfazasına me'mur birer mi'mârî ve bir de adetce şimdiki İnşâ'at ve Ta'mîrât İdâresi me'murin-i fenniyyesinin iki misli kadar bir hey'et-i ta'mîriyyesi vardır. Ale'l-husus ki bu binâ'ların değeri bir Süleymaniye, bir Yeni Câmi', bir Yeşil Câmi', bir Karatay Medresesi, bir Sahretullahi'l-Müşerrefe kadar bile değildir.*" *Evkâf Nezâreti'nin 1909 Yılı Bütçesi Esbâb-ı Mûcibe Mazbatası*. Cited in ibid, p. 140.

References to European cities were common in the reformist language of the nineteenth century. For instance, Mustafa Reşid Paşa, one of the most influential reformers of the nineteenth century, set the basic replanning aims in the context of city space even before the declaration of the *Tanzimat* Edict. Influenced by the Western urban structures during his diplomatic missions in London and Paris, he was among the earliest reformers advocating the application of *kavâid-i hendese* (geometrical rules) to urban space. His main considerations were to enlarge and regularize labyrinthine streets, and convert timber city fabric to masonry, which was, in turn, the only way to prevent frequent fires.[86] This also coincided with a change in the perception of fires from divine punishment to signs of underdevelopment and occasions to regularize urban space. He also suggested that talented students should be sent to Europe to study modern construction methods of Western architecture. In addition, foreign architects and engineers should be employed to create an urban structure based on Western examples.[87]

Therefore, what is significant is not simply this reference itself, but the very materialist and secular approach to waqf assets in the sense that they were seen only as historical monuments and works of art that embodied architectural heritage. This approach constructed from the perspective of art ("*san'ât nokta-i nazarından*")[88] excluded any mention of the social, cultural and religious functions of waqfs. It marked a rupture in the way spatial ordering of the city was perceived as the understanding of architecture was historicized. The same approach can be observed in the efforts to cleanse the surroundings of mosques and monuments of import, such as Ayasofya, Süleymaniye, and Çemberlitaş in order to spotlight their architectural magnificence following the 1865 Hocapaşa Fire. This rupture invites a question as to how we can link it to other changes in notions of waqfs in social, religious, economic and political terms other than questions of property.

[86] Cavid Baysun, "Mustafa Reşid Paşa'nın Siyasi Yazıları," *İstanbul Üniversitesi Edebiyat Fakültesi Tarih Dergisi* 11, no. 15 (1960): 124-125.
[87] Cavid Baysun, "Mustafa Reşid Paşa'nın Siyasi Yazıları," pp. 124-125.
[88] *Evkâf Nezâreti'nin 1909 Yılı Bütçesi Esbâb-ı Mûcibe Mazbatası*. Cited in Seyit Ali Kahraman, *Evkâf-ı Hümâyûn Nezâreti*, p. 145.

Chapter 3:

The *Icâreteyn* System: development, legal framework and functioning

The importance of waqfs in terms of economy, religion, and urban layout required the refinement of a large body of legal rules to meet the idea and practice of waqf, and practical necessities of administration. Consequently, religious endowments came to be recognized as a significant issue in the corpus of Islamic jurisprudence. To all appearances, the diversity of Islamic legal reasoning is reflected in the diversity of opinions among the 'founding fathers' of the Hanafite school on waqf as in many other issues. Leeuwen in his study of waqfs in Ottoman Damascus informs that Abu Hanifa, the founder, touched the subject of waqf only briefly, and he was less concerned with legal implications of waqf than limitations on the founders' scope of operation and status of the waqf-object itself as a pious gift (*sadaqa*), the irrevocability of which was central.[89] Muhammad al-Shaybani (d. 805) expanded Abu Hanifa's confining line of reasoning in an environment where the regulations related to waqfs became more complex. On the other hand, Abu Yusuf advocated the multiplication of religious endowments, and tried to codify a framework that would be encouraging for founders to turn their properties into waqfs. What became the dominant view on waqfs within the Hanafite doctrine is Abu Yusuf's less restrictive perspective.[90] Yet, Abu Bakr al-Shaybani al-Khassaf, the chief qadi of Baghdad in the eight century, was the first to attempt to compile the articulated discussions on waqf in the form of collection of rules, and his work, *Kitab ahkam al-awqaf,* persisted as the major source with regard to the Hanafite waqf jurisprudence.[91]

Transactions that could be conducted on endowed property, such as perpetual or temporary leases, inheritance of usufructuary rights (*intikâl*), transfer (*ferâğ*), subcontracting, exchange (*istibdâl*) and separation (*ifrâz*), were permitted by Islamic law as exceptional means to cope with the inalienability of waqf property in cases where waqf assets were in danger of dilapidation, or the transaction provided more advantages to the waqf. The inalienability of waqf property, simply dictating its

[89] Richard van Leeuwen, *Waqfs and Urban Structures: The Case of Ottoman Damascus* (Leiden, Boston, Köln: Brill, 1999), p. 38.
[90] Ibid, pp. 38-39.
[91] Ibid, p. 39.

protection against any kind of economic transactions, was one of the basic results of the conception of waqf as belonging to the realm of *huquq Allah.* It meant that once a property was endowed it became the property of God, and refered to the eternal nature of the endowment. However, such a strict rule was not practical since it was not always capable of responding to various configurations of necessity, be it for the interest of the waqf or for the needs of society. Its being impractical is reflected even on the legal level presented in fatwa collections used in this study even if we were to leave aside the practical problems encountered. And yet, fatwa collections indicate that the emergence of transactions on waqf property was not always related to the danger of dilapidation.

In particular, the issue of leasing waqf possessions seems to have stirred up deep controversy among scholars from the early history of waqf until relatively recent times. The main question, from which the debate resulted, is the stipulation that only a limited period of rent was permitted, usually one, or at maximum three years.[92] On this question, Leeuwen quotes the following remarks from a treatise on *istibdâl* (exchange of waqf possessions with *mülk*) and *ijara tawila* (long-term leasing), entitled *Risala tata'allag bi-al-awqaf min al-istijara wa-al-istibdal ila ghayr dhalik* ("Treatise concerning waqfs: on rent, exchange and other issues"), written in 1766 by an unknown author or authors: "After all [a long-term leasing would lead to the repeal of waqf], people would in the course of time no longer remember that a property is waqf and consequently give false statements in court. Since oral testimonies are the main category of legal evidence, this would endanger the legal status of waqfs. In the old days, this was not seen as a problem and there were no limits to the terms of the leasing of waqfs, but in these times people are prone to corruption and eager to appropriate what is not theirs."[93] Although the argument regarding unlimited leasing in the "old days" challenges our general assumption that waqf property leases moved from shorter terms to longer terms in contradiction to the mentioned stipulation while as much as it is true that it might possibly be an occasion for the author or authors to criticize "corruption" in that time, it is still revealing that restrictions on leasing terms were a fact.

[92] John Robert Barnes, *An Introduction to Religious Foundations*, p. 51; Richard van Leeuwen, *Waqfs and Urban Structures*, p. 63.
[93] Richard van Leeuwen, *Waqfs and Urban Structures*, p. 63.

Icâreteyn, as one form of long-term leasing, means double rent paid for immovable waqf assets. It was composed of *mu'accele*, i.e. the downpayment, and *müeccele*, i.e. a small amount of rent paid at the end of every month or year.[94] The system of *mukâata* as another form of long-term leasing needs to be explained due to its similarity to *icâreteyn*. The difference between the *mukâtaa* and *icâreteyn* systems was that buildings or plants on waqf lands rented through *mukâtaa* became the freehold of the renter, and only the land itself remained in possession of the waqf.[95] The *mukâtaa* system was not limited to waqf property alone. It could be adapted to *mîrî* land as well, as it is seen from the fatwa collections,[96] and it was mostly applied to the construction of public buildings in the nineteenth century.[97] On the other hand, in the *icâreteyn* system, both buildings or plants and the land continued to be the property of the waqf.

The payment of *müeccele* monthly or yearly provided some protection for the waqf. In the first place, it served as a potential site of waqf's memory, in other words as a ritual repeating itself every month or year to remind that the ultimate ownership of the property belonged to the waqf, not to the lessee.[98] That is to say that it prevented any claim based on the right of prescription (*mürûr-u zaman*). The renter could only maintain his/her right over the waqf as long as he/she paid the *müeccele* regularly. Otherwise, the waqf had the right to assign the property to another lessee.[99] Secondly, it made the practice of *mukâtaa* or *icâreteyn* legal according to Islamic law since it also meant the renewal of the contract between the waqf and the renter every year.[100] However, there is no indication in the fatwa collections under study that such an argument was used to justify long-term leasing.

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[94] Ömer Hilmi Efendi, *İthaf-ül Ahlaf fî Ahkam-il Evkaf*, p. 17.
[95] Ibid, p. 17.
[96] "*Zeyd arâzî-yi emîriyyeden tapu ve mukâta'a ile tasarrufunda olan yeri taraf-ı saltanattan kendüye temlîk-i sahîh ile temlîk olunmadan bir cihete vakf eylese sahîh olur mu? El-cevap: Olmaz*." Abdülrahim, *Fetâvâ-yı Abdürrahim*, p. 394.
[97] Nazif Öztürk, *Türk Yenilişme Tarihi Çerçevesinde Vakıf Müessesi*, p. 257.
[98] "*'Arsası mukâta'alu vakf ve binâ'sı mülk olmak üzere bir menzile mutasarrıf olan Zeyd nice seneden berü bir vakfın mütevellîsine menzil-i mezburun 'arsasının mukâta'asıdur deyu senede şu kadar akçe verub 'arsanın vakfiyyetini ikrar etmiş iken hâlâ Zeyd ol 'arsa kimin vakfıdır ben bilmem vâkıfın ismi ma'lûm olmayacak ba'de'l-yevm mukâta'a vermem demeğe kâdir olur mu? El-cevap: Olmaz*." Abdülrahim, *Fetâvâ-yı Abdürrahim*, p. 406.
[99] "*İcâre-i mu'accele ve müeccele ile bir vakf dükkana mutasarrıf olan Zeyd her re's-i şerhde ücret-i müeccele vermekte ta'allül ve mümâtale üzere olsa hâlâ mütevellî dükkan-ı mezburu âhara icâra kâdir olur mu? El-cevap: Tenbîh-i hâkimle müntebih olmazsa olur*." Abdülrahim, *Fetâvâ-yı Abdürrahim*, p. 517.
[100] Bülent Köprülü, "Evvelki Hukukumuzda Vakıf Nev'iyetleri ve İcareteynli Vakıflar," *İstanbul Üniversitesi Hukuk Fakultesi Mecmuası*, Vol. XVIII, No. 1-2 (1952), p. 713.

Parties involved in an *icâreteyn* arrangement were the founder, the trustee, the ones specified as the receipients of revenue, the lessee, and the qadi, among whom the relations were organized according to their sanctioned status and well-established and preferred rules. From the cases noted in the fatwa collections it seems quite clear who had certain rights over others. In many cases, the founder laid the ground for the functioning and operations of the waqf. The conditions stipulated by the founder were to be followed unless they became harmful to the interests of the waqf in the course of time, or a necessity emerged, the solution of which contradicted them. If some of them turned to be disadvantageous for the waqf it was then the trustee or the qadi to decide for the well-being of the waqf.

In the Ottoman world, a pragmatic approach seems to have been adapted. In the fatwa collections under study, the occasions for renting waqf possessions usually originated from the need for repair and reconstruction as the following typical example illustrates:

> The waqf house, the office of trustee and the habitation of which were stipulated to Zeyd, needs to be repaired. The waqf is not able to repair [the house]. If Zeyd is also not able to repair, is it licit for Zeyd that he rents out the house to someone else with the permission of the qadi until the rent enough for repairment is accumulated? The answer: it is.[101]

One way to determine the period of lease was to limit it with the period in which the lessee regained the amount of money that he/she spent for reconstruction through the usage of the waqf house as the case above demonstrates. Such cases required the permission of the qadi, and there was no question of returning the waqf to the ones who had been appointed by the founder to receipients of revenues generated from the sources of the waqf, and to maintain the office of trustee after the lessee was repaid through usage.[102] Likewise, the trustee did not have the right to take the property back before the

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[101] "*Tevliyet ve süknâsı Zeyd'e meşrûta olan vakf menzil ta'mîre muhtâç olub vakıfda ta'mîre müsâa'de olmayub Zeyd dâhi ta'mîre kâdir olmasa Zeyd menzili re'y-i hâkimle ta'mîre kifâyet edecek ücret hâsıla olunca âhara icâr edub ücretiyle menzili ta'mîre kâdir olur mu? El-cevap: Olur*." Erzurumlu Feyzullah, p. 187.

[102] "*Tevliyet ve süknâsı vâkıfın batnen ba'dehu batın evlâdına ve evlâd-ı evlâdına meşrûta vakf menzil harâp olub vakıfda ta'mîre müsâa'de olmayub ta'mire kifâyet edecek ücret hâsıla olunca icâr lâzım olmağla Zeyd menzili re'y-i hâkimle 'Amr'a icâr eder oldukta 'aded-i eyyâm beyân olunmadan yevmi şu kadar akçeye 'Amr'a icâr ve teslîm edub 'Amr'a menzilin harâb olan muvâza'anı malınla ta'mîr eyle masrûfunu ücretten istîfâ edince menzilde sâkin ol dimekle 'Amr dahi malından kadar-ı ma'rûf şu kadar akçe sarf ve menzilin harâb olan muvâza'anı ta'mîr edub masrûfunu sekini ile istîf'a ettikten sonra Zeyd menzili almadan fevt olup nöbet-i tasarruf evlâd-ı vâkıfdan Hind'e gelse Hind re'y-i hâkimle menzil-i mezburu 'Amr'dan almağa kâdir olur mu? El-cevap: Olur*." Feyzullah Efendi, *Fetâvâ-yı Feyziyye*, p. 188.

lessee recovered his/her money by using the waqf property, or was compensated in cash for the amount of money that was not compensated through usage.[103] Similarly, the cases where the leasing was contrary to the founder's conditions absolutely resulted in on behalf of the ones specified as beneficiaries by the founder. Moreover, if the waqf had enough income for rebuilding after the dilapidation of a waqf object renting was invalid.[104]

The conditions set by the founder could have three components: the right of habitation in case of a waqf house, the revenues generated from the waqf-object and the right of trusteeship. The founder could stipulate these three, or one or two of them according to his will. If it was a case in which someone was determined only to receive the revenues of a waqf house it was then the trustee to decide to whom the waqf house was rented.[105]

Such cases also suggest that a need for repair or reconstruction that legitimized renting was not always necessary since as long as the residence of a waqf house was not stipulated to someone it had to be rented out to produce revenue in any way. Yet, if the right of habitation was assigned to someone by the founder the scope of configurations tends to expand. First of all, if there was an inevitable necessity, leasing waqf house was valid even its residence was stipulated to specific person or persons as the following cases present:

> The waqf house, the office of trustee and the habitation of which were stipulated to children, is in the process of dilapidation. The waqf is not able to rebuild [the house]. If the children are also not able to repair, it is licit for them that they rent out the house with the permission of the qadi in order to repair the house with the rent accumulated. The answer: it is.

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[103] "*Zeyd mütevellîsi olduğu vakf-ı harâba bir menzili 'Amr'a beher yevm ikişer akçeye icâr eyledikte menzil-i mezburu bi'l-külliye i'mârât ve meremmet eyle ne mikdar akçe harç edersen istîfâ eyle demekle 'Amr dahi malından yirmi beş bin akçe harç ve sarf edip menzil-i mezburu i'mârât eyledikten sonra hala Zeyd 'Amr'a masârıfını istîfâ etmeden veyahud istîfâ etmediği mikdârı galle-i vakıfdan vermeden 'Amr'ı menzil-i mezburdan meccânen ihrâca kâdir olur mu? El-cevap: Olmaz*." Abdürrahim, *Fetâvâ-yı Abdürrahim*, p. 455.

[104] "*Zeyd'in mütevellîsi olduğu vakf akâr harâb oldukta ta'mîre müsâa'de var iken Zeyd ol akârı bi-gayr-i vech-i şer'i 'Amr'a bey' ve teslîm ettikten sonra Zeyd ma'zûl ve yerine Bekir mütevellî olsa Bekir akârı 'Amr'dan alub vakf içün zabta kâdir olur mu? El-cevap: Olur*." Feyzullah Efendi. *Fetâvâ-yı Feyziyye*, p. 201.

[105] "*Gallesi vâkıfın mutlaka evlâdına ve evlâd-ı evlâdına meşrûta vakf menzile icâreteyn ile mutasarrıf olan Zeyd bilâ-veled fevt olup mütevellîsi menzili âhara icâr etmek istedikte vâkıfın evlâdı mücerred gallesi bize meşrûta olmağla menzilde sâkin oluruz deyu mütevellîyi menzili icârdan men'e kâdir olurlar mı? El-cevap: Olmazlar*." Feyzullah Efendi. *Fetâvâ-yı Feyziyye*, p. 191.

> In this context, are some persons able to prevent children from leasing by stating that leasing is not licit since the habitation of the mentioned house is stipulated? The answer: they are not.[106]

Second, according to the cases observed in fatwas, it appears that the right of residence was reserved no matter what kind of transactions took place due to any kind of necessity. The right of habitation to a waqf house could be transferred by the beneficiaries to a third person even if the house was devastated by a fire. And if, for instance, this third person built a new house as his/her own *mülk* the following beneficiaries who were entitled by the founder to the right of habitation had the right to make the third person remove his/her *mülk* house unless the removal was disadvantageous for the waqf.[107] Such situations not only reveal the protected nature of habitation right but also let us infer about the perception of waqf property in relation to freehold property. It seems that freehold property did not have binding legal force over such examples.

The income of pious foundations came from two kinds of sources, either income derived from land or revenue extracted from property that had a roof, or ceiling (*sakf*). *Müstagallât* corresponded to revenue-bearing property in the form of land whereas *musakkafât* refered to revenue-yielding buildings, such as houses, shops, public baths, or warehouses. In addition to these, movable property could also bear income to religious endowments, such as money loaned at interest. The latter practice was a controversial issue according to the Hanafite school, yet its legality was announced by Ebussuud in the Ottoman world.[108] Thus, renting out waqf possessions was an indispensable practice for religious endowments to obtain revenue to continue their functioning. As mentioned above, the controversy arose when long-term leasing was the

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[106] "*Tevliyet ve süknâsı evlâda meşrûta olan vakf menzil harâba müşrif olub vakıfda binâ'ya müsâa'de olmayub evlâd dahi 'imârât ve meremmete kâdir olmasalar hâlâ evlâd rey'-i hâkimle ol menzili hâsıl olan ücreti ile 'imârât ve meremmet etmek içün icâr edüb ücreti ile menzil-i mezburu ta'mîre kâdir olurlar mı? El-cevap: Olurlar. Bu sûrette bazı kimesneler menzil-i mezburun süknâsı meşrûttur icâr câiz değildir deyu evlâdı icârdan men'e kâdir olurlar mı? El-cevap: Olmazlar*." Abdürrahim, *Fetâvâ-yı Abdürrahim*, p. 458.

[107] "*Süknâsı 'atîkaya ba'dehum bir mescid-i şerîfte imâm olanlara meşrûta vakf menzilde 'atîka sâkinler iken harîkte muhterik olub ba'dehu binâya vakıfda müsâa'de olmayub 'atîka dahi hak-ı süknâlarını âhardan 'Amr'a ferâğ idüb ba'dehu 'Amr ol menzilin yerine izn-i mütevellî ile malıyla nefsi içün müceddeden menzil binâ edub mutasarrıf iken fevt olup veresesi zabt ettiklerinden sonra 'atîka münkârızlar olup nöbet ol mescidin imâmına geldikte imâm vakfa dahi mütevelli olmağla verese-i 'Amr'a binâlarını kal'i arz-ı vakfa muzır olmayacak kal' ettirip yerini vakf içün zabta kâdir olur mu? El-cevap: Olur*." Abdürrahim, *Fetâvâ-yı Abdürrahim*, p. 467.

[108] John Robert Barnes, *An Introduction to Religious Foundations in the Ottoman Empire*, p. 50.

case. Yet, there is no indication of the duration in simple renting (*icâr*) as seen in the fatwa collections other than the general rule that it was usually not exceeding a period of three years. However, it was possible that even a term of three years could not be accepted as seen from the fatwas.[109]

The question as to what was intended to specify between renting by only stating *icâr* and renting by stating *icâre-i mu'accele* and *icâre-i müeccele*, that could be either *icâreteyn* or *mukâtaa*, remains unclear. If it was only because of the form of rent, in case of *icâr*, a single rent determined monthly or yearly, and in the case of *mukâtaa* and *icâreteyn*, double rent composed of *mu'accele* and *müeccele* it is easy to understand. However, whether it also implied a difference between the durations of leasing in two cases is difficult to grasp. Yet, the tension pervading the fatwa collections between practice and legal framing might have something further to say on this. In the fatwas, there are significant cases in which necessities make contradictions in legal formulations inevitable. Apart from fires, another necessity could be the absence of persons who were reluctant to rent a waqf asset for only a period of one or two years. Such cases resulted in unavoidable longer-term leases.[110]

Moreover, this tension seems to originate from the fact that some factors in non-*şer'i* transactions forced them to continue as such as the following example illustrates:

> Zeyd rents out a waqf asset, the trustee of which is himself, to Amr for a period of ten years in return for a certain amount of rent equal to its market value. After he takes the amount in cash, he is removed [from the office of trusteeship] and replaced by Bekir. Is [Bekir] able to take back the waqf asset from Amr for free before Amr reacquires his money through his usage of the asset, by stating that the mentioned leasing is not licit? The answer: he is not.[111]

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[109] "*Zeyd mütevellîsi olduğu vakf hamamı cem'an üç sene tamamına dek 'Amr'a ic'ar eylese ic'ar-ı mezbur câiz olur mu? El-cevap: Olmaz*." Abdürrahim, *Fetâvâ-yı Abdürrahim*, p. 496.

[110] "*Zeyd mütevellîsi olduğu vakf hamamı bir seneye veyahud iki seneye istîcâra tâlib bulunmamağla Zeyd üç sene tamamına dek vakfa nâfi' olmağın ecr-i misli olan yüz bin akçeye 'Amr'a icâr ve teslîm ettikten sonra Zeyd ma'zûl olub yerine Bekir mütevellî oldukta ben mütevellî-ı sâbıkın icârını tutmam deyub ol hamamı üç sene tamam olmadan 'Amr'dan alub âhara icâra kâdir olur mu? El-cevap: Olmaz*." Abdürrahim, *Fetâvâ-yı Abdürrahim*, p. 496.

[111] "*Zeyd mütevellîsi olduğu vakf 'akârâtı on seneye dek 'Amr'a ecr-i misli olan şu kadar akçeye icâr ve teslîm edüb ücret-i mezbureyi 'Amr'dan cümle peşin aldıktan sonra Zeyd ma'zûl olup yerine Bekir mütevellî oldukta 'Amr verdiği ücreti ol 'akârâtın ecr-i mislinden istîfâ etmeden icâr-ı mezbur sahîh değildir deyu ol 'akârâtı 'Amr'dan meccânen almağa kâdir olur mu? El-cevap: Olmaz*." Abdürrahim, *Fetâvâ-yı Abdürrahim*, p. 496.

In this example, there is nothing unreasonable. However, one wonders that if the waqf did not have a ready reserve to pay the amount of money received in advance back to Amr, then what would follow. Given the fact and logic that several other instances necessitated virtually long-term leasing, such as kind of agricultural produce that was harvested only once every two years, or the unlikeliness and unattractiveness of a situation in which one rented a waqf house at maximum only for three years, even the duration of simple renting (*icâr*) mentioned in the fatwa collections could possibly be more than three years. In spite of that possibility, this is not beyond speculation, and thus one should look at actual cases. In addition, it should not go without noting that flexible formulations of scholars, such as "the continuation of a lease for ten subsequent periods of three years" as indicated by Leeuwen[112] were not always accepted as the following case demonstrates:

> If Zeyd rents out the waqf asset, the trustee of which is himself, for a long-term period of 24 years by renewing the contract every three years as the end of previous contract be the beginning of the following contract, is the mentioned leasing licit? The answer: it is not.[113]

Apart from this abstract and juridical discussion, case studies can provide an idea about the practices, experiences and applications of legal rules concerning transactions over waqf property. For example, Hoexter, in her article where she examines the practices of perpetual lease and exchange transactions of waqf property in Ottoman Algiers by taking the Waqf al-Haramayn as a case, claims that not only in Algiers but also in many other places and periods both transactions were far from being exceptional, but widespread.[114] Depending on data derived from income registers of Waqf al-Haramayn, she assesses that until the last few decades of Ottoman rule in Algiers the number of both types of transactions was insignificant, and they were employed only in exceptional situations in which waqf was dilapidated and stopped to produce income. It followed a substantial increase in the number of leases and exchange transactions in most of which neither dilapidation nor destruction was the case.[115] Nevertheless,

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[112] Richard van Leeuwen, *Waqfs and Urban Structures*, p. 63.
[113] "*Zeyd mütevellîsi olduğu vakf 'akârâtını yirmi dört sene tamamına dek her üç senede bir akd-i cedîd olub akd-i sânînin ibtidâsı akd-i evvelin intihâsı olmak üzere icâre-i tavîle ile icâr ve teslim eylese icâr-ı mezbur sahîh olur mu? El-cevap: Olmaz.*" Abdürrahim, *Fetâvâ-yı Abdürrahim*, p. 496.
[114] Miriam Hoexter, "Adaptation to Changing Circumstances: Perpetual Leases and Exchance Transactions in Waqf Property in Ottoman Algiers," *Islamic Law and Society*, Vol. 4, No. 3, Islamic Law and Society. (1997), p. 322.
[115] Ibid, p. 325.

exchange transactions proved to be very gainful for the Waqf al-Haramayn, and the rent charged to the tenants rose considerably in comparison to the amount in the former periods.[116] Furthermore, the records kept regularly and orderly were themselves the evidence of the continuous control of the assets the Haramayn had, which invalidated the '*ulama*'s opposition contingent upon the assumption that "if the period [of lease by the same person] is long, this results in the annulment of the waqf (*ibtal al-waqf*), since whoever saw the person treating the property the way owners do, will, with the passage of time, consider him its owner."[117] From the tenants' point of view, too, perpetual leases were more advantageous than three-year leases, and in the end this advantage turned into an increase in the annual rent. In brief, it can be said that advantage was mutual.[118] Hoexter concludes that in the case of the Waqf al-Haramayn "a clear, rational economic policy" was pursued by applying leases and exchange transactions no matter in what condition the waqf assets were, partly destroyed or in perfect condition.[119]

This practicality formed around necessity found its reflection as corruption or decline discourse in *İthâf-ül Ahlâf fi Ahkâm-il Evkâf* by Ömer Hilmi Efendi. It was first published in 1890 and has been one of the major primary sources on waqfs in the Ottoman Empire. Ömer Hilmi Efendi was a member of the committee that was formed to prepare the Ottoman civil code (*Mecelle*), and during his employment in this committee he was charged with the duty of arranging waqf issues. The outcome of this mission was *İthâf-ül Ahlâf fi Ahkâm-il Evkâf*.[120] He also worked as undersecretary (*müsteşâr*) of the *Evkâf-ı Hümâyûn Nezâreti* and as general inspector of waqfs.

In his work, he confines corruption particularly to two systems: *icâreteyn* and *gedik*[121]. Although the *icâreteyn* system was instituted legally from the sixteenth century onwards because of the necessities mentioned before, according to Ömer Hilmi Efendi, it was abused and corrupted in the course of time, and resulted in "bad and detrimental"

[116] Ibid, pp. 325-326.
[117] Ibn 'Abidin, *Radd al-Muhtar*, vol. IV. 400. Cited in ibid, p. 326.
[118] Miriam Hoexter, "Adaptation to Changing Circumstances," p. 326.
[119] Ibid.
[120] Tahsin Özcan, "Osmanlı Vakıf Hukuku Çalışmaları", *Türkiye Araştırmaları Literatür Dergisi*, Vol. 3, No. 5 (2005), p. 619.
[121] For different meanings of *gedik* see Engin Deniz Akarlı, "A Bundle of Rights and Obligations for Istanbul Artisans and Traders, 1750-1840," in *Law, Anthropology and the Constitution of the Social: Making Persons and Things*. Alain Pottage and Martha Mundy (eds.) (Cambridge, New York: Cambridge University Press, 2004), pp. 166-200.

outcomes.[122] Yet, he does not explain what these "bad and detrimental" results of the corrupted *icâreteyn* system were. By especially pointing masonry assets of endowments, he further dwells on how waqfs that were far from being dilapidated were converted into *icâreteyn.*[123] His indication of masonry assets of endowments is certainly a reference to inflammable materials since recurrent fires were the main reasons for the development of the *icâreteyn* system. Thus, the leasing of waqfs' completely intact property through *icâreteyn* was the peak of Ömer Hilmi Efendi's criticism against decadent administrators and beneficiaries who pursued their interests.

In a document produced by the state in the corpus of *Düstûr* at the time of the discussions regarding the broadening of the levels of inheritance (*intikâl dereceleri*) on waqfs run with *icâreteyn* in 1865, the tone towards the development of the *icâreteyn* system sounds more flexible and pragmatic.[124] The document explains its development with reference to the "preservation of waqfs' interests" and the "maintainance of the flourishing condition of real estates" in cities.[125] It seems that the prolongation of leasing periods was required to bind lessees with the duty of repairment.[126]

What Ömer Hilmi Efendi and this document have in common is the widespread practice of *icâreteyn*. He confined the *icâreteyn* system to actual necessities in an authenticist way by rejecting its development beyond its legal boundaries while the document mentioned above presented *icâreteyn* as a more customary practice rather than a clear-

[122] "*Fakat ma'lûm olduğu üzre en güzel ve en nâf'i bir usûl ve kanun süi istimâl olunduğu surette en fena ve muzır neticeleri intâc edeceği mücerrebâtı umûrdan olmakla, bervechi meşrûh ihdâs olunmuş olan icâreteyn usûli mürûrı zaman ile ahlâf tarafından pek çok süi istimâlata uğratılarak fena ve muzır neticeler vermiştir.*" Ömer Hilmi Efendi, *İthâf-ül Ahlâf fi Ahkâm-il Evkâf*, p. 55.
[123] "*Ezcümle henüz vâkıfın yaptığı hâl üzre bulunan kârgîr han ve hamam gibi müsekkâfât-ı mamûre mütevell'iyân ve müteneff'izânın menâfi'i zatiyyeleri sâikasile "zarûretler kendi mikdârlarınca takdîr olunur" ve "hılâfı kıyâs sâbit olan gayre makisünaleyh olmaz" kâi'de-i fikhiyyelerine muhâlif olarak icâreteyne tahvîl olunmuştur.*" Ibid, p. 55.
[124] "*Dersa'âdet ile Rumeli ve Anadolu'nun ba'zı büyük şehirlerinde olan musakkafât ve sâir müstegallâtın ekseri icâreteyn denilen usûl-ü vakfiyeye tâbi' olub tesîsât-ı vakfiyenin ibtidâsında müstegallât-ı icâre-i vâhide yolunda iken muahharen icâreteyn usûlüne tahvîl olunmuş şöyle ki evâilde bir kimse mutasarrıf olduğu mülk 'arsa üzerine hâne veya hân ve dükkan yaparak bunun kirâsını tesîs eylediği bir hayra tahsîs edub bu mülk vakfın malı ve içünde bulunan adeta müstecir olmağla ol mülkün ta'mîr ve termîmi ve yanar yıkulur ise müceddeden inşâsı vakfına 'âid olduğundan ve vakıflarda ise ta'mîre kudret kalmadığından bir çok mülk harâb olmuş ve öyle yerlerin icâresi bi't-tab' düştüğüne mebnî evkâfın temettu'u dahi tenezzüle başlamış olmasıyla hem vakıfların muhâfaza-yı menâfi'i ve hem de emlâkın husûl-ü ma'mûriyyeti maksadıyla cennet-mekân Sultan Süleyman Han ol a'srında emlâkın usûl-ü tasarrufiyesi bir başka yola konulmuştur. Çünkü müstecirin ikâmet ettiği yeri ta'mîr etmek vazîfesinden olmayub kendüsünü bulunduğu yerin i'mârına mecbur etmek içün müddet-i tasarrufunu temdîd eylemek lâzım geldiğine…*" *Hayrât ve müberrâta dâir, 1284/1867. Düstûr*, 1:1, p. 232.
[125] Ibid.
[126] Ibid.

cut exception in law. Ömer Hilmi Efendi's constraining line of reasoning has been followed and shaped as a kind of reaction to 'Westernization' of the empire within the limits of modernization paradigm by comtemporary historians as well.

Among them is Nazif Öztürk.[127] He has been one of the most influencial historians who wrote on the institution of waqf in the nineteenth century. In general terms, he represents the nineteenth century transformation of property relations as changes to satisfy 'Europeans.'[128] The main target of Öztürk's opposition to the 'Westernization' of the empire is the ownership of waqf or *mîrî* property by non-Muslims and foreigners.[129] Moreover, he perceives the nineteenth century as an era of collapse as he states that "like other institutions of the state, the institution of waqf was also in an obvious process of disintegration as a result of the psychological and social effects of the decline that emerged in the nineteenth century on the individuals of society."[130]

Öztürk's nationalistic perspective is not the only angle from which the nineteenth century institution of waqf is presented within the decline paradigm. John Robert Barnes is another advocate of decline paradigm, whose point of departure is accounts of European observers.[131] He devotes a chapter to the results of changes in waqf administration, entitled "The Decline of Religious Foundations under the Imperial Evkaf Ministry."[132] Depending on the observations of Europeans[133] in the empire, he deals with how waqfs were deprived of revenue to undertake restoration activities as a result of the government's takeover of waqfs' sources of revenue with the foundation of the *Evkâf-ı Hümâyûn Nezâreti*. According to Barnes, this resulted in the dilapidation of

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[127] Nazif Öztürk, *Türk Yenileşme Tarihi Çerçevesinde Vakıf Müessesesi*; "Osmanlılar'da Vakıfların Merkezi Otoriteye Bağlanması ve Sonuçları;" "XIX. Asır Osmanlı Yönetiminde Batılılaşma Hareketlerinin Vakıflar Üzerindeki Etkileri."

[128] For instance, he states that "*Avrupalılar, miri ve vakıf ahkam-ı arazi ile toprakların istimlak edilmesini, alınacak kredi karşılığında ipotek gösterilmesini istiyor; Londra, Paris ve Berlin konferanslarında olduğu gibi, devletin mali ve siyasi yönden zor durumda kaldığı dönemlerde, bu isteklerini yeniliyorlardı*." Nazif Öztürk, "Vakıfların Merkezi Otoriteye Bağlanması," p. 26.

[129] For example, he states that "*Klasik dönemde vakıf görevlilerinin serğilediği yolsuzluklar sonucu, gayrimüslimlerin XIX. yüzyılın ikinci yarısında, rüşvet dahil her türlü yola başvurarak, İstanbul'un en güzel semtlerinde mülk edinmek için ısrarlı bir hareket içinde olduklarını ve bu yolda da başarı kazandıklarını göstermektedir*." Nazif Öztürk, "XIX. Asır Osmanlı Yönetiminde Yaşanan Batılılaşma Hareketlerinin Vakıflar Üzerindeki Etkileri," p. 28.

[130] "*XIX. Yüzyılda baş gösteren çüküşün toplumun bireyleri üzerindeki psikolojik ve sosyal etkileri sonunda, devletin diğer sektörlerinde olduğu gibi, vakıf sektöründe de açık bir çözülme hali yaşanmaktadır*." Nazif Öztürk, "Vakıfların Merkezi Otoriteye Bağlanması," p. 27.

[131] John Robert Barnes, *An Introduction to Religious Foundations.*

[132] Ibid, pp. 118-153.

[133] For instance, Charles MacFarlane, *Turkey and Its Destiny* (London: 1850).

waqf assets because officials of the *Nezâret* misadministered and misappropriated funds, and neglected waqfs.[134] Although he might have a point in the increased dilapidation of waqf assets in the nineteenth century due to lack of income, he does not consider the *Nezâret* as an institution of state centralization. In other words, he does not go beyond "incompetent," "dishonest" and "negligent" administrators to evaluate structurally the relation of the *Nezâret* to the state's concerns in the establishment of a central waqf administration.[135]

The decline discourse particular to waqfs seems difficult to be reconciled with the representation of the nineteenth century within the formation of a central state as pursued in this thesis. It fails to grasp the pragmatism in the institution of the *icâreteyn* system by confining it to a clear-cut exception in Islamic legal categories. It reduces the *Nezâret* to the personal failures of officials without dwelling on a structural analysis including both the relation of the *Nezâret* to state domination over waqf property and the emergence of new power configurations between the *Nezâret* and trustees, or other social classes. On the other hand, it totalizes the transformations in the nineteenth century as 'Westernization' in a nationalistic way, and it rejects both the multiple layers of reforms and the perception of the adoption of Western models as a process of translation that was in a continuous dialog with local dynamics.

[134] John Robert Barnes, *An Introduction to Religious Foundations*, p. 120.
[135] Ibid, p. 133.

Chapter 4:

The inalienability of waqf property: Transactions as divergences on waqfs run through *icâreteyn*;

The late seventeenth and early eighteenth centuries

The scope of the lessees operations over waqf property rented through *icâreteyn* seems to be quite significant. The rights of the lessee with regard to the transactions that he/she could conduct over waqf property are important to assess the relation of waqf property to freehold and *mîrî* property. The extent of transactions is also important to question the representation of land with limited divisibility and inalienability before the nineteenth century. First, I will clarify what kind of transactions were possible over waqf property in the late seventeenth and early eighteenth centuries by using the fatwa collections of the respective periods. Then I will compare them with transactions as presented in the fatwas, laws and regulations of the nineteenth century to reveal changes and continuation and accumulation of legal framing.

To begin with, irrevocable transfer (*ferâğ*) it is necessary to note that similar to the differentiation between *irth* and *intikâl* to keep the distinction between *mülk* and *mîrî* or waqf property different terminologies were used to specialize *ferâğ* (transfer) and *bey'* (sale) separately. The word '*ferâğ*' means the transfer of usufructuary rights on *mîrî* and waqf property from one person to another while the word '*bey*'' was used for the sale of *mülk* property. The transfer of usufructuary rights, or the right of trusteeship was accepted if these rights were not stipulated to someone by the founder. In such cases, the trustee had to approve the transfer unless it was disadvantageous for the waqf.[136] If usufructuary rights or the right of trusteeship were stipulated, then the transfers proved to be invalid or valid only in a period limited by the duration of shift in the right of usage or of trusteeship as the following case demonstrates:

[136] "*Zeyd tasarrufunda olan icâre-i mu'accele ve müeccelelü vakf menzili şu kadar akçe bedel mukâbelesinde 'Amr'a ferâğ edip ba'dehu ferâğa mütevellî-i vakf-ı mezburdan izin taleb ettikte mütevellî li-garaz izin vermem demeğe kâdir olur mu? El-cevap: Olmaz*." Abdürrahim, *Fetâvâ-yı Abdürrahim*, p. 541.

> Zeyd as from the first generation of the founder's children is the possessor [*mutasarrıf*] the waqf, the trusteeship of which was stipulated to the founder's children and the children's children from generation to generation. After Zeyd transfers the trusteeship to Amr who is non-relative Zeyd dies. The turn of using [the trusteeship] shifts to Bekir from the second generation of the founder's children. By preventing Amr from holding the trusteeship, is Bekir able to hold [it] himself on the basis of the founder's stipulation? The answer: he is.[137]

The situation was the same when the case involved the right of residence that was stipulated by the founder.[138] The issue of transfer becomes more complex when various rights on waqf property had no stipulations attached to them. Examples are varied, and invoke numerous questions. For example, a renter of a waqf-house could transfer his/her right of use even if the house was completely devastated by a fire.[139] Such cases suggest that the right of residence could turn into the usage right on land contrary to the expectation that the contract between the waqf and the lessee would be annulled when the waqf-house was no longer there. It can be concluded that contracts revolved around the rationale of continuation rather than resuming transactions as far as the waqf continued to profit. For instance, cases in which land and buildings belong to different waqfs illustrate that after fires the waqf of buildings was given the right to rebuild as long as it continued to pay the rent of the land to the waqf of land.

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137 "*Tevliyeti vâkıfın batnen ba'dehu batın evlâdına ve evlâd-ı evlâdına meşrûta vakfın tevliyetine vâkıfın evlâdından batın-ı evvelden olan Zeyd mutasarrıf iken Zeyd tevliyeti ecânibden 'Amr'a ferâğ ettikten sonra Zeyd fevt olub nöbet-i tasarruf vâkıfın evlâdından batın-ı sânîden olan Bekir'e gelse Bekir tevliyeti 'Amr'a zabt ettirmeyub şart-ı vâkıf üzere kendi zabta kâdir olur mu? El-cevap: Olur*." Feyzullah Efendi, *Fetâvâ-yı Feyziyye*, p. 198.

138 "*Süknâsı evlâda ve evlâd-ı evlâda ve ba'de'l-inkırâz gallesi medine-i münevvere fukarâsına meşrûta vakf menzilde evlâddan Hind şart-ı vâkıf üzere sâkine iken Hind menzil-i mezburdan kasr-ı yed edub bir mikdar akçe bedel mukâbelesinde süknâsını 'Amr'a fâriğ olub Bekir-i kadıya hüccet yazdırub ba'dehu Hind fevt olub evlâd münkârızlar olmağla medine-i münevvere mütevellîsi menzil-i mezburu 'Amr'dan alub icâre-i mu'accele ve müeccele ile Bekir'e icâr etmiş olsa hâlâ 'Amr Hind'e verdiği akçeyi Hind'in tereke-i vakfiyesinden almağa kâdir olur mu? El-cevap: Olur*." Abdürrahim, *Fetâvâ-yı Abdürrahim*, p. 508.

139 "*Bir vakf menzilin tahtâniyesi Zeyd ve fevkâniyesine 'Amr icâre-i mu'accele ve müeccele ile mutasarrıflar iken ol menzil muhterik olup 'arsa sırfa kaldıktan sonra Zeyd 'arsa-ı mezbureyi izn-i mütevellîyle Bekir'e ferâğ Bekir dahi ol 'arsa üzerine izn-i mütevellîyle mu'accelesine mahsûb olmak üzere thatânî bir oda binâ ettikte 'Amr dahi hak-ı ta'allîyesi olmağla ol odanın üzerine ke'l-evvel mu'accelesine mahsûb olmak üzere oda binâ murâd ettikte Bekir men'e kâdir olur mu? El-cevap: Olmaz." Abdürrahim, Fetâvâ-yı Abdürrahim, p. 511; "Zeyd bir vakf 'arsayı mütevellîsinden icâre-i mu'accele ve müeccele ve senede şu kadar akçe mukâta'a misli ile alub mu'accelesini mütevellîye verub ba'dehu Zeyd ol 'arsa üzerine mülkiyet üzere izn-i mütevellî ile menzil binâ edub kendüye ba'dehu evlâdına vakf ve şart edub ba'dehu Zeyd fevt olub evlâdı mutasarrıflar iken menzil-i mezbur harîkte muhterik olub 'arsa sırfa kaldıkta binâya vakıfda müsâa'de olmayub evlâd dahi binâya kâdir olmamağla evlâd ol 'arsayı mütevellîsi izniyle âhara ferâğ ve tefvîze kâdir olurlar mı? El-cevap: Olurlar*." Abdürrahim, *Fetâvâ-yı Abdürrahim*, p. 540.

However, other cases reveal that the relation of the renter of a waqf building to the waqf of land could be removed after a fire if deemed necessary or the conditions dictated so as the following example presents:

> Amr is the possessor the wooden cellars, the buildings of which are the waqf of Zeyd, stipulated to a reason, and the land of which belongs to the waqf of Ayasofya. After [the cellars] burns out by a fire, and the land becomes vacant, Amr transfers the land to Bekir. Bekir builds a [new] house to be his own property with his goods with the permission of the trustee of the waqf building. By preventing the trustee of the building from taking the rent charged to the land, is the trustee of [the waqf] of Ayasofya still able to take [it] himself for the waqf of Ayasofya? The answer: he is.[140]

In this case, Zeyd, the founder of a waqf on a plot of land that belonged to another waqf, namely Hagia Sophia, and the trustee of Zeyd's waqf are completely moved out of the scene after Amr tranfers his right on the land to Bekir following the fire, although Zeyd is the initial renter of the plot. In the end, Bekir replaces Zeyd as the owner of the cellars that he reconstructs. One wonders that if Zeyd demanded to maintain his position as the original lessee of the waqf-land, and even attempted to rebuild the cellars himself, then what would be the response of the mufti as the authority to sanction the law. Or can it be said that the last person who has obtained the usufract, in this case, that means Bekir, makes the previous claims invalid? If that is the case, then why does Bekir need to be permitted by the trustee of the building? Or does the mufti assume that Zeyd withdraws his rights on the land after the fire? The questions remain unanswered, which is typical since one fatwa was usually structured to answer one question leaving related aspects only as assumptions. In this fatwa, the primary purpose of the mufti is to elucidate that the rent received from that land by the waqf of Hagia Sophia will continue to be received no matter who is using it.

In the context of irrevocable transfer, we can cite another practice within the scope of operations of the lessee on waqf property. That is about the divisibility of the waqf property that was rented by *icâreteyn*. An endowment asset could be rented by more than one person, and each person could transfer his/her share without the approval of

[140] "*'Arsası Ayasofya vakfından olup binâsı Zeyd'in bir cihete meşrût vakfı olan tahtadan mebnî mahzenlere 'Amr mutasarrıf iken harîkte muhterik olup 'arsa sırfa kalub ba'dehu 'Amr ol 'arsayı Bekir' ferâğ edub Bekir dahi malıyla nefsi içün binâ vakfının mütevellîsi izniyle mülkiyet üzere menzil binâ eylese hala Ayasofya mütevellîsi 'arsanın ecr-i mislini binâ mütevellîsine aldırmayub Ayasofya vakfı içün kendi almağa kâdir olur mu? El-cevap: Olur*." Abdürrahim, *Fetâvâ-yı Abdürrahim*, p. 475.

the others.[141] The divisibility of waqf property is significant with regard to the accessibility of waqf assets in the economic sphere. The reflection of the divisibility in practice which was sound according to the law remains a question. Nevertheless, fatwas seem to pave the road for the circulation of endowed assets. The divisibility of waqf property was not limited to cases of transfer or separation of shares, but it also included material divisibility. A shop, cellar, a piece of agricultural land, or even a house belonging to a waqf could be legally divided as long as it was capable of being physically divided, and proved to be productive of profit for the waqf.[142]

The last point to be noted regarding irrevocable transfer is the fact that the amount of money received in return for transfer was not subjected to the lessee's debts. That means that the fee paid to the lessee in return for the transfer of his/her usage rights to another person was not categorized in the *tereke* of the lessee, and thus lenders, if any, did not have the right to take it.[143]

Another transaction over waqf property comes in the form of subcontracting. I use subcontracting in the sense that a lessee could rent out a waqf asset that he rented before

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[141] "*Zeyd 'Amr ve Bekir ve Beşir ile müşterek olduğu icâre-i mu'accele ve müeccelelü vakf mahzenden reb'-i hissesini izn-i mütevellîyle şu kadar akçe mukâbelesinde sıhhatinde 'Amr'a ferâğ edip lâkin mütevellîden ferâğa temessük alınmadan Zeyd bilâ-veled fevt olsa hâlâ mütevellî mücerred Zeyd'in hayatında temessük alınmadı hisse-i mezbureyi Zeyd'in mahlûlünden olmak üzere vakf için zabta kâdir olur mu? El-cevap: Olmaz*." Another example is: "*Zeyd icâre-i mu'accele ve müeccele ile tasarrufunda olan vakf menzilden nısf hissesini bir mikdâr akçe bedel mukâbelesinde 'Amr'a ferâğ edub lâkin izn-i mütevellî bulunmadan Zeyd bilâ-veled fevt olsa mütevellî Zeyd'in hissesini vakf içün zabt ve icâra kâdir olur mu? El-cevap: Olur*." Abdülrahim, *Fetâvâ-yı Abdürrahim*, p. 541.

[142] The following fatwas are examples of different waqf assets regarding divisibility: "*Reb'i Zeyd'in mülkü ve sülüs-ü erba'ı vakf olup kâbil-i kısmet olan menzilin kısmeti vakfa nâfi' olıcak Zeyd ile mütevellînin talebiyle kısmet olunup vakf mülkten ifrâz olunmak câiz olur mu? El-cevap: Olur.*" "*Dört kepenk bir kebîr-i dükkana icâre-i mu'accele ve müeccele ile Zeyd ve 'Amr mutasarrıflar olup kısmet olunduğu takdirce her biri hissesiyle intifâ' mümkün olıcak Zeyd ben hissemi izn-i mütevellî ile ifrâz edub müstâkılen hissemi tasarruf ederim demeğe kâdir olur mu? El-cevap: Olur.*" "*Zeyd ve 'Amr beyinlerinde icâre-i mu'accele ve müeccele ile bir vakf bostan yerine iştirâk üzere mutasarrıflar iken Zeyd ve 'Amr ol bostan yerini izn-i mütevellîyle beyinlerinde iktisâm eyleseler câiz olur mu? El-cevap: Olur*." Abdürrahim, *Fetâvâ-yı Abdürrahim*, pp. 461-462.

[143] "*Düyûnu terekesinden ezyed olduğu hâlde fevt olan Zeyd'in ücret-i mu'accele ve müeccele ile tasarrufunda olup oğlu 'Amr ile kızı Hind'e intikâl eden vakf menzili 'Amr ve Hind bir mikdâr bedel mukâbelesinde izn-i mütevellî ile Bekir'e ferâğ ve tefvîz ve bedel-i mezburu kabz etmiş olsalar hâlâ erbâb-ı düyûn bedel-i mezburdan deynlerini istîfâya kâdir olurlar mı? El-cevap: Olmazlar*." "*Medyûnan fevt olan Zeyd'in ücret-i mu'accele ve müeccele ile tasarrufunda olub oğlu 'Amr ile kızı Hind'e intikâl eden vakf menzili dâinleri bedel mukâbelesinde âhara ferâğ ettirub bedelden istîfâ-yı deyn etmeğe kâdir olurlar mı? El-cevap: Olmazlar*." "*Düyûnu terekesinden ezyed olduğu halde fevt olan Zeyd'in ücret-i mu'accele ve müeccele ile tasarrufunda olup oğlu 'Amr ile kızı Hind'e intikâl eden vakf menzili 'Amr ve Hind bir mikdâr bedel mukâbelesinde izn-i mütevellî ile Bekir'e ferâğ ve tefvîz ve bedel-i mezburu kabz etmiş olsalar hâlâ erbâb-ı düyûn bedel-i mezburdan deynlerini istîfâya kâdir olurlar mı? El-cevap: Olmazlar*." Abdürrahim, *Fetâvâ-yı Abdürrahim*, p. 542.

to a second lessee, and even then, the second lessee could rent out the same asset to a third person.[144] The question of whether subcontracting was *şer'i* or not was usually ignored in the fatwas. Nevertheless, there are rare examples of cases that gives an idea about the soundness of the practice.

> Zeyd, the lessee of a waqf khan, transfers [the usage rights on] the half of the khan to Amr in return for three thousand akçes, and takes the mentioned amount from Amr. Is Zeyd still able to prevent Amr from the usage [of the khan] by returning back the three thousand akçes to Amr on the basis of the unsoundness of the mentioned leasing? The Answer: he is.[145]

As it is obvious from this example, the second renting out by Zeyd was not sound. Yet, whatever the mufti's stance was, the fatwa itself suggests the existence of such practices, at least in imagination. The question as to how they adjusted the value of waqf property in cases of leasing according to different layers of *ecr-i misl*, the market value of a waqf asset, remains unanswered.

The exchange of waqf assets (*istibdâl*) is yet another transaction observed in the fatwa collections. The trustee of a waqf could exchange a waqf asset with a freehold property if the conditions were met, and the transaction proved to be advantageous for the waqf. Then, the freehold became waqf, and the waqf asset turned into freehold property. Exchange transactions required the permission of the sultan.[146] If the exchange was contrary to the interests of the waqf it was not allowed.[147]

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[144] "*Zeyd icâre-i mu'accele ve müeccele ile mutasarrıf olduğu bir vakf dükkanını yevmi ikişer akçe ücretle bir sene tamamına dek 'Amr'a icâr ve teslîm ettikten sonra 'Amr ol dükkanı bir kaç ay yedişer sekizer akçeye ba'zı kimesnelere icâr edub ücretini alsa hâlâ 'Amr sene tamamında ecr-i müsemmâyı Zeyd'e verdikte Zeyd ana râzı olmayub sen ol dükkanı şu kadar ziyâdeye icâr eylemişsin ol ziyâdeyi dahi bana ver dimeğe kâdir olur mu? El-cevap: Olmaz*." Abdürrahim, *Fetâvâ-yı Abdürrahim*, p. 522.

[145] "*Bir vakf hanın müstec'iri olan Zeyd ol hanın nısfını üç bin akçeye 'Amr'a icâr edub meblağ-ı mezburu 'Amr'dan almış olsa hâlâ Zeyd icâr-ı mezbure sahîha olmamağla aldığı üç bin akçeyi Amr'a verub ol hanın nısf-ı şâyi'ini tasarrufdan 'Amr'ı men'e kâdir olur mu? El-cevap: Olur*." Abdürrahim, *Fetâvâ-yı Abdürrahim*, p. 499.

[146] "*Zeyd icâre-i mu'accele ve müeccele ile mutasarrıf olduğu vakf menzilin müddet-i medîde zabt ve tasarrufla mu'accelesi istîfâ ettikten sonra harîkte muhterik olup yerine menzil binâ olunmak mümkün olmamağla mütevellîsi emr-i sultani ile 'arsasını cem'i şerâit-i istibdâl mevcuda olmağla Hind'in mülk 'arsası ile istibdâl edip vakf-ı 'arsayı Hind'e verub Hind'in 'arsasını vakf içün zabt eyledikte Zeyd ol arsa benim muhterik olan 'arsam bedelidir deyu mütevellîden almağa kâdir olur mu? El-cevap: Olmaz*." Abdürrahim, *Fetâvâ-yı Abdürrahim*, p. 461.

[147] "*İstanbul hisarı dâhilinde olup mahal-i rağbette olan 'arsa-yı hâlîya müntefî'i baha iken Bekir'in mülk menzili ile istibdâl câiz olur mu? El-cevap: Olmaz*." Abdürrahim, *Fetâvâ-yı Abdürrahim*, p. 461.

As to the inheritance (*intikâl*) of usufructuary rights over waqfs run with *icâreteyn*, the situation is as simple as it is surprising if we leave aside the stipulations of the founder as to the inheritance of the waqf.[148] It is simple because only daughters and sons could inherit waqf assets, and it is surprising since daughters and sons inherited equally from both fathers and mothers.[149] The same terms pertaining to *intikâl* of usage rights over waqfs rented through *icâreteyn* were also valid for non-Muslims unless the offspring professed another religion.[150] In the case of the non-existence of children, the waqf asset in question reverted to the waqf as escheat.[151]

The *intikâl* of usage rights over waqfs run through *mukâtaa* seems more complex due the fact that buildings or threes on waqf lands rented with *mukâtaa* were deemed *mülk,* thus, they were subjected to another set of inheritance laws. The case below represents the distinction between waqf land and *mülk* assets on it:

> Zeyd as the trustee rents out the land that is the land of a waqf to Amr in return for a downpayment and a certain amount of yearly rent equal to the market value [of the land]. If then Amr constructs buildings on the land to be his own property, do those buildings become the property of Amr? The answer: they do.[152]

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[148] Stipulations of the founder had the legal sanction to set the terms as to the inheritance of waqf property. However, this aspect is excluded in this thesis since I basically deal with waqfs run with *icâreteyn* on which the founder's line was supposed to come to an end in the fatwa compilations under examination.

[149] "*Zeyd ücret-i mu'accele ve müeccele ile vakf 'akâra mutasarrıf iken fevt olup oğulları 'Amr ve Bekir ile kızı Hind'i terk eyledikte mezburlar ol 'akârı […] tasarruf ederler yohsa ale'l-seviye mi? El-cevap: Ale'l-seviye*." "*Zeyd ücret-i mu'accele ve müeccele ile ba'zı 'akârâta mutasarrıf iken fevt olup zevcesi Hind'i ve evlâdını terk ettikte ol 'akârâttan zevcesi Hind'e hisse intikâl eder mi? El-cevap: Etmez*." "*İcâre-i mu'accele ve müeccele ile bir vakf menzile mutasarrıf olan Hind bilâ-veled fevt oldukta menzil-i mezburun tasarrufu vâlidesi Zeyneb ile li-ebeveyn […] Zeyd'e intikâl eder mi? El-cevap: Etmez*." Abdürrahim, *Fetâvâ-yı Abdürrahim*, pp. 543-544.

[150] "*Zeyd-i zimmî on iki bâb vakf odalara icâre-i mu'accele ve müeccele ile mutasarrıf iken fevt olub oğlu Bekir-i müslim ile âhar oğlu Beşir-i zimmîyi terk eylese ol odalardan Bekir'e hisse intikâl eder mi? El-cevap. Etmez*." Abdürrahim, *Fetâvâ-yı Abdürrahim*, p. 543.

[151] "*Zeyd zevcesi Hind ile iştirâk-ı sevî üzere icâre-i mu'accele ve müeccele ile bir vakf menzile mutasarrıflar iken menzil-i mezbur harîkte muhterik olub 'arsa-yı sırfa kaldıkta Zeyd ol 'arsadan kendi hissesi üzerine izn-i mütevellî ile mu'accelesine mahsûb olmak üzere bir menzil binâ edub Hind'in hissesi hâliya kaldıktan sonra Hind bilâ-veled fevt olsa hâlâ mütevellî Hind'in 'arsa-ı mezbureden hissesini vakf içün zabt ve icâr murâd eyledikte Zeyd mütevellîye ben ol 'arsa üzerine senin izninle vech-i muharrer üzere binâ etmekle 'arsanın mecmû'u benim tasarrufumda olmuş olur deyup mütevellîyi icârdan men'e kâdir olur mu? El-cevap: Olmaz*." Abdürrahim, *Fetâvâ-yı Abdürrahim*, p. 513.

[152] "*Bir vakfın müstegallâtından olan 'arsayı mütevellîsi Zeyd 'Amr'a ücret-i mu'accele ve senede ecr-i misle mu'addil şu kadar akçe mukâta'a takdîri ile icâr ve teslîm edub ba'dehu 'Amr Zeyd'in izniyle ol 'arsa üzerine nefsi için mülkiyet üzere ebniye ihdâs eylese ol ebniye 'Amr'ın mülkü olur mu? El-cevap: Olur*." Abdürrahim, *Fetâvâ-yı Abdürrahim*, p. 464.

Mülk properties on waqf lands were subjected to Islamic succession rules, and the waqf did not have the right to intervene in freehold properties. For instance, if the lessee of a waqf land, on which he/she had *mülk*, died without children only the waqf land reverted to the waqf as escheat, but not the *mülk* property of the lessee.[153] Yet, it should be noted that waqf lands run with *mukâtaa* did not necessarily include *mülk* property.[154] A *mülk* building on a piece of waqf land could also be endowed, thus there could be two or more different waqfs on the same land:

> Amr is the possessor of a waqf house run with [*icâreteyn*], the land run with long-term *mukâtaa* of which belongs to the waqf of Ayasofya, and the building of which is the waqf of Zeyd, stipulated to another reason. After Amr dies, the house is inherited by Bekir and Beşir, the sons of Amr, and Hind, the daughter of Amr. [After the death of Amr] Hind also dies without children. Halid, the trustee of Zeyd's waqf, wishes to claim Hind's share of the mentioned house for the waqf. Is Velid, the trustee of the waqf of Ayasofya, able to claim the mentioned share [of Hind] on the basis of the fact that the land, on which is the house, belongs to the waqf of Ayasofya? The answer: he is not.[155]

In this example, the actors operating on the same land are: in the first place, the waqf of Hagia Sophia; then Zeyd, the founder of the waqf house; Amr, the lessee of the Zeyd's waqf house; Bekir, Beşir and Hind as the heirs of Amr; and finally, the trustee of the waqf house as the authority to rent out Hind's share to someone else, which turned to the waqf since Hind does not have a child. This picture seems to contribute to the fact that multiple claims to usage rights of waqf assets were in line with multiple claims to both land and surplus in terms of *mîrî* property.

In conclusion, the scope of transactions that could be conductable on waqf property proves that the principal of inalienability can not be said to have been observed over

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[153] "*Hind tasarrufunda olan icâre-i mu'accele ve müecceleli vakf arsa üzerine izn-i mütevellî ve malıyla nefsi içün mülkiyet üzere bir oda binâ edub ba'dehu Hind bilâ-veled fevt olmağla veresesi ebniye-i mezbureyi mülkleri olmak üzere zabt murâd ettiklerinde mütevellî mücerred 'arsa icâre-i mu'accele ve müeccelelü vakf olup Hind bilâ-veled fevt olmağla vakfa intikâl eder deyup vereseyi zabtan men'e kâdir olur mu? El-cevap: Olmaz*." Abdürrahim, *Fetâvâ-yı Abdürrahim*, p. 464.

[154] "*Zeyd mukâta'a-yı kadîme ile bir bostan yerine mutasarrıf iken bilâ-veled fevt olmağla mütevellî-i vakf-ı mezbur ol bostan yerini vakf içün zabt ve icâr murâd ettikte Zeyd'in veresesi mücerred ol bostan yeri mukâta'alu olmağla mülk hükmünde olup ırsen bize intikâl eder deyu mütevellîyi zabtan men'e kâdir olurlar mı? El-cevap: Olmazlar*." Abdürrahim, *Fetâvâ-yı Abdürrahim*, p. 479.

[155] "*'Arsası mukâta'a-yı kadîmelu Ayasofya vakfından olup binâsı cihet-i ahraya Zeyd'in vakfı olan menzilin icâre-i mu'accele ve müeccele ile mutasarrıfı olan Amr fevt olup menzil-i mezbur oğulları Bekir ve Beşir ile kızı Hind'e intikal eyledikten sonra Hind dahi bilâ-veled fevt olmağla menzil-i mezburdan Hind'in hissesini Zeyd'in vakfı mütevellîsi Hâlid binâyı vakf içün zabt ve icâr murâd eyledikte Ayasofya mütevellîsi olan Velid ol menzilin 'arsası Ayasofya vakfından olmağla hisse-i mezbureyi ben zabt ve icâr ederim demeğe kâdir olur mu? El-cevap: Olmaz.*" Abdürrahim, *Fetâvâ-yı Abdürrahim*, p. 472.

waqf property. This not only suggest that the development of the *icâreteyn* system as a contingency in Islamic law served to meet the needs of society for the circulation of waqf property in the economic sphere, but also invite an attempt to question the validity of the representation of land with limited divisibility and alienability before the progulmation of the Land Code.

Chapter 5:

The nineteenth century: What changed?

A Hesitant Road to Private Property: Changes in Inheritance

Before moving on to the changes in inheritance laws on *mîrî* and waqf property in descriptive terms, a couple of remarks are needed as to the motivations of the state behind these changes. The establishment of individual property rights on land was closely related to "productionist concerns" of central states.[156] In general terms, the institution of private property has been explained in relation to state centralization which itself overlapped with the commercialization of agriculture, growth of trade, colonial expansion and interstate competition. The conception of land as "the chief source of value" and "an economic asset" was developed in conjunction with more intensified taxation over land from the eighteenth century onwards.[157] As stated by İslamoğlu, this was accompanied with "orderings of property relations on land in terms of individual rights, furthered by the understanding that individual ownership was essential for economic growth in that only those who controlled surplus production could be expected to invest in capital improvements."[158]

From this background, I argue that in the nineteenth century Ottoman context, the institution of individual property rights did not entail the invalidation of state ownership of land. Instead, the state developed other mechanisms that would result in increase in production. One of these mechanisms came in the form of changes in inheritance laws. Another was the development of mortgage on *mîrî* and waqf property as will be discussed in the following chapter. The nineteenth century conceptualization of inheritance on *mîrî* and waqf property was characterized by the state's effort to increase productivity and profitability on land. The changes in inheritance laws converged on the expansion of groups of persons who could inherit. The expectation from the broadened circles of persons was primarily to convince persons within their individual families that usage rights over waqf or *mîrî* property were guaranteed to remain in the hands of the family. If the family was persuaded, then it would invest more capital and labour to

[156] Huri İslamoğlu, "Towards a Political Economy," pp. 12-13.
[157] Ibid, p. 13.
[158] Ibid.

improve waqf or *mîrî* property. In this sense, I consider the changes in inheritance laws as signs of the state's hesitancy to withdraw from its title to land.

Inheritance practices differed according the nature of property involved, be it waqf, *mîrî* or *mülk*. Different categories of property resulted in different legal orders within different domains of law, such as sharia, *qanun*, or customary law, in the Empire. The one which regulated the system of inheritance of usufructuary rights on *mîrî* property was mostly *qanun*, and it differed from sharia to a considerable extent.[159] Thus, the inheritance of *mülk* property which was defined by Islamic inheritance rules is excluded in this thesis.[160] On the other hand, inheritance of waqf property was more complicated. For my purposes here, I focus on inheritance of waqfs run through *icâreteyn* and changes in inheritance laws in waqf property together with *mîrî* property in the nineteenth century. These changes made inheritance rules in waqf and *mîrî* property almost the same. Thus, in what follows I examine both.

The first change in the inheritance of usufructuary rights on *mîrî* lands came with a decree in 1847.[161] It ended the exclusive priority of sons by entitling daughters to inherit the land from their fathers without the payment of any fee.[162] Another decree established in the same year entitled mothers to leave the usage rights they had over *mîrî* land to both their sons and daughters without any requirement to pay a *tapu* fee.[163] Yet another imperial decree established in 1858 extended the circles of groups who could inherit without the payment of *tapu* fee by including fathers and mothers.[164] This was valid if there were no children of the deceased. However, all these decrees did not change the hierarchy that made males prior to females. In other words, females could inherit without payment if there was no male on the same level of inheritance.

[159] Kenneth M. Cuno, *The Pasha's Peasants*, p. 74.
[160] There is an established literature on Islamic law of succession. Among others, see, David Powers, *Studies in Qur'an and Hadith: The Formation of the Islamic Law of Inheritance* (Berkeley: University of California Press, 1986); David Powers, "The Islamic Inheritance System: A Socio-Historical Approach," *Arab Law Quarterly*, Vol. 8, No. 1 (1993), pp. 13-29; *Islamic Family Law*, Chibli Mallat and Jane Connors (eds.) (London: Graham and Trotman, 1991); Richard Kimber, "The Qur'anic Law of Inheritance," *Islamic Law and Society*, Vol. 5, no. 3 (1998), pp. 291-325. For an empirical study of wealth mobility in Ottoman context, see Boğaç A. Ergene and Ali Berker, "Inheritance and Intergenerational Wealth Transmission in Eighteenth-Century Ottoman Kastamonu: An Empirical Investigation," *Journal of Family History*, Vol. 34, No. 1 (2009), pp. 25-47.
[161] Halil Cin, *Osmanlı Toprak Düzeni*, p. 17.
[162] Ibid, p. 18.
[163] Ibid.
[164] Ibid, p. 366.

Otherwise, males had the priority over females. Yet, this rule was to change with the Land Code of 1858. The Code treated male and female children on equal basis.[165] Equality between male and female heirs was only legitimate for the children of the deceased or the first level of inheritance. That is to say that males were still prior to females if the case involved fathers and mothers as heirs to their children.[166] If we rank inheritance levels of usufructurary rights on *mîrî* land we can say that the first level included both male and female children on equal basis, the second level fathers, and the third level mothers. Prior levels excluded groups of persons who were categorized in the following levels. Inheritance with the payment of *tapu* fee was applied if there were no heirs who had the right to inherit without payment. Those who could inherit with the payment of *tapu* fee were determined by law, and the Land Code also broadened these levels into nine.[167] The intention in the determination of these groups of persons was to give preference to wider family members if they wished so instead of non-relatives.

The intersection of *mîrî* and waqf lands with regard to inheritance was realized with the imperial decree of 1858 mentioned above. This decree was also applied to waqf lands which were made out of state lands, namely *arâzî-i mevkûfe*.[168] Likewise, the Land Code continued to treat inheritance rules as same for waqf and state lands.

The inheritance law of 1867 followed the Land Code and completed the widening of inheritance levels.[169] It furthermore included both male and female grandchildren, brothers and sisters, and finally husbands and wives. The opening of the Law is self-evident to reveal the motivation behind the widened levels:

> Simply, the imperial permission decided on the procedures of inheritance [*intikâl*] of *mîrî* and waqf lands [made out of state lands], which were being used with *tapu*, in order to increase and amplify the subject of agriculture and

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[165] "*Arâzî-i mîrîye ve mevkûfe mutasarrıf ve mutasarrıfelerinden biri fevt oldukta, 'uhdesinde olan arâzî erkek ve kız evlâdına, gerek arâzînin olduğu mahalde bulunsunlar ve gerek diyâr-ı aherde olsunlar, meccânen ve bilâ-bedel mütasâviyen intikâl eyler.*" *Arâzî Kanûnnâmesi*, p. 178. See Ahmet Akgündüz, p. 695.

[166] "*Arâzî-i mîrîye ve mevkûfe mutasarrıf ve mutasarrıfelerinden bilâ-veled vefât edenlerin arâzîsi babası var ise ona, yok ise vâlidesine ber-minvâl-i sâbık meccânen intikâl eder.*" *Arâzî Kanûnnâmesi*, p. 178. See Ahmet Akgündüz, p. 695.

[167] *Arâzî Kanûnnâmesi*, pp. 179-180. See Ahmet Akgündüz, pp. 696-697.

[168] Halil Cin, *Osmanlı Toprak Düzeni*, p. 366.

[169] *Arâzî-i emîriyye ve mevkûfenin tevsî'-i intikâlâtına dâir nizâmnâme ve zeyli, 1284/1867, Düstûr*, 1:1, pp. 223-224.

> trade, and consequently, the wealth and prosperity of the domain one step further with the facilitation of transactions …[170]

Inheritance rules concerning *mîrî* and waqf lands made out of state lands came to be united in 1858. Yet apparently, *arâzî-i mevkûfe* did not include all the waqfs rented through *icâreteyn*. Therefore, there was a distinct discussion in 1867 on the broadening of inheritance levels pertaining only to waqfs run with *icâreteyn*.[171] It seems that inheritance of waqfs run with *icâreteyn* was handled separately. However, this does not still mean that all the waqfs rented out through *icâreteyn* were subjected to new inheritance rules. New regulations were initially applied to only waqfs that were controlled by the *Nezâret*[172], meaning *evkâf-ı mazbûta*, and according to the document concerning the ownership of real estate by foreigners, the number of *evkâf-ı gayr-i mazbûta*, waqfs that were not controlled by the *Nezâret*, was higher than *evkâf-ı mazbûta*.[173]

The intention in the widening of inheritance levels appears to be formulated with reference to "public interest."[174] This "public interest" was especially valid for those who did not have children.[175] As mentioned before, in the absence of children, the waqf property in question reverted to the waqf as escheat. However, this situation deprived the heirs of the lessee other than his/her children of property. Thus, the extension of inheritance levels to include wives and grandchildren, for instance, was deemed

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[170] "*Mücerred teshîl-i mu'âmelât ile emr-i zirâ'at ve ticâretin ve o cihetle servet ve ma'mûriyyet-i memleketin bir kat daha tezyîd ve tevsî'i maksadıyla ba tapu tasarruf olunagelen arâzî-i emîriyye ve mevkûfenin usûl-u intikâlâtı hakkında karargir olan müsâ'adât-ı seniyye …*" Ibid, p. 223.
[171] *Hayrât ve müberrâta dâir, 1284/1867. Düstûr*, 1:1, pp. 232-236.
[172] "*İş bu müsâ'ade-i seniyye bi'l-tevliye tasarruf ve idâresi zat-ı […] hazret-i hilâfetpenâhîye 'âid olan selâtin-i 'izâm hazırâtıyla müte'allıkâtı evkâf celîlesine ve evkâf-ı hümâyûn nezâreti ma'rifetiyle idâre olunmakta bulunan evkâf-ı mazbûtaya münhasır olub evkâf-ı sâirede cereyân etmeyecektir.*" *Bi'l-icâreteyn tasarruf olunan musakkafât ve müstegallâtın usûl-ü intikâlâtı hakkında karargir olan müsâ'adat-ı seniyye, 1285/1869. Düstûr*, 1:1, p. 226.
[173] "*… evkâf-ı gayr-i mazbûtanın 'adedi evkâf-ı mazbûtadan ekser ve bunlara merbut olan musakkafât ve müstegallâtın hukuk-u tasarrufiyesince tevsî'-i intikâl kâidesini henüz gayr-ı mukarrir olmak hasebiyle …*" *Musakkafât ve müstegallât-ı mevkûfede muvâza'at-ı ferâğ hakkında buyuruldu-ı sâmî, 1286/1870. Düstûr*, 1:3, p. 164.
[174] "*… evlâdı olmayan bir kimse ise vefâtından sonra sâir müte'allikâtının mahrûm olacaklarını gördükçe müteessir olması emr-i tabî'i olduğundan ve hakîkat halde dahi bir adamın çalışub yaptığı teberru'ân […] vakf olduğu hâtırına bile gelmeyerek 'âdeta malı gibi zannederek inşâ eylediği meskenden bilâ-veled vefâtı takdîrinde zevce veya ahfâdının sokağa atılması revâ görülmediğinden mukaddemleri olduğu gibi mücerred menfa'at-i 'âmme maksadıyla şu usûl-i intikâliyede bir derece daha ta'dilât ve tevsî'at icrâsı efkâr-ı halkça tekevvün etmiş olduğundan ve yirmi seneden berudur bu madde devletçe dahi kah be kah düşünülür idi.*" *Hayrât ve müberrâta dâir, 1284/1867. Düstûr*, 1:1, p. 233-234.
[175] Ibid.

necessary from the perspective of society.[176] The concept of *menfa'at-i 'âmme* or *menfa'at-i umûmiye* (public interest) was also frequently used with regard to city planning activities in the nineteenth century. Building and street regulations, and expropriation laws were the products of the nineteenth century, and they were, by and large, Istanbul-oriented. The concept of *menfa'at-i 'âmme/umûmiye* was used to legitimize city planning projects, especially expropriation activities as even the names of expropriation laws reveals, such as *Menâfi-i Umûmiyye için İştirâ olunan Arâzî ve Emlâk Hakkında Nizâmnâme* (The Regulation for the Expropriation of Land and Real Estate for Public Interest of 1856).[177] Here, we see the usage of the concept for the widening of inheritance levels in a document which also seems very Istanbul-centered.[178] According to the document, the gradual cease of rules that regulated and limited the foundation of waqfs resulted in a great increase in the number of waqfs in the capital, thus persons came to have to use waqf property.[179]

It seems that the scarcity of property other than waqf in the capital stimulated the idea of widening levels of inheritance. Other documents also indicate that there was a certain need to widen inheritance levels in waqf property from the perspective of foreigners in the Empire.[180] In other words, demands of foreigners to own real property and land in the Empire appear as one of the factors that the state needed to take consideration in establishing new laws.[181]

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[176] Ibid.

[177] Osman Nuri Ergin, *Mecelle-i Umur-ı Belediyye* (İstanbul: İstanbul Büyükşehir Belediyesi Yayınları, 1995).

[178] "*… bir mülkü vakf etmek devletçe bir çok takayyüdât altında olmasıyla herkes dilediği yeri vakf eylemeğe muktedir olmayarak bu cihetle emlâk-ı vakfiyye pek az olub bir çok emlâk-ı sırf dahi mevcûd olmasıyla herkes ya şerâit-i mevzû'a ve ma'lûmesiyle vakf yeri tasarruf eylemekte veyahud bu sûret işine gelmez ise mülk-ü sırf bulub temellük etmekte min cihet-i muhtâr iken sonraları nasılsa bu takayyüdât zâil olduğundan ba'zısı sahîhan niyet-i hayriye ve ba'zısı dahi evlâd ve ensâbına irâd yapmak gibi menfa'at-ı zatiyye üzerine rast geldiği yeri dahi umûma terk olunmuş olan sokak ve meydanları belki uhrânın câm'î hâvalilerini bile vakf edub bu hal ile ekser yerde ve ale'l-husûs dersa'âdette mülk-ü sırf olan yer hiç kalmadığı cihetle herkes hah na-nah vakf yere mutasarrıf olmak mecbûriyyetinde olub…*" *Hayrât ve müberrâta dâir, 1284/1867. Düstûr*, 1:1, p. 233.

[179] Ibid.

[180] "*… muvâza'a denilen maddenin beyn-en-nâs ihtiyârını icâb eden esbâbın başlıcaları ecânibin memâlik-i mahrûse-i şâhânede tasarruf-u emlâk edememesi ve musakkafât ve müstegallât-ı mevkûfede mahlûl usûlünün mer'î olması kaziyyeleri iken muvahharan neşr ve i'lân olunan kanun iktizâsınca memâlik-i devlet-i 'alîyede ecânibe hakk-ı istimlâk verilmiş ve selâtin-i 'izâm-ı hazerâtının ve mensûbât-ı 'alîyenin evkâfı ile evkâf-ı mazbûta-ı musakkafât ve müstegallâtın hukuk-u tasarrufiyesince diğer bir kanun ile tevsî'i intikâle müsâa'de buyurulmuş olduğuna nazaran…*" *Musakkafât ve müstegallât-ı mevkûfede muvâza'at-ı ferâğ hakkında buyuruldu-i sâmî, 1286/1870. Düstûr*, 1:3, p. 163.

[181] The law that entitled foreigners to own landed property was issued in 1866. See, Şevket Pamuk, *Osmanlı Ekonomisinde Bağımlılık ve Büyüme*, p. 111.

Although there are many missing points it seems that there was a certain inclination towards more facilitated circulation of waqf and *mîrî* property in the nineteenth century. The idea that if inheritance levels were broadened renters would improve the land or real estates over which they had usage rights with the expectation of keeping it in the hands of the family appears to be the major motivation behind the changes in the inheritance of usufructuary rights on *mîrî* and waqf property. Consequently, this improvement would result in an increase in production and wealth over which the state could impose more taxes.

Apart from benefits expected from widened levels of inheritance, these changes meant a certain disadvantage for waqfs. As mentioned above, before the changes the nineteenth century codification brought, waqfs leased through *icâreteyn* could be inherited by sons and daughters of the lessee equally. If the deceased had no children then the waqf property reverted to the waqf as *mahlûl* (escheat). The waqf re-rented out the property in question in return for *mu'accele* and *müeccele*. However, new rules almost made it impossible that waqf property could become *mahlûl*, and accordingly deprived waqfs of the downpayment received at the beginning of every renting. The solution of this problem was envisioned in the form of increases in *müeccele* and fees paid for the transfer from the deceased to heirs, which were decided to be adjusted to market value of the waqf property.[182] However, this solution might not be desirable for those who had children to leave waqf property as inheritance without any extra payment due to the adjustment to the market value of the property. Thus, the new regulation was decided to be optional according to wishes of lessees.[183] In conclusion, it is safe to say that another intention, if not expected to be achieved in a long-term, in the extension of inheritance levels was the accommodation of market values of the day instead of values determined

[182] "*… emlâk-ı vakfiyede tevsî'-i intikâlât ile mahlûlâtın tenâkusatından dolayı vakıflara terettüb edebilecek noksân-ı temettu'a mukâbil dâimî bir menfa'at aramak lâzım gelub şimdi müeccele nâmıyla alınan icârat ise pek şey-i kalîl olmağla bunun hadd-i lâyıkına iblâğı hâlinde mahlûlât bedelâtını örteceği derkâr ise de dâire-i intikâlin derece derece tevsî'inde harç-ı intikâlin dahi tezyîdi takdîrinde mahlûlâtça olan zâyi'âtın kapatılmasını temîn edeceğinden her vakf mülkün kıymet-i hakîkiyesi ta'yîn ve takdîr olunarak bindesine bir münâsib şey ta'yîn ve icâre-i müeccele olarak anın istihsâli ile vakfına verilmesi ve şimdi evlâda intikâlde binde on beş harç alınmakta olub bunun fakat evlâd hakkında ibkâsıyla andan ilerüsünde derece derece artarak binde yüz ve belki daha ziyade harç-ı intikâl alınması …*" *Hayrât ve müberrâta dâir, 1284/1867. Düstûr, 1:1*, pp. 234-235.

[183] "*… şu usûlün ihtiyârî bırakılması yani belki herkes tezyîd-i icârat mukâbilinde gösterilen menâfi'i kendüsüne muvâfık göremeyeceğine ve mesela bir adamın müte'addid evlâdı olub irtihâli halinde mutasarrıf olduğu vakf yerin anlara kalacağından emîn iken zamm-ı icâre ile hak-ı intikâlin tevs'ine nâil olmakta kendü içün bir fâide göremeyeceğine binâen bu usûle kimse mecbûr edilmeyerek her kim ister ise ana müsâa'de kılınması sûretinin dahi kâide tutulması …*" *Hayrât ve müberrâta dâir, Düstûr*, 1:1, p. 235.

according to "*kadîm müeccel*," same fixed value for decades that ceased to be contemporary.[184]

The discussions in 1867 on the expansion of inheritance rights on waqfs run through *icâreteyn* and controlled by the *Nezâret* turned into a law in 1869.[185] The law brought no changes, but a far more determined stress on the adjustment of rents to present value of the waqf property. It sanctioned the annulment of "*icârât-ı kadîme*"[186], rent determined in somewhere in the past, and the re-establishment of rents every five years.[187] In 1875, a new law was enacted with no change with regard to the previous one except for an addition stating the optional character of the law with reference to satisfaction of "real property owners."[188]

Finally, another law established in 1910 extended inheritance levels on waqf and *mîrî* property by including children of grandchildren, and grandfathers and grandmothers as well as their children.[189] It also changed the status of wives and husbands by entitling them to inherit one quarter of the property with children of the deceased. Another significant change the law put forward is that waqfs run through *icâreteyn* and *mukâtaa* were also subjected to new rules. Thus, for the first time, inheritance rules pertaining to both *mîrî* property and waqfs rented out with *icâreteyn* or *mukâtaa* were united. However, in the context of this law, waqfs run with *mukâtaa* refer to waqf lands on

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[184] Ebül'ula Mardin, *Toprak Hukuku Dersleri*, pp. 62-63.
[185] *Bi'l-icâreteyn tasarruf olunan musakkafât ve müstegallâtın usûl-ü intikalâtı hakkında karargir olan müsâa'dat-ı seniyye, 1285/1869. Düstûr*, 1:1, pp. 225-229.
[186] "*Hukuk-u intikâliyesi tevsi' olunan musakkafât ve müstegallât-ı mevkûfeye heyet-i hâzirelerinin erbâb ve vakf ma'rifetiyle takdîr ve ta'yîn olunacak kıymet-i sahîhalarına nazaran binde kırk para icâre-i müeccele-i seneviyye tahsîs kılınarak bunların icârat-ı kadîmesi fesh ve ilgâ olunacaktır.*" *Bi'l-icâreteyn tasarruf olunan musakkafât ve müstegallâtın usûl-ü intikâlâtı hakkında karargir olan müsâa'dat-ı seniyye 1285/1869, Düstûr*, 1:1, p. 227.
[187] "*Hukuk-u intikâliyesi tevsi' ve kâi'desine tevfîkan icâreleri müceddeden ta'yîn olunan musakkafât ve müstegallâtın usûl-u cedîde üzere verilecek senedlerinin tanzîm ve i'tâsı târihinden i'tibâren beş sene zarfında emlâkça kıymetinin terakkîyesinden veyahud tedennîsinden nâşi icâre-i mahsûsalarının mikdârı aslâ tezyed veya tenkîs olunmayub fakat her beş senede bir kere musakkafât ve müstegallât-ı mezkurenin kıymet-i hâliyeleri tahkîk olunarak icâreleri tecdîd ve ta'dîl olunacaktır.*" Ibid, p. 229.
[188] "*… bi'l-cümle teba'a ve sâir ashâb-ı emlâkın istihsâl-i kemâl-i hoşnudu ve rızâsı kaziyyesi olduğuna ve hukuk-u tasarruf-u emlâkda mu'âmele-i cebriyye ise hilâf-ı kâ'ide-i mu'adelet bulunduğuna mebnî … iş bu tevsi'-i intikâl usûlünün mecbûrî sûretinde temîninden sarf-ı nazarla ihtiyârî yani ashâb-ı emlâkdan rağbet edenlere mahsûs olmak üzere evkâf-ı mazbûta ve mülhakeye temîni husûsuna …*" *Bi'l-icâreteyn tasarruf olunan musakkafât ve müstegallât-ı mevkûfe hakkında nizâmnâme, 1292/1875, Düstûr*, 1:3, p. 462.
[189] *Emvâl-i gayr-i menkûle intikâlâtı hakkında kanun-ı muvakkat 1328/1910, Düstûr*, 2: 5, pp. 145-147.

which there was no *mülk* (freehold) property.[190] Otherwise, they were subjected to Islamic law of succession since land was treated according to the type of property on it.[191]

All these new laws and regulations indicate a new rent regime in the Empire, and a new mentality in terms of wealth creation or capital formation and investment by providing the family with the guarantee that the family could continue to enjoy usufructuary rights through generations. The following quotation from a contemporary who wrote a commentary on land laws illustrates this point:

> The more the inheritance levels are extended, the more the possessors [*mutasarrıf*] improve the *mîrî* land in their possessions with more labour and capital. [Given the fact that] the interests of the state increase in correlation to public interest and wealth, the extension of the boundaries of inheritance [*intikâl*] one step further was approved to encourage those who do not invest their wealth in land due to the narrowness of inheritance of land to get landed property, [and] to increase value of land, so the wealth.[192]

Individual property rights also mean individual taxation, which signifies the elimination of intermediaries. In the case of waqfs, we see the ever-increasing elimination of trustees by state officials, and individual lessees as the persons addressed by the state. On the other hand it seems that inheritance transactions were multiple, characterized by different rules for different types of property. Nevertheless, we can still see a gradual unification of inheritance laws both on *mîrî* and waqf property.

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[190] The law only refers to *mukâtaa-yı kadîmelü müstegallât* which means revenue-bearing waqf property in the form of land. Ibid, p. 146.

[191] Ömer Hilmi Efendi, *İthâf-ül Ahlâf fi Ahkâm-il Evkâf,* pp. 81-83.

[192] "*İntikal derecesi ne kadar genişletilirse, araziye mutasarrıf olanlar, uhdelerinde bulunan miri araziyi daha çok emek ve sermaye sarfı ile imar edeceklerdir. Arazi intikalinin darlığından dolayı servetlerini araziye yatırmayanları gayrımenkul edinmeğe sevketmek, arazinin değerini, dolayısıyla serveti arttırmak; umumi menfaat ve servet nisbetinde devletin de menfaati artacağı cihetle, hudud-u intikaliyenin bir derece daha genişletilmesi münasib gürülmüştür*." H. Cemalettin, *Telhîs-i Ahkâm-ül Arâzî* (İstanbul: 1329), pp. 299-300. Cited in Halil Cin, *Osmanlı Toprak Düzeni*, p. 457.

Chapter 6:

Waqf and *Mîrî* Property as Mortgage

The development of mortgaging (*rehn*) on *mîrî* and waqf propery was another axle of the state's attempts to increase production on land. The creation of mortgage was closely related to the developments in agriculture, the growth of trade, greater economic and financial integration with Europe, modern banking institutions and systems of borrowing. The nineteenth century witnessed the development of market oriented production and commercialization of agriculture along with the establishment of commercial banking institutions and new ways of both domestic and external borrowing.[193] In an empire where production was largely depend on agriculture with limited technology and networks of transportation and communication the need for agricultural reforms felt much more profoundly. Sending of student to Europe to study modern methods of agriculture, the foundation of agricultural schools, the establishment of model farms and fields, activities of seed distribution and importation of agricultural machinery were the products of this need.[194] The primary aim was to make agriculture more productive and profitable. Another aspect of agricultural reforms was the institution of new borrowing systems for cultivators.[195] Traditional moneylenders were the only address cultivators could apply for credit. But, interest rates demanded by these moneylenders were usually high, and most of agricultural producers could not afford these high rates.[196] Especially after 1899, European commercial banks opened branches in the Empire to finance trade and agriculture.[197] But, their efforts remained limited to financing wealthy merchants and local notables.[198] Therefore, the state needed to establish a domestic bank that would serve the needs of poorer classes of cultivators.[199]

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[193] Şevket Pamuk, *Osmanlı Ekonomisinde Bağımlılık ve Büyüme; A Monetary History of the Ottoman Empire* (New York: Cambridge University Press, 2000).
[194] Donald Quataert, "Dilemma of Development: The Agricultural Bank and Agricultural Reform in Ottoman Turkey, 1888-1908," *Int. Journal of Middle East Studies*, 6 (1975), p. 221.
[195] Şevket Pamuk, *A Monetary History of the Ottoman Empire*, p. 222; Haydar Kazgan, *Osmanlı'dan Cumhuriyet'e Türk Bankacılık Tarihi* (İstanbul: Türkiye Bankalar Birliği, 1997), p. 107.
[196] Şevket Pamuk, *A Monetary History of the Ottoman Empire*, p. 222.
[197] Ibid. p. 221.
[198] Ibid.
[199] Donald Quataert, "Dilemma of Development," p. 212.

The foundation of Ziraat Bankası (Agricultural Bank) by the state in 1888 was envisioned to meet needs of cultivators for low-interest credit. By offering low-interest loans, the bank became an alternative credit institution to traditional moneylenders, and the main agent that financed agricultural reforms.[200] Thus, an overview of its history and credit procedures would be helpful in understanding the development of mortgaging over waqf and *mîrî* property.

The system of the Memleket Sandığı (regional fund) as a lending institution proposed by Midhat Paşa in the 1860s served as a model first for the system of the Menafi Sandığı (fund for public improvement) established in 1883, and then for the Agricultural Bank.[201] The bank tried to accommodate the problems these institutions faced before, and reach higher number of cultivators by establishing more than 400 branches throughout the empire. Cadastral surveys were necessary for the bank to issue loans. Therefore, each branch was required to obtain registers showing size and value of lands within its area of operation.[202] The bank was entitled to issue loans for repayment periods of ten years at maximum, and loans were secured through mortgage. Individuals demanding credit from the bank were required to provide immovable property as collateral.[203] About the approximate amount of loan offered by the bank, Quataert informs that "shortly after the turn of the century, a central Anatolian cultivator with such a loan [820 piasters] could have purchased a modern plow and perhaps a dozen sheep."[204] In this context, the conception of waqf and *mîrî* property as collateral and their integration to credit transactions were evidently needed to improve agricultural production.

Before dwelling on the developments in terms of mortgaging of waqf and *mîrî* property as seen in the new laws and regulations issued in the second half of the nineteenth century, I shall look over the practice of temporary transfer as presented in the fatwas produced in the early nineteenth century. Because, it seems that the practice of mortgaging developed out of *ferâğ* transactions. In other words, temporary *ferâğ* transactions paved the way for the development of mortgaging.

[200] Ibid. p. 211.
[201] Ibid. p. 212.
[202] Ibid. p. 213.
[203] It is necessary to note that Donald Quataert does not problematize the question of ownership in his article.
[204] Ibid. p. 216.

The fatwa compilation under study provides cases for both *mîrî* and waqf property. Thus, I am able to present a comparison between the practices of *ferâğ* on *mîrî* and waqf assets. To begin with the cases on *mîrî* property, transactions of *ferâğ* (transfer) could be conductable on *mîrî* lands as well. Transfer of usage rights on *mîrî* and waqf property to the lender by the lessee for his/her debts was called *ferâğ bil-vefâ*, and it refers to a temporary transfer.[205] In other words, the transfer was limited to a time period in which the lessee would pay his/her debt to the lender. After the debt was paid the lessee reacquired his/her usage rights. The permission of the state official or of the trustee was required for these transactions.[206]

If the case involved the death of the lessee, the amount of money received for transfer was not included in the *tereke* of the lessee since the title to the property (*rakabe*) belonged to the state. Thus, *mîrî* lands could not be subjected to the lessee's debts.[207] It appears that there was no change in terms of the limitation to the payment of debts by transferring usage rights since the amount of money received for the transfer of usage rights on waqf property had not been subjected to the transferee's debts in the late seventeenth and early eighteenth centuries. The legal argument was the same: the *rakabe* of waqf property belonged to the waqf itself, not to the lessee. Another important aspect of the phenomenon is that *mülk* properties on a piece of *mîrî* land were not included in the transactions of transfer.[208]

As to the practice of temporary transfer over waqf property, the cases presented in the fatwa compilation are more explicit to reveal that debts were compensated through the

[205] Ömer Hilmi Efendi, *İthâf-ül Ahlâf fi Ahkâm-il Evkâf*, p. 72; Halil Cin, *Osmanlı Toprak Düzeni*, p. 279.
[206] "*Zeyd tasarrufunda olan tarlaları 'Amr'dan aldığı şu kadar akçe mukâbelesinde vefâ-yı ferâğ edub ba'dehu Zeyd'in kız karındaşı Zeyd'in emriyle meblağ-ı mezburu 'Amr'a verub ba'dehu Zeyd tarlalarını zabt murâd ettikte 'Amr ol tarlaları Zeyd'e zabt ettirmemeğe kâdir olur mu? El-cevap: Olmaz*." Meşrepzâde Arif Efendi. *Fetâvâ-yı Câmiü'l-icâreteyn*, p. 334.
[207] "*Medyûnen fevt olan Zeyd'in tapu ile tasarrufunda olub oğulları 'Amr ve Bekir'e intikâl eden tarlaları dâinleri bedel mukâbelesinde âhara ferâğ ettirub bedelinden istîfâ-yı deyn etmeğe kâdir olurlar mı? El-cevap: Olmazlar. Arâzî-i emirîyyenin rakabesi beytü'l-maldır. Sâhib-i tımar ve mutasarrıf olunanlar rakabe-i aslına mâlik değillerdir. Padişah-i islam cânibinden temlîk olunmayınca kimsenin mülkü olmaz. Ancak evlâd-ı zükûra ırsi bi-hasb el-kanundur*." Ibid, p. 355.
[208] "*Zeyd tarlasını bir mikdâr akçe bedel mukâbelesinde izn-i sâhib-i arzla 'Amr'a ferâğ ettikten sonra ol tarlada olan Zeyd'in mülk ceviz ağaçlarını dahi tefvîz-i mezburda dâhil olur deyu zabt murâd ettikte Zeyd ben eşcârı vermem deyu 'Amr'ı men'e kâdir olur mu? El-cevap: Olur*." Ibid, p. 337.

usage of the waqf property transferred to the lender.[209] The lessee could also divide a part of waqf property over which he/she had usage rights, and he/she could transfer his/her usage rights on that part of the property to the lender, which was also valid on *mîrî* property.[210] Yet, if the case involved the death of the debtor before the debt was paid, then the waqf was not responsible for the payment of the debt.[211] Such cases present both the inalienability of waqf property and irresponsibility of the waqf. However, if it was the transferee who died without any children before taking his/her money back, the waqf could not treat the waqf as *mahlûl* (escheat) and could not re-rent out the waqf property.[212] The last point worth to be noted with regard to temporary transfer is that if the debtor died before paying his/her debt the lender was legally incapable to take his/her money from the transactions conducted by the children of the debtor.[213]

It can be concluded that the practice of temporary transfer on *mîrî* and waqf property were almost the same, and these practices were characterized by the ability to pay debts through usage instead of mortgaging. That is to say that waqf and *mîrî* property did functioned as objects of a security contract to acquire credit, but at the same time, were actually transferred to the person who gave a loan. In other words, the debt was paid through the usage of the transferred waqf or *mîrî* property. However, after the second

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[209] "*Zeyd icâre-i mu'accele ve müeccele ile tasarrufunda olan odayı 'Amr'a olan şu kadar akçe deyni mukâbelesinde izn-i mütevellîyle 'Amr'a ferâğ edub ba'dehu üç ay mürûrunda ol oda harîkte muhterik olsa hâlâ 'Amr meblağ-ı mezburdan istîfâ etmediği mikdârı Zeyd'den almağa kâdir olur mu? El-cevap: Olur*." Ibid, p. 255; "*Zeyd icâreteyn ile tasarrufunda olan vakf menzili 'Amr'dan karz aldığı şu kadar akçe mukâbelesinde izn-i mütevellîyle 'Amr'a vefâ-yı ferâğ ve teslîm ettikten sonra Zeyd menzil-i mezburu tekrar 'Amr'ın yedinden deyn-i mezburu edâ etmeden fuzûli almış olsa hâlâ 'Amr menzil-i mezburu Zeyd'den alub deyn-i mezkuru istâfâ edinceye dek zabta kâdir olur mu? El-cevap: Olur*." Ibid, p. 333.

[210] Halil Cin, *Osmanlı Toprak Düzeni*, p. 284.

[211] "*Zeyd icâreteyn ile tasarrufunda olan vakf mahzenin nısfını 'Amr'a şu kadar akçe bedel mukâbelesinde ferâğ eder oldukta bedel-i merkumu ne zaman 'Amr'a verirse mahzenin nısfını 'Amr'dan almak şartıyla ferâğ ve teslîm ve kabz ettikten sonra kable'l-edâ el-deyn Zeyd müflisân bilâ-veled fevt olsa mütevellî mahzenin nısfını 'Amr'dan alub âhara icâra kâdir olur mu? El-cevap: Olur. Bu sûrette 'Amr mücerred Zeyd müflisân fevt olub ve mahzenin nısfını benden alub âhara icâr etmekle bedel-i merkumu mal u vakıfdan yahud kendi malından zaman ol deyu mütevellîye cebre kâdir olur mu? El-cevap: Olmaz*." Meşrepzâde Arif Efendi. *Fetâvâ-yı Câmiü'l-icâreteyn*, p. 329.

[212] "*Zeyd icâre-i mu'accele ve müeccele ile tasarrufunda olan vakf menzili şu kadar akçe bedel mukâbelesinde izn-i mütevellîyle 'Amr'a ferâğ ve kabz-ı bedel eder oldukta Zeyd bedel-i mezburu her ne zaman 'Amr'a verirse 'Amr menzili Zeyd'e vermek şartıyla ferâğ ve kabz-ı bedel edub 'Amr dahi ol şartla kabul ve menzili kabz ettikten sonra 'Amr bilâ-veled fevt olsa hâlâ Zeyd bedel-i merkumu verese-i 'Amr'a verub menzil-i mezburu zabt etmek istedikte mütevellî râzı olmayub 'Amr'ın mahlûlünden âhara icâr ederim demeğe kâdir olur mu? El-cevap: Olmaz*." Ibid, p. 329.

[213] "*Düyûnu terekesinden ezyed olduğu halde fevt olan Zeyd'in ücret-i mu'accele ve müeccele ile tasarrufunda olub oğlu 'Amr ile kızı Hind'e intikâl eden vakf menzili 'Amr ve Hind bir mikdâr bedel mukâbelesinde izn-i mütevellîyle Bekir'e ferâğ ve tefvîz ve bedel-i mezburu kabz etmiş olsalar hâlâ erbâb-ı düyûn bedel-i mezburdan deynlerini istîfâya kâdir olurlar mı? El-cevap: Olmazlar*." Ibid, p. 340.

half of the nineteenth century, we see a gradual transformation from usage to mortgaging in the sense that mortgaging did not entail the transfer of usufructuary rights on *mîrî* and waqf property to the creditor. The debtor could still use *mîrî* or waqf asset even after he/she mortgaged it. The completion of full mortgaging was attained with a law issued in 1913. But, before this law, a look at the previous regulations and laws is in order.

To begin with the Land Code of 1858, it did not sanction the forced transfer of *mîrî* and waqf lands for the debts of the lessee (*mutasarrıf*) by the lender.[214] In other words, *mîrî* and waqf lands made out of state lands were not subjected to forced transfer. However, this was not valid if the lessee transferred his usufructuary rights he/she had on *mîrî* or waqf property for a time period in which the lessee would pay his/her debt to the lender. After the debt was paid the lessee reacquired his/her usage rights.[215] If the renter died before he/she paid the debt without any heirs it was not possible for the lender to take back his/her money. Because the *mîrî* land in question reverted to the state as escheat. If the lessee had heirs then it was heirs to pay back the money to be able to inherit usage rights.[216]

Yet, this was to change first with the *Tapu Nizâmnâmesi* issued in 1859. It entitled the lender to take back the money he/she loaned even if the lessee died without heirs.[217]

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[214] "*Medyûn olan kimsenin mutasarrıf olduğu arâzîsini dâini alacağı mukâbilinde zaptedemediği misillü âhara ferâğa dahi cebrederek bedelinden istîfâ-yı deyn etmeye salâhiyeti yoktur*." *Arâzî Kanunnâmesi*, p. 195. See Ahmet Akgündüz, p. 711.

[215] "*Arâzî-i mîrîye ve mevkûfe rehn olunamaz. Fakat bir kimse mutasarrıf olduğu arâzîyi deyni mukâbilinde dâinine me'mûru ma'rifetiyle her ne zaman deynini edâ eylerse kendüye reddetmek şartıyla veyahud her ne zaman deynini edâ eylerse kendüsünün hakk-ı istirdâdı olmak ma'nâsına ferâğ bi'l-vefâ ile fâriğ olduğu halde, gerek müddet ta'yîn olunsun ve gerek olunmasın deynini edâ etmedikçe ol arâzîyi istirdâd edemez ve deynini tamamen edâ eyledikte arâzîsini gerüye alabilür*." *Arâzî Kanunnâmesi*, p. 195. See Ahmet Akgündüz, p. 711.

[216] "*Ber-minvâl-i meşrûh şartla veyahud vefâ tarîkiyle arâzîsini dâinine ferâğ eylemiş olan kimse kâmilen edâ-yı deyn etmeksizin evlâdını yahud babasını yahud anasını terk ederek fevt oldukta dâininin veyahud dâin fevt olmuş ise umûmen veresesinin ol arâzîyi hasb eylemeğe salâhiyetleri olub, fâriğin evlâdı yahud babası veya anası deyn-i mezkuru kâmilen edâ etmedikçe kendülerine intikâl eden arâzî-i mezkureyi zaptedemezler. Ve eğer fâriğ bulunan kimse böyle hakk-ı intikâle nâil olan vârisleri olmadığı halde vefât etmiş ise gerek dâininin ve gerek ba'del-vefât veresesinin hakk-ı hasbi kalmayub ol arâzîye mahlûlât-ı sâire mu'âmelesi olunur*." *Arâzî Kanunnâmesi*, p. 196. See Ahmet Akgündüz, p. 712.

[217] "*Bir kimse ba-tapu tasarrufında olan arâzîyi ber minvâl-i sâbık me'mûru ma'rifetiyle dâinine deyni mukâbelesinde vefâ-yı ferâğ ettikten sonra kable'l-edâ fevt oldukda deyn-i merkum düyûn-ı sâiresi gibi tereke-i vâkfiyesinden istîfâ olunur. Ve eğer aslâ terekesi yoğise veyahud tereke-i mevcûdesi düyûnuna vefâ itmez ise ..., ve eğer mütevefânın hakk-ı intikâle nâil veresesi olmayubda hakk-ı tapu sâhibi var ise bu bâbda müte'ârif olan tapu-yı misl aranmayarak arâzî-i mezkure bi'l-müzâyede her ne mikdâra bâliğ olur ise hakk-ı tapu sâhibi ol mikdâr ile tefvîze tâlib olduğu halde ana tefvîz olunarak alınan akçeden cânib-i beytü'l-mal içün tapu-yı misl mukâbili arâzî-i mezkurenin bir senelik mahsûli mikdârı alıkonulub*

Tapu Nizâmnâmesi was followed by an imperial decree issued in 1862[218] and a *nizâmnâme* enacted in 1869.[219] These regulations also accepted the payment of debts by transferring usage rights on *mîrî* and waqf lands even in the case of the lessee's death.[220] According to the *Nizâmnâme* of 1869, if the debtor did not leave an inheritance the value of which was not enough to pay back the debt the waqf or *mîrî* property became *mahlûl*, and a part of it which was enough to pay the debt was re-rented out in return for *mu'accele*. In this situation what claim the lender had is that he/she could take back his/her money from the downpayment.[221] In other words, the waqf or the state itself compensated the lender. It appears to be crucial with regard to the extent of the lessee's rights on waqf and *mîrî* property. Two years later in 1871 two articles were added to the *Nizâmnâme* of 1869, stating that if the debtor had heirs a place and a piece of land for residence and agriculture necessary for the subsistence of heirs could not be taken from the *tereke* of the debtor.[222] However, it is essential to note that the *Nizâmnâme* of 1869 only applied to waqfs on which new inheritance laws were valid, meaning waqfs controlled by the *Nezâret*.[223]

As to the law issued in 1913, it completed the functioning of *mîrî* and waqf property as mortgage by establishing a kind of money lending system.[224] In the first place, it

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bâkîsiyle mütevefânın terekesinden ifâ olınmıyan deyn-i mezkur ifâ kılınur." *Tapu Nizâmnâmesi, 1275/1859. Düstûr*, 1:1, pp. 206-207.

[218] Halil Cin, *Osmanlı Toprak Düzeni*, p. 447.

[219] *Arâzî-i emirîyye ve mevkûfe ve musakkafât ve müstegallât-ı vakfiyenin ba'de'l-vefât temîn-i deyn etmesine dâir nizâmnâme, 1286/1869. Düstûr*, 1:1, pp. 242-243.

[220] "*Bir kimesne mutasarrıf olduğu arâzî-i emirîyye ve mevkûfeyi deyni mukâbelesinde memûru ma'rifetiyle dâinine vefâ-yı ferâğ ve tefvîz edub kable'l-edâ fevt oldukta deyn-i mezkur düyûn-u sâire gibi medyûnun tereke-i vakfiyesinden istîfâ olunur. Eğer aslâ terekesi yoğise veyahud tereke-i mevcûdiyesi düyûnuna vefâ etmez ise medyûnun gerek hak-ı intikâle nâil olan veresesi ve hak-ı tapu sâhibi bulunsun ve gerek bulunmasın ol arâzîden deyne vefâ edecek mikdârı bi'l-müzâyede bedel misliyle tâlibine tefvîz olunarak deyn-i mezkur te'diyye kılınacaktır.*" Ibid, p. 242.

[221] "*Fakat mefruğunbih bilicareteyn tasarruf olunur nizamlı gedikat-ı mevkufeden veyahut usulen tevsii intikali icra olunmuş müsekkafat ve müstegallatı mevkufeden ise, o surette vefaen fariğ, eshabı intikalden kimsesi olmadığı halde vefat edipte eda-ı deyne vafi terekesi bulunmasa, vefaen mefruğunbih tarafı vakıftan ba muaccele ahara icar ve tefviz olundukta, vefaen mefruğunleh olan kimse müteveffa zimmetinde olan alacağını muaccele-ı merkumeden istifa edebilir*." Ömer Hilmi Efendi, *İthâf-ül Ahlâf fi Ahkâm-il Evkâf*, p. 73.

[222] "*… musakkafât ve müstegallât-ı mevkûfenin intikâl ettiği vârisin hanesi yoğise ikâmetine kâfî bir mesken satılamaz ve medyûn-u mütevefânın ta'yişi zirâatına mütevâkıf ise hanesi idaresine kâfî arâzî dahi veresesinden alınamaz …*" *Arâzî-i emirîyye ve mevkûfe ve musakkafât ve müstegallât-ı vakfiyenin ba'de'l-vefât temîn-i deyn etmesine dâir nizâmnâme, 1286/1869. Düstûr*, 1:1, p. 243.

[223] "*… temîn-i deyn içün medyûnun vefâ-yı ferâğ eylediği arâzîsinin veyahud hak-ı intikâli tevsi' olunan musakkafât ve müstegallât-ı mevkûfenin ba'de'l-vefât bedelinden te'diyye-i deyn olunmak içün medyûnun hayat ve memâtında …*" Ibid, p. 242.

[224] *Emvâl-i gayr-i menkûlenin deyn mukâbilinde te'mînât irâesi hakkında kanun-ı muvakkat, 1331/1913. Düstûr*, 2:5, pp. 158-161.

extended the scope of property that the *Nizâmnâme* of 1869 applied.[225] In the second place, it made possible that the lessee could get a bank loan by mortgaging the *mîrî* or waqf property over which he/she had usage rights.[226] Yet, Ottoman companies and banks, such as Ziraat Bankası, were not allowed to transfer the waqf or *mîrî* property to their possessions.[227] Mortgaging as defined by the law did not entail the transfer of usage rights. The debtor still had the right to benefit from usage rights. Furthermore, both the debtor and the lender could transfer their rights to third parties. That is to say that the lender could transfer his/her personal rights or the rights of the bank or company on the *mîrî* or waqf property in question to a third party with or without the consent of the debtor.[228] On the other hand, the debtor could also transfer his/her rights with his/her debt to another person in spite of the fact that the *mîrî* or waqf property was mortgaged. Yet, this did not annul the mortgaging of the property and the third person received the waqf or *mîrî* asset as mortgaged.[229] Another change the law of 1913 brought is that *mülk* properties on *mîrî* on waqf lands were also deemed as mortgaged.[230] *Ferâğ* transactions over *mîrî* and waqf lands before this date did not include *mülk* properties as mentioned above. The last point to mention is that as opposed to classical terminology the law employed the word '*füruht*' (sale) in the case in which the debtor failed to pay his/her debt.[231] Needless to say, it does not necessarily mean that the waqf or *mîrî* property was actually sold, and became private property. But, it reveals that the strict terminology to keep the distinction between *mülk* property on the one hand, and *mîrî* and waqf property on the other hand came to be loosened with regard to mortgage.

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[225] "*Müstakılen veya şâyi'en tasarruf olunan emlâk ve arâzî-i emirîyye ve mevkûfe ile musakkafât ve müstegallât-ı vakfiye deyn mukâbilinde merhûn hükmünde olmak üzere temînât-ı irâe olunabilir*." Ibid, p. 158.

[226] "*Emvâl-i gayr-i menkûle Ziraat Bankası nâmına ve nukûd-u mevkûfeden istikrâz edilen meblağ mukâbilinde vakıfları nâmına veya kasabât dahilinde musakkafât ve 'arsalar üzerine ikrâz ve idâneye cânib-i hükümetten me'zûn Osmanlı şirket ve bankaları nâmlarına dahi temînât-ı irâe edilebilir*." Ibid, p. 159.

[227] "*Ancak bu nev'-i şirket ve bankalar emvâl-i mezkureyi ferâğ-ı kat'i ile 'uhde-i tasarruflarına geçiremezler*." Ibid, p. 159.

[228] "*Dâyin temînât olarak kabul eylediği gayr-i menkûl üzerindeki imtiyâzını alacağı ile beraber defter-i hakani idareleri ma'rifetiyle ve medyûnun rızâsıyla ve şayed sened-i emre muharrer ise rızâsına mürâca'at etmeksizin 'ahara devr edebilur*." *Emvâl-i gayr-i menkûlenin deyn mukâbilinde te'mînât irâesi hakkında kanun-ı muvakkat, 1331/1913. Düstûr*, 2:5, p. 159.

[229] "*Medyûn dahi te'mînât göstermiş olduğu mahali yine te'mînât olarak kalmak üzere dâyinin rızâsıyla deyni havâleten kabul eden kimseye kat'iyen ferâğ edebilur*." Ibid, p. 159.

[230] "*Te'mînât gösterilen mahaller üzerinde mebnî ve magrûs bulunan veya sonradan ihdâs ve ilâve ve gars edilen ebniye ve eşcâr ve kürum ol mahallere tabi'en te'mînât gösterilmiş hükmünde tutulur*." Ibid.

[231] "*Müddet-i müdâyene münkaziyye olubda deyn 'ifâ edilmediği … te'mînât-ı irâe edilmiş bulunan mahal defter-i hakani idaresi cânibinden ol deyn içün madde-i atiyye mucibince füruht edilur*." Ibid, p. 160.

Conclusion

This thesis grew out of the question of the place of waqf property in the overall transformation of property relations in the nineteenth century Ottoman Empire. The answer is far from being completed within the limits of this thesis. Yet, certain points have been clarified and further questions can be posed.

The formation of modernity in property relations was characterized by the development of individual ownership rights on land. Yet, the establishment of individual property rights did not eliminate the twofold meaning of property holding, i.e. right to land (*rakabe*) and right to use. The right to land, whether *mîrî* or waqf, was maintained in legal vocabulary. The individualization of property relations meant the individualization of taxation along with the elimination of intermediaries, rather than the state's withdrawal from its title to land. It also meant guaranteed usage rights with unlimited circulation of land. The basic idea was to increase production, and consequently taxes in landed property.

Within this historical background, in the first place, I have attempted to elucidate the centrality of the *icâreteyn* system in the transformation of waqf property. The development of the *icâreteyn* arrangements from the sixteenth century onwards demanded an understanding of the impact of social and economic needs on Ottoman legal order. The embodiment of the *icâreteyn* system as one form of long-term leasing in law required justification to solve controversies, and legal formulations concerning long-term leasing came to be expressed usually in reference to recurrent fires. In this context, the emergence of the *icâreteyn* system appears as a contingency in Ottoman law.

The centrality of the *icâreteyn* system and its relevance to changing property relations rested on the transactions that the lessee had the right to conduct over waqf property. First, I have examined the legal framework of these transactions in the late seventeenth and early eighteenth centuries, and I have come to the conclusion that the legal principal of the inalienability of waqf property was far from being followed, and that Ottoman legal discourse tended to be practical rather than rigidly accurate as the lessee's scope of operations on waqf property in terms of transactions suggests. This conclusion has to do

not only with the conception of waqf property as belonging to the realm of *huquq Allah* according to Hanafite waqf jurisprudence, but also the ignorance of the contribution of jurisprudential debates accumulated before the nineteenth century to the Land Code of 1858 in Ottoman historiography. The representation of the Land Code as the formal end of the limitations on the divisibility and alienability of land appears to be in need of reconciliation with the long-established interpretative discourses of Ottoman jurists. The conception of land as an object that was not only cultivable but also transactable can be traced in the fatwas produced before the nineteenth century.

Second, I have examined the fatwas, laws and regulations of the nineteenth century to shed light on changes in the legal boundaries of the lessee's rights on both waqf and *mîrî* property. Beginning in the early nineteenth century the distinction between waqf and *mîrî* property became increasingly blurred. The state's efforts to reassert the control of *mîrî* and waqf lands made out of state lands appear to be one of the reasons of this situation. In relation to waqfs, the *Evkâf-ı Hümâyûn Nezâreti* as an apparatus of Ottoman state making served to centralize waqf administration and control revenues generated from waqfs. The expanding bureaucracy and deepening documentation within the body of the *Nezâret* indicate the administrative signs of a new waqf regime in the making. The replacement of the trustee in waqf administration by state officials was not only a change in agency, but also a transformation from individual to central waqf administration. The standard codification of the land regime, on the other hand, made waqf property more and more assimilated into *mîrî* category. This is basically why I included *mîrî* property in the nineteenth century in my analysis. The modifications in inheritance laws and the development of mortgaging were the major changes in terms of transactions, and these changes affected both *mîrî* and waqf property. New laws and regulations were of more secular and liberal in nature in comparison to Islamic waqf jurisprudence of ages. However, they were not as rapturous as they have been considered in earlier literature. Judging from the fatwa compilations under study, Ottoman state established new laws by restructuring already existing ones, moreover, by codifying already existing practices. In other words, new laws owed a great deal to earlier legal debates.

As to the changes in inheritance laws, the broadening of inheritance levels was mainly designed for an increase in production and capital formation within the family. The idea

was simple: if inheritance levels were widened, the lessee would improve the land by employing more labour and capital with the expectation that the family would continue to maintain usage rights on the land. This state protection in terms of usufructuary rights on *mîrî* lands was also valid for waqf property. Especially, the improvement of real estates was envisioned to be achieved through such protection. The accommodation of market values of the day instead of long-established rents was another novelty that signified a new rent regime in terms of real estates. By considering these changes in inheritance laws as signs of Ottoman reluctance to annul state ownership of land, I have claimed that new inheritance laws functioned as alternative mechanisms to increase production.

New patterns of intergenerational transmission of wealth were also created by these changes in inheritance laws. In this sense, the individualization of property rights also means the individualization of capital formation within the family. In other words, the conception of the family transformed from one that lived on subsistence to another that was supposed to produce ever-increasing surpluses. On the other hand, these changes altered the position of women in capital formation and wealth mobility. New laws ended the exclusive priority of males over females, and by and large, men and women became equal with regard to inheritance rights on *mîrî* and waqf property.

Yet, there are several questions that remain unanswered with respect to changes in inheritance laws. To give this thesis its full meaning in terms of changes in inheritance laws, its findings have to be compared with changes in Islamic law of succession. Thus, the first question concerns the relation and relevance of *intikâl* laws to *şer'i* laws that regulated the inheritance of *mülk* property. This question also includes how different domains of law differed and overlapped with regard to wealth mobility without demonstrating sharia and qanun as dichotomous, but as interwoven and reconstituted for a unified category of individual property. Another question involves inheritance laws and economic stratification. In other words, the question is to what extent new inheritance laws that came to be more equal removed economic stratification, especially between women and men, in actual terms. It can also be asked equality for which women: wives or daughters. Marital status, gender, social status and customary practices are all other factors that affect inheritance practices. If we associate inheritance with marriage, divorce and birth as we do with death, other factors, such as

dowry, are also determinative in shaping of inheritance practices. Needless to say, the only way to construct a holistic perspective of inheritance is to undertake case studies.

There are more particular questions as well. Both with regard to the centrality of the *icâreteyn* system for the capital of the empire and the issue of ownership by foreigners, how did Istanbul constitute a special case in terms of inheritance practices? The scarcity of property other than waqf in the capital stimulated the changes in inheritance rules on waqfs that were run with the *icâreteyn* system as seen in the new laws. We should also add to this the need to enhance rent values of real estates, and the pressure coming from European population in Istanbul to own property. Another related question concerns different patterns of inheritance in urban and rural areas. This is especially important if we deal with what was inherited, and how inheritance practices differed according to the nature of property, be it land or real estate.

The development of mortgaging, on the other hand, was characterized by economic needs of the century to establish a money lending system over waqf and *mîrî* property. The transformation of temporary transfer transactions into mortgaging ended the transfer of waqf or *mîrî* property that was contingent upon usage. That is to say that the payment of debts through the temporary transfer of usufructuary rights on *mîrî* and waqf property transformed into mortgaging to provide cultivators with an alternative way of borrowing. Waqf or *mîrî* property functioned as collateral to acquire personal or bank credits. The primary aim was to achieve increases in agricultural production through providing cultivators with an alternative to high-interest loans offered by traditional moneylenders.

As to methodological and theoretical aspects, this thesis could barely represent the social embedded in law itself. Law as constructed upon social relations is not simply a matter of state imposition, but an arena for different claims. The findings of this thesis need to be integrated with further studies on administration of law and production processes in order to assess continuous negotiation processes between persons and state agencies with reference to legal categories and claims to land. Case studies are necessary to provide an idea about social practices, experiences and applications of legal rules, so that a distinction between general and idiosyncratic features and developments becomes also possible.

On the other hand, a comparison between the transformations of different categories of landed property is vital since it is not possible to understand property relations without a holistic perspective. This thesis has dealt with transformation of waqf property in legal terms from the vantage point of the *icâreteyn* systems. Since waqf property was increasingly assimilated to *mîrî* property in the nineteenth century it has also included, to a certain point, *mîrî* property with respect to inheritance and mortgage. However, it has to exclude several issues within its limits. One of them is the question of waqfs that were outside the domain of new laws and regulations. Apperantly, these laws did not comprise waqfs in the empire other than waqfs controlled by the *Nezâret* or run with *icâreteyn*. To put it simply, this thesis gives no answer to the relevance and relation of transformations in other waqfs. Another excluded point, though a very important aspect of changes in property relations, is the question of taxation trough registers with title deeds over waqf property. To understand the relation of waqf property to *mîrî* and *mülk*, the issue of taxation stands as a point of departure in the overall transformation of property relations. In a wider context, transformation in *mülk* property remains as an untouched topic in Ottoman historiography.

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