SULH IN EIGHTEENTH-CENTURY OTTOMAN FATWA COMPILATIONS

by

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ABSTRACT

SULH IN EIGHTEENTH-CENTURY OTTOMAN FATWA COMPILATIONS

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Sulh; Fatwa; Şeyhülislam; Islamic Law; Conflict Resolution; Mediation; Negotiation; Fatwa Compilation; Orientalism

Sulh is a mechanism for dispute settlement in the Hanafi and Ottoman law. This study aims to explore this concept through three fatwa compilations of eighteenth-century *şeyhülislam*s, namely *Behcetü'l-fetâvâ ma'a'n-nukûl*, *Fetava-yı Abdurrahim* and *Neticet'ül-fetâvâ me'an-nukul*. It has been tried to situate the concept of *sulh* in the broader picture of the Ottoman law. It will be argued that *sulh* has been a practice through which the individuals can behave as courts. In other words, the disputants can settle their disputes based on very well-defined legal principles. This makes *sulh* different from mere negotiation or mediation in which the disputants are crucial in setting the regulations of the process of the dispute settlement. Furthermore, it will be also argued that while the legal opinions of the eighteenth-century Ottoman jurists are very consistent, they are not in total agreement with the pre-Ottoman and earlier Ottoman jurists. This further observation seems to have implications for the broader debates on the 'closure of the gate of *ictihâd*' as well as homogeneity and integration in the Ottoman law of the eighteenth century.

ÖZET

ONSEKIZINCI YÜZYIL OSMANLI FETVA MECMULARINDA SULH

M. Hadi Hosainy

Yüksek Lisans, Tarih

Tez Danışmanı: Yrd. Doç. Dr. Hülya Canbakal

Sulh; Fetva; Şeyhülislam; İslam Hukuk; Uyuşmazlık Çözümü; Arabuluculuk; Müzakere; Fetva Mecmuası; Oryantalizm

Sulh kavramı Hanefi/Osmanlı hukukunda bir uyuşmazlık çözümü mekanizmasına işaret eder. Bu çalışma bu kavramı, *Behcetü'l-fetâvâ ma'a'n-nukûl*, *Fetava-yı Abdurrahim* ve *Neticet'ül-fetâvâ me'an-nukul* olmak üzere üç 18. yy. şeyhülislam mecmuası ışığında incelemeyi amaçlamaktadır. Bu çerçevede sulh kavramının Osmanlı hukukundaki yeri belirlenmeye çalışılmış, ve sulhun bireylerin mahkeme gibi hareket etmlerine olanak sağladığı iddia edilmiştir. Başka bir deyimle, dava tarafları kendi uyuşmazlıklarını çok iyi tanımlanmış prensipler çerçevesinde çözebilmektedirler. Sulhun bu özelliği ise onu, dava taraflarının uyuşmazlık çözümü sürecindeki kuralları belirlemede önemli rol aynadıkları müzakere ve arabuluculuktan ayırmaktadır. Bununla birlikte, 18. yy. şeyhülislamlarının hukukî görüşlerinin birbirileriyle çok tutarlılık arz etmesiyle birlikte, onların Osmanlı öncesi ve daha erken Osmanlı hukukçularıyla tamamen aynı görüşü paylaşmadıkları da gözlemlenmiştir. Bu ise 'ictihâd kapısının kapanması' ve 18. yy. Osmanlı hukukundaki homojenleşme ve bütünleşme gibi daha genel tartışmalar için değerlendirilmesi faydalı bir gözlemdir.

To my dear brother, Qasem,
whom I will never be able to appreciate sufficiently

Doostet Daram Dadashi!

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A Note on Transliteration:

The transliteration used for Ottoman Turkish in this study follows the usage in Mehmet Erdoğan's *Hukuk ve Fıkıh Terimleri Sözlüğü*. For example, *şeyhülislam* is preferred to *shaykh'ul-islâm*, and *ictihâd* to *ijtihâd*. The words that have entered English lxicons have been used without transliteration, such as fatwa, mufti, and sharia. Arab authors and Arabic book titles have been given in a reader-friendly manner. For example H is used for both (ح) and (ه) and S is used for (ص), (س), and (ث).

List of Abbreviations:

Abdurrahim *Fetava-yı Abdurrahim*, Istanbul, Dar'üt-Tıbaat'il-Mamure, 1827.

DİA Türkiye Diyanet Vakfı İslam Ansiklopedisi, İstanbul, 1988-

EI[2] *Encyclopedia of Islam*, New Edition, Leiden, 1954-

Netice *Neticet'ül-fetâvâ me'an-nukul*, İstanbul, Matbaa-ı Amire, 1849.

Yenişehirli *Behcetü'l-fetâvâ ma'a'n-nukûl*. İstanbul: Darü't-tıbā'ati'l-āmire, 1849/1266

INTRODUCTION

The concept of *sulh* refers to a contract that settles disputes among the individuals. This is an option laid in front of individuals by the Islamic/Ottoman law, so that they can resolve the extant disputes among them without recourse to court. A detailed account regarding the principles related to this way of settlement is given in Ottoman legal texts parallel to the earlier Hanafi texts. This study aims to shed light on this mechanism of dispute settlement through the fatwa compilations that belong to three eighteenth-century *şeyhülislam*s and a legal manual *fürû'-ı fıkh* by the sixteenth-century jurist Halebi.

It will be demonstrated, in the first chapter, that while the Ottoman jurists allowed individuals to choose extra-judicial mechanisms to settle their disputes, they also established legal norms, defining the related stipulations and principles in meticulous detail. This finding has significant implications for the place of Ottoman law in the debates about Islamic law and conflict resolution. This thesis argues that *sulh* is not an Islamic version of alternative dispute settlement (ADR), i.e. *sulh* is not a mere process of negotiation or mediation totally outside the formal legal process. It does not, however, suggest that Islamic law is quite similar to the court-based, rational formalistic legal system of the modern West.

Property relations among individuals are considered in Islamic law as part of the category of 'claims of men'. What are considered in modern law as the law of contracts, law of family and divorce, law of inheritance, as well as some parts of the penal law, all fall in this category of claims. When disputes arise in this domain, state does not take any action without the complaint of the individuals involved. Law places the individual, whose complaint or consent is vital to commence a legal process, at the center of legal activities. However, once a complaint is placed, Islamic law is quite sensitive in handling scrupulously the mutual rights and obligations of individuals. For example, if a person is injured by another, the perpetrator is not punished unless there is a complaint

on the part of the injured. Once a complaint is placed, the court has to follow a fixed the procedure in order to establish ‘justice’.

Whatever falls in the category of the‘claims of men’ can be subject to settlement as well. Therefore, it would not be farfetched to claim that a study of *sulh* also delineates a general picture of the Islamic private law. Furthermore, the general attitude of Islamic law towards the domain of the ‘claims of men’ is reflected in *sulh* as well though in the *sulh* process individuals themselves take on the function of the court. Thus, *sulh* requires the presence of a plaintiff who makes a claim against a defendant. The two disputing parties make a settlement contract, which should be totally in line with the relevant principles in Islamic law. This contract is legal[1] and binding, as is the case with the decision made by the court.

Sulh emerges also as an intermediate institution that balances the ambition of Islamic jurists to cover nearly all aspects of individual activities on the one hand and the limits of judicial practice, on the other. *Sulh* lightens the burden of the court because individuals take on its function; but at the same, the strictly defined conditions and processes of *sulh* demonstrate that Islamic jurists tends not to make any concessions on their totalistic attitude. That is why it is assumed that *sulh* must have been practiced more frequently than it appears in the court registers. This is one reason that makes the study of the fatwa compilations on this issue more relevant.

The Ottoman practice of *sulh* is studied in the second chapter, which explores and tries to explain the fatwas available in the relevant chapters of the *şeyhülislam* compilations. The chapter argues that Ottoman *şeyhülislam*s of the eighteenth century further emphasized individual rights and obligations compared to earlier Ottoman and pre-Ottoman jurists. Furthermore, some signs of further legal homogenization in the eighteenth century are pointed out as they appear in the fatwa compilations.

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[1] The term “legal” here does not merely refer to“machinery for settling disputes and a moral obligation to conclude them sooner or later,” but to a body of principles enforced by political authority. For a distinction of these two meanings of law, see Richard Abel, “A Comparative Theory of Dispute Institutions in Society,” *Law & Society Review*, **8** (2), Winter, 1974, pp. 221-224.

The fatwa compilations form a significant part of the legal literature, which are very useful to track the evolution of legal principles over time.[2] Tracing this evolution is a secondary but consistent concern of this study and touched upon in both chapters. The relationship between the legal principles put forward by the Ottoman law and by earlier Hanafi jurists. The main source for the pre-Ottoman Hanafi jurists has been the secondary literature in Turkish and English. In this context, not only the question of 'continuity' versus 'change' will be explored, but also the possible implications of the findings in the Ottoman context will be examined.

A. Fatwa in Hanafi School:

The compilations under study belong to *şeyhülislam*s of the eighteenth century. This legal genre existed since the early period of Islamic history and continued with increasing significance through the post-classical era, including the Ottoman period. Fatwa is defined as the response given by a *fakîh*, one who is learned in Islamic canonical jurisprudence, which does not have the meaning of *hukm* (legal decision that is binding). A *fakîh* who issues fatwas is called mufti. The question posed to the *fakîh* for a fatwa is called *istifta* and the questioner is named *müstefti*.[3]

The source of sharia, or Islamic law, theoretically is totally divine; God is the ultimate source. Quran is directly his words, given to Muhammad through revelation. Muhammad, both as the conveyer of the divine message and its interpreter, was a secondary source. In the following centuries, however, *fikh* started to develop, using Quran and *hadîs* as well as *kıyas* (legal analogy) and *icmâ'*[4] (consensus among the founding Islamic community) as sources. [5]

[2] See Baber Johansen, "Legal Literature and the Problem of Change: The Case of Land Rent," in his (ed.) *Contingency in a Sacred Law: Law and Ethical Norms in the Muslim* Fiqh, (Leiden, Boston, Köln: Brill, 1999), pp.447-453.

[3] Ebül'ula Mardin, "Fetvâ," *İslam DİA*, IV. p. 583; Fahrettin Atar "Fetva" *DİA*, XII. p. 489; J.R. Walsh, "Fatwâ," *EI*[2], IX, pp. 866-867.

[4] Mardin, "Fetvâ," p. 583.

[5] There is a whole discussion on the beginning of *fikh* that was started with Schacht who claims in his *An Introduction to Islamic Law*, (Oxford: Clarendon Press, 1982), that al-Shafii was the founder of Islamic legal theory (pp. 37-48). The position has been

The relation between fatwa and *ictihâd* is a complicated one. A jurist who can deduce a legal opinion based on these four sources is called *müctehîd*.[6] A fatwa issued can be either *ictihâd* or mere imitation (*taklîd*) of earlier jurists' legal opinions. Issue of *ictihâd* is a controversial one as well. While the earlier works of scholars such as Schacht and Coulson argue for the "closure of the gate of *ictihâd*" in the post-classical era, this view has been revised in relatively recent studies in the Islamic law.[7] The information in the Ottoman texts support the continuation of *ictihâd* in the post-classical era as well.[8]

In the Islamic legal tradition, there is another important institution, that of *kazâ* (judgment). A *kadı* (judge) makes decisions on legal disputes as well as a mufti. *Kazâ* is different from *iftâ.* A comparison between the two institutions of *kaza* and *iftâ* will be helpful especially in understanding the latter:

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repudiated by recent works such as those of Hallaq's. For example, see W. Hallaq "Was al-Shafi'i the Master Architect of Islamic Jurisprudence?"*International Journal of Middle Eastern Studies* **25,** 1993, where he argues and convincingly shows that it was in the 10th century that Islamic legal theory was established.

[6] Wael Hallaq defines *ictihâd* as "the maximum effort expended by the jurist to master and apply the principles and rules of *usûl al-fiqh* (legal theory) for the purpose of discovering God's law." "Was the Gate of Ijtihad Closed?" *International Journal of Middle East Studies*, **16** (1), 1984, p.3.

[7] Hallaq, "Was the Gate of Ijtihad Closed?"; Johansen, "Legal Literature."

[8] R.C. Repp notes that Ebu's-su'ûud was known by his contemporaries as a follower of the tradition of "*ra'y*" (*ictihâd*). *The Mufti of Istanbul*, (Oxford Oriental Institute Monographs-Ithaca Press, 1986), p.282. Ebu's-su'ûd's fatwa on the permissibility of cash waqf is a case of *ictihâd*, which is based, according to İnalcık, on public welfare (*istislâh*), which is an additional source in the Hanafi legal theory. "Kânun and the Shariah," 1987, p.4, cited in Ali Yaycıoğlu, "Ottoman Fatwâ: An Essay on Legal Consultation in the Ottoman Empire," Unpublished Master's Thesis, Bilkent University, 1997, p.25. For further information on *istislâh* see Şükrü Özen, "İstislâh," *DİA*, XXIII. pp.383.388.

Table 1: The comparison between *iftâ* and *kazâ*

	İftâ	*Kazâ*
Restrictions	Mufti: Should be Muslim	Judge: Should be Muslim, male, and free[9]
The way question raised	By an individual	By adversarial parties[10]
Enforcement of the decision	Not binding	Binding[11]
The subject matter	Both worldly affairs and those related to worship and ritual	Merely worldly affairs between people[12]
Universe of the validity of the decision	All the Muslims all over the time	Merely the applicants involved in the case[13]
Method	Mufti finds the rulings through general principles	*Kadı* applies the rulings to cases[14]

Considering legal practice, there is a difference between a judge's decision and a mufti's fatwa. Court registers are an appropriate source for invistegating the legal practice, since the decisions of the judges were binding. The fatwas, on the other hand, formed the theoretical bases of law, formulating the legal principles in an abstract language, applicable universally to all Muslims and for all the times. However, it is not to say that fatwas are totally useless for researches on legal practice. Fatwas were mainly issued upon real cases,[15] giving information about the legal concerns of a certain

[9] Mohammed Fadel, "Two Women, One Man: Knowledge, Power, and Gender in Medieval Sunni Legal Thought," *IJMES*, **2** (2), 1997, pp.189-190.

[10] M.K. Masud, B. Messick, and D.S. Powers, "Muftis, fatwas, and Islamic legal interpretation," in Muhammed Khalid Masud, Brinkely Messick, and David S. Powers (ed.s) *Islamic Legal Interpretation: Muftis and their Fatwas*, (Cambridge, Massachusetts, London: Harvard University Press, 1996,) p. 18; B. Messick, "The Mufti, the Text and the World: Legal Interpretation in Yemen," **21** (1), 1986, p.103.

[11] Messick, "The Mufti, the Text and the World," p.103; Fahrattin Atar, "Fetva," p. 488; Masud, Messick, and Powers "Muftis," p.18.

[12] Fahrattin Atar, "Fetva," p.488; Kevin A. Reinhart, "Transcendence and Social Practice: Muftis and Qadis as Social Interpretors," *Annales Islamologiques*, 1994, **27**, pp.14-16.

[13] Wael Hallaq, "From *Fatwâs* to *Furû'*: Growth and Change in the Islamic Substantive Law," *Islamic Law and Society*, 1994, **1** (1), p. 34; Fahrattin Atar, "Fetva," p.488; Masud, Messick, and Powers "Muftis," p.18.

[14] Ebül'ula Mardin, "Fetvâ," p.583.

[15] Hallaq, "From *Fatwâs* to *Furû'*," pp.37-38.

historical time and space. Furthermore, fatwas formed an alternative arena for the settlement of disputes.[16]

B. Fatwas in Ottoman Law:

In the Ottoman polity, the office of *şeyhülislam* (i.e. *meşihat*) was established in the 15th century.[17] The title of *şeyhülislam* was attributed to the mufti of Istanbul. In time, this title paved the way towards further bureaucratization. During the reign of Kanuni Sultan Süleyman, a large department, *fetvâhâne*, was associated with the office under an officer, *fetvâ emîni*.[18]

The desclining nature of the qualifications of the muftis, i.e. the decrease in the qualification sought in muftis, who previously had to be absolute *muctehid*, is observed by Wael Hallaq as a sign of flexibility in the legal theory to establish "a balance between the demands of religious idealism and the exigencies of reality."[19] Such balance was established in the Ottoman Empire via further bureaucratization of the *meşihat*, which made it possible to respond to the increasing number of queries in a more efficient way. It was as a corollary of this bureaucratization that Ebu's-su'ûd presumably issued 1412 fatwas in one day, and 1413 in another day.[20]

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[16] M. Akif Aydın, *İslam-Osmanlı Aile Hukuku*, (İstanbul: Marmara Üniversitesi, 1985, p.77).

[17] R.C. Repp, "Shaykh al-Islam," *EI*[2], p.400.

[18] Now, the procedure worked as following: The applicant (*müstefti*) inquires to the office for a fatwa. Draftsman (*müsveddeci*) formulated the query of the applicant. The draft went to the *fetvâ emîni*. If *emîn* approved the query (*istiftâ*), then the copyst (*mübeyyiz*) produced a fair copy of the query, which was submitted to the *şeyhülislam*. He wrote his ruling and signed it. Then the fatwa was collated by a collator (*mukabeleci*) and handed out to the person who had query by the distributor. Uriel Heyd, "Some Aspects of the Ottoman Fatwa," *Bulletin of the School of Oriental and African Studies*, **32** (1), 1969, p.47; İsmail Hakkı Uzunçarşılı, *Osmanlı Devletinin İlmiye Teşkilatı*, (Ankara: Türk Tarih Kurumu Basımevi, 1988), pp.196-7.

[19] Wael B. Hallaq, "Ifta' and Ijtihad in Sunni Legal Theory: A Developmental Account" in M. Khalid Massud, Brinkley Messick, and David Powers (eds) *Islamic Legal Interpretation: Muftis and Their Fatwas*, (Cambridge, Massachusetts, London: Harvard University Press, 1996), p.42.

[20] Heyd, "Ottoman Fatwa," p.46.

Ottoman fatwas can be classified into two main groups. One category is those issued at the center, by the *şeyhülislam*s, and the second one consists of fatwas issued by provincial muftis. This does not mean that fatwas in each group were homogenous. However, the classification is useful to point out two different types of jurists. While the *şeyhülislam* delineated the general framework of the legal principles based on his personal interpretation, the provincial mufti had to stick with those general principles.[21]

Despite the significance of fatwa as one of the main sources for Ottoman legal history,[22] Ottoman fatwa is still among the understudied historical sources. The earliest studies on Ottoman fatwa were written in the 1950s. Ziya Yörükan and Mario Grignashi wrote their articles in 1952 and 1963 respectively and Fredrich Salle's dissertation was finished in 1962.[23] Uriel Heyd's 1969 article appraised the place of fatwa in the Ottoman legal system; furthermore, he depicted the structure of the Ottoman fatwa.[24] Vehbi Ecer, in his article in 1970, focused on the significance of fatwa in Turkish culture.[25] Ertuğrul Düzdağ's work in 1972 drew attention to *Şeyhülislam* Ebu's-su'ûd

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[21] The provincial muftis, while issuing fatwas, had to refer to the works of previous authoritative jurists. Uzunçarşılı, *İlmiye Teşkilatı*, p.179. Heyd observes that the fatwas issued by the provincial muftis were supported via referece to the earlier jurists. "Ottoman Fatwa," p. 45.

[22] Other important sources are imperial edicts, *kanunname*s, and and court registers. Johansen enumerates the main five sources for legal history: susbstantive law and legal theory (*usûl* and *mütûn*), commentaries (*şurûh*), fatwas, treatises, and court registers. Johansen, "Legal Literature," pp.448-450.

[23] Ziya Yörükan, "Bir Fetva Münasebeti ile, Fetva Müessesesi, Ebussuud Efendi ve Sarı Saltuk," AUİFD, **1** (2-3), 1952,pp.137-160; Mario Trignashi, "La valeur du témiognage dans l'empire Ottoman" Recueils de la Société Jean Bodin, **18**, 1963, pp.211-323 cited in Ekin Tuşalp, "Treating Outlaws and Registering Miscreants in Early Modern Ottoman Society: A Study of Legal Diagnosis of Deviance in *Şeyhülislam* Fatwas" Unpublished MA Dissertation, Sabanci University, 2005, p. 3; Fredrich Salle, *Proessrecht des XVI. Jahrhunderts Im Osmanishen Reich*, Weisbaden, Ph.D, 1962, cited in Tuşalp,"Treating Outlaws" p.3.

[24] Heyd, "Ottoman Fetva," pp.35-56.

[25] Vehbi Ecer, "Türk Kültürünün Tetkikinde Fetva Kitaplarının Önemi," *Türk Kültürü*, **90**, 1970, pp. 402-404.

Efendi's fatwa compilations.[26] However, these studies were followed by a two-decade-long hiatus, brought to an end by such scholars as Colin Imber[27] and Haim Gerber.[28]

The Ottoman fatwa has also been studied by some scholars whose main focus is the *ulema* and the office of *şeyhülislam*. Here we can cite the works of Veli Ertan,[29] İsmail Hakkı Uzunçarşılı,[30] and Abdülkadir Altunsu.[31] This group of scholars has been interested in the *ulema* and office of *şeyhülislam* not only in the context of legal history, but also in the significance of this institution in Ottoman politics.[32]

The *şeyhülislam* fatwas have not been used by scholars of legal history alone. They have been also used by social and economic historians. One good example is Tahsin Özcan's study of Ottoman artisans, using the fatwa compilations of four *şeyhülislam*s who served in the seventeenth and eighteenth centuries'.[33] There are also some theses that have used fatwas as sources for Ottoman social history.[34]

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[26] Mehmet Ertuğrul Düzdağ, *Şeyhülislam Ebussuûd Efendi Fetvaları Işığında 16. Asır Türk Hayatı*, (Istanbul Enderun Kitabevi, 1983).

[27] Colin Imber, *Ebu's-su'ud: The Islamic Legal Tradition* (Edinburgh: Edinburgh Univeristy Press, 1997).

[28] Haim Gerber, *State, Society, and Law in Islam: Ottoman Law in Comparative Perspetive*, (Albany: State University of New York Press, 1994); and *Islamic Law and Culture 1600-1840*, (Leiden, Boston, Köln: Brill, 1999).

[29] Veli Ertan, *Tarihte Meşihat Makamı; İlmiye Sınıfı ve Meşhur Şeyhülislamlar*, (Istanbul: Bahar Yayınevi, 1969).

[30] İsmail Hakkı Uzunçarşılı, *İlmiye Teşkilatı*.

[31] Abdülkadir Altunsu, *Osmanlı Şeyhülislamları*, (Ankara: Ayyıldız Matbaası A.Ş., 1972).

[32] See R.C. Repp, *The Mufti of Istanbul*.

[33] Tahsin Özcan, *Fetvalar Işığında Osmanlı Esnafı*, (İstanbul: Kitabevi, 2003).

[34] Gökçen Havva Art, "Through the Fetvas of Çatalcalı Ali Efendi the Relations between Women, Children and Men in the Seventeenth Century," Unpublished MA Thesis Boğaziçi University, 1995; Kürşat Urungu Akpınar, "*İltizam* in the *Fetva*s of Ottoman Şeyhülislams," Unpublished MA Thesis, Bilkent University, 2000.

C. Compilations under Study

Since seventeenth and eighteenth centuries, further Islamicization of the Ottoman law (a shift from *örf* to sharia) has been observed by some scholars.[35] Although the degree which this process of Islamicization influenced each part of the empire is a matter of debate,[36] decline of *kanun*[37] and an increase in the influence of sharia[38] in this period is a general observation. In this context, taking into consideration Johansen's argument that fatwa was the main tool through which legal change and development took place, the significance of the fatwa compilations in seventeenth and eighteenth centuries for the study of Ottoman law should be emphasized.

This study covers *sulh* chapters of three eighteenth-century fatwa compilations. One of the compilations used as a primary source here is *Fetâvâ-yi 'Abdurrahîm* by Menteşizade Abdürrahim Efendi (d.1128/1716), who held the office of *şeyhülislam* from June 26, 1715 to December 4, 1716.[39] The published version has about 11050 fatwas. This compilation does not contain the original evidences (*nakl*) which are used as the supporting material (*mesned*) for the fatwas. There are some other unpublished editions[40] and a summary[41] of this compilation available as well.

[35] Ömer Lutfi Barkan, *XV-XVI ıncı Asırlarda Osmanlı İmparatorluğunda Ziraî Ekonominin Hukukî ve Malî Esasları*, (İstanbul: İstanbul Üniversitesi, 1943).

[36] Hülya Canbakal draws attention to the heterogeneity of such an Islamization impact in different areas of the empire. "Bir Kaç Fetva Bir Soru: Bir Hukuk Haritasına Doğru," in Günay Kut and Fatma Büyükkarcı Yılmaz (eds.) *Şinasi Tekin'in Anısına Uygurlardan Osmanlıya*, (İstanbul: Simurg Kitapçılık, 2005), pp. 258-270.

[37] Uriel Heyd, *Studies in Old Ottoman Criminal Law*, Edited by V.L. Ménage, (Oxford: At the Clarendon Press, 1973), p.152.

[38] Heyd, *Studies in Old Ottoman Criminal Law*, pp.153-154.

[39] The compilation was published by Dârüt-Tıbâati'l-Ma'mûreti's-Sultâniyye, 1243/1827. Mehmet İpşirli "Abdurrahim Efendi, Menteşzâde" *DİA*, I. p. 290.

[40] One edition was done by *fetva emîni* Mehmed b. Ahmed b. Mustafa el-Gedûsî (d.1253/1837) with the title *Fayz al-Karîm fî Nuqûl Fatâwâ 'Abdurrahîm* (İstanbul Müftülüğü Library, no 142-143, v.I-II, 455-469 folios, 3 Safar 1238/20.10.1822). Two other manuscript copies are available in Süleymaniye Library, H. Hüsnü Paşa, no.498 and Yazma Bağışlar, no. 2006). El-Gedûsi provided the fatwas with their *nukûl* (pl. of *nakl*), showing the sources of the *nukûl* as well. A second edition was done by Malatyalı

Another source used in the study is *Behcet el-Fetâvâ ma'a'n-Nukûl*, which is a compilation of fatwas by *Şeyhülislam* Yenişehirli Ebül'-Fazl Abdullah b. Ahmed (d.1156/1743). Yenişehirli held office as *şeyhülislam* from May 7, 1718 to September 30, 1730.[42] This opus, as one of the most valuable Ottoman fatwa compilations was edited by *fetva emîni* Mehmed Fıkhî el-Ayni.[43] Yenişehirli's fatwas were edited initially by himself. However, Ayni found the order of the fatwas inappropriate and therefore prepared an edition of his own. He included Yenişehirli's later fatwas as well. He also added the *nukûl* for each fatwa, writing down the exact place of the source. The title *Behcet el-Fetâvâ* was also given by Ayni as well. There are on other manuscript edition[44] and two summaries[45] available.

The last compilation used as a primary source here is *Netîce el-Fetâvâ ma'a'n-Nukûl*, edited by es-Seyyid Ahmed Hafız Mehmed b.Ahmed b.Şeyh Mustafa el-Gedûsî (d.1253/1837).[46] This opus, unlike the other two primary sources mentioned above, is the fatwa compilation of not one *şeyhülislam*, but of many *şeyhülislam*s incumbent since 1143/1730. *Netice* was gradually compiled and the final version, edited by el-Gedûsî, was published. Before that, *fetva emîni* Es-Seyyid Ahmed had fulfilled the wish of the incumbent *şeyhülislam* Dürrizade es-Seyyid Ahmed Efendi (1792-1798) to

Hocazâde Seyyid Mehmed Rasim Efendi (d.1316/1898) titled as *Fetâvâ-yı 'Abdurrahim ma'a'n-Nukûl* (İstanbul Müftülüğü No. 136). See Özen, "Fetva Literatürü," pp. 301-302.

[41] A summary of the fatwas of 'Abdurrahim is provided by *fetva emîni* Çeşmîzâde Mehmed Hâlis in his *Khulâsa al-Ajwiba*. Özen, "Fetva Literatürü," p. 302.

[42] Mehmet İpşirli, "Abdullah Efendi, Yenişehirli" *DİA*, I. p. 100.

[43] It was published by Matbaa-i 'Âmire, 1266/1850, 1289/1872, pp.643.

[44] *Fetâvâ-yı Vîdînî* (Beyazıt State Library, Beyazıt Section, no.2772). Şükrü Özen, Osmanlı Döneminde Fetva Literatürü," *Türkiye Araştırmaları Literatür Dergisi*, **3** (5), 2005, p. 304.

[45] Fındıklı Süleyman Efendi *Al-Fihrist al-Kâmil li Bahjat al-Fatâwâ*. Şükrü Özen has identified three different manuscripts of this book. One is in Süleymaniye Library, Kasidecizâde Section, no 267 (1b-77b) having the date of 18 Zilka'da 1200 (12.9.1786). The other one is in Süleymaniye Library, Hacı Mahmud Ef., no.1239, ist.1209/1794, 159 sheets. The last one is in Murat Molla Library, Murad Molla, no. 1187, ist. 1185/1771, 62 folios. According to Şükrü Özen's work, which is based on the first copy, Fındıklı Süleyman Efendi provided summaries of the fatwas so that finding the detailed fatwas with their *nukûl* would be easier. Özen, "Fetva Literatürü," p. 303. The second summary to be mentiones is Çeşmizade Mehmed Hâlis's *Khulâsa al-Ajwiba*. Ahmet Özel, "Behcetü'l-fetâvâ," *DİA*, V. p.346.

[46] It was published in Istanbul, Matbaa-i Âmire, 1237, 1265/1849.

compile the fatwas of previous *şeyhülislam*s in one book to be presented to the Sultan. Es-Seyyid Ahmed named the book as *Netîce el-Fetâvâ*.[47] This compilation was edited later by el-Gedûsî in 1226 (1811), adding the *nukûl* from classical legal books to support the fatwas of *Netice*. This later version was published in Istanbul, 1265 (1849). In this last version, the names of nine *şeyhülislam*s whose fatwas were compiled in the work are given in abbreviated form.[48] However the fatwas in *Netice* are not confined to those of these nine *şeyhülislam*s[49] but include fatwas of other *şeyhülislam*s whose full names are mentioned in the compilation.[50]

Another primary source used for this study belongs to the *fürû‘* genre,[51] elucidating the principles of the law in practice, rather than legal theory (*usûl-ı fıkh*). The source is *Mülteka'l-Ebhar* the main opus of Burhânuddîn[52] İbrahim b. Muhammed b. İbrahim el-Halebî, one of the most well-known Ottoman jurists,[53] and a contemporary of Süleyman the Magnificent. *Mülteka* is based on famous Hanafi works such as el-Kudûrî's (d.428/1037) *el-Muhtasar*, el-Mavsılî's (d.683/1203) *el-Muhtâr*, Ebu'l-

[47] Istanbul University Merkez Library, Nadir Eserler-Türkçe Bölümü, no. 4696.

[48] The names of these nine *şeyhülislam*s are: Mirzazade Şeyh Mehmed Efendi (1730-1731), Paşmakçızade Es-Seyyid Abdullah Efendi (1731-32); Damadzade Ebühayr Ahmed Efendi (1755-56); İsmail Efendizade İshak Efendi (1733-34), Dürri Mehmed Efendi (1734-36); Feyzullah Efendizade Es-Seyyid Mustafa Efendi (1736-45), Ak Mahmudzade Es-Seyyid Mehmed Zeynü'l-Abidin Efendi (1746-48), Karaismail Efendizade Mehmed Es'ad Efendi (1748-49), and Karahalil Efendizade Mehmed Said Efendi (1749-50).

[49] As mistakenly proposed by Ekin Tuşalp, "Treating Outlaws," pp.29-30.

[50] Some of these *şeyhülislam*s are Pîrîzâde Mehmed; Damadzâde Feyzullah; Dürrizade Mustafa; Mehmed Salih; Veliyüddin; [Salihzâde] Mehmed Emîn; Dürrîzâde Ataullah; Dürrîzâde Mehmed Ârif; Müftîzâde Ahmed; Mekkî Mehmed Efendi; Es-Seyyid Mehmed Kâmil; Mehmed Şerîf; and Hamîdîzâde Mustafa. Özen, "Fetva Literatürü," p. 270.

[51] One limitation of this study is the usage of different genres for the sake of comparison. Comparing the fatwa compilations of eighteenth century with those of sixteenth century (for example that of Ebu's-su'ûd) would be more appropriate. However, since this study is based on the printed works due to the time considerations, and the debate on contiuity and change in legal principles is of secondary importance, *Mülteka* was preferred.

[52] According to Şükrü Selim Has , "Halebî, İbrahim b. Muhammed", the name Burhânuddîn, although added by Süyûtî and Joseph Schacht, is neither used by Halebi himself nor does it exist in the Ottoman sources. *DİA*, XV. p.231.

[53] Though his biography might make him pre-Ottoman as much as Ottoman, it is the broad usage of his opus *Mülteka* by the Ottoman *ulema* that places him more appropriately in the category of Ottoman jurist.

Berekât en-Nasafî's (d.710/1310) *Kenz-üd'dekâik*, and Burhaneddin Mahmud el-Mahbûdî's (d.745/1344) *Vikâyet er-rivâye* was completed in the year 923/1517.[54] Later, it was taught as a textbook in Ottoman madrasas and used as a handbook by muftis and *kadı*s of the following generations.[55] It was published many times,[56] and has more than fifty expounded versions (*şerh*s)[57] and translations.[58] The version used here is the *şerh* of Muhammed Mevkûfâtî (d.1654).[59] Halebi helps to establish a link between the pre-Ottoman legal texts and those of the eighteenth-century *şeyhülislam*s.

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[54] Has , "Halebî," p. 232; Joseph Schacht, "al-Halabî", *EI*², III. p.90; Ahmet Özel, *Hanefi Fıkıh Alimleri*, (Ankara: Türkiye Diyanet Vakfı Yayınları, 2006), p.123.

[55] Has , "Halebî," p.232; Uzunçarşılı, *İlmiye Teşkilatı*, p.173; Ahmet Özel, *Hanefi Fıkıh Alimleri*, p. 123.

[56] Istanbul, 1252, 1258, 1260, 1271, 1303, 1309, 1316, 1325; Bulak, 1263; Bombay, 1278 cited in Şükrü Selim Has , "Halebî."

[57] Has , "Halebî;" Ahmet Özel, *Hanefi Fıkıh Alimleri*, p.123, provides a list of important *şerh*s on *Mülteka* as: A) Şeyhzade, Abdurrahim b. Muhammed (d.1078/1667), *Mecme'ul-enhür*. This opus is known as *Dâmâd* and published many times (Cairo, 1298; Istanbul, 1241, 1257, 1264, 1276, 1287, 1304, 1310, 1317, and1329). B) Muhammed b. Ali el-Haskefî (d.1088/1677), *Ed-Dürr'ül-Müntekâ* (Istanbul, 1317, 1327). C)Mahmud el-Bâkânî (d.1003/1594), *Mecra'l-enhür*. A *şerh* by D) Muhammed b. Muhammed el-Benhesî (d.987/1579). Mevkûfâtî has *şerh* in Turkish language (Bulak, 1254; Istanbul, 1269, 1276).

[58] Mouradgea d'Ohsson, *Tableau general de l'Empire Ottoman*, I-III, Paris, 1787-1820; I-VII, Paris1788-1824 involves a summary of *Mülteka*. H. Sauvaire, *Le Moultaka el abheur, avec commentaire abrege du Madjma el-enheur*, Marseille, 1876, 1882 translates *Mülteka* and Şeyhzade Abdurrahim's *şerh* on it, *Mecme'ul-enhür*. Cited in Ahmet Özel, *Hanefi Fıkıh Alimleri*, p.123.

[59] İbrahim Halebi, *Şerh-i Mülteka el-Ebhur: Mevkufat*, translated and latinized by Nedim Yılmaz, 1993, İstanbul: İlmi Neşriyat.

CHAPTER 1

A. Definitions

Sulh is a rigorously defined contract in the Islamic classical texts of law. Many details have been provided regarding different occasions and possibilities to eradicate any possible point of obscurity. This fact contradicts with Weberian argument of '*kadijustiz*', i.e. a kind of justice effected by *kadı*s who are not bounded by any rules and principles, as well as some anthropological studies of Islamic peacemaking in the field of Conflict Resolution on the other. The former argues for lack of doctrinal rigor while the latter takes the concept of *sulh* as a mere ritual of negotiation and mediation in Islamic societies. One aim of this section is to show how scrupulously Islamic law examines this legal concept leaving no space for judges' personal discretion. This section will help us to scrutinize the existence of either continuity or change of the legal principles from the pre-Ottoman classical period to the eighteenth century.

The latter, i.e. students of Islamic conflict resolution, make big generalizations about the Islamic societies and their differences with the Western societies to reach the conclusion that indigenous methods of conflict resolution in the Islamic societies are worth taking into consideration. The data in the compilations under study contradicts those generalizations, demonstrating a considerable extent of formalism in the Ottoman legal system as well as a high degree of individualism in the Ottoman society as perceived by the law.

A chronological order will be followed in giving the definitions and conditions of *sulh*, starting from the pre-Ottoman Hanafi classical texts, continuing with the prominent opus of the 16th-century Ottoman jurist, Halebi, and finalizing with the 18th century *şeyhülislam* Abdurrahim. The other two compilations are not included in the

first chapter. For the purpose of the first chapter, i.e. providing a general definition and comparision of that over time, it is sufficient to cover one of the fatwa compilations of an eighteenth-century *şeyhülislam*.[60] For the pre-Ottoman classical texts, the citations of the secondary litertura has been used. Some of the existing works on *sulh* has taken an a-historical approach towards the concept; citing simultaneously for the same issue from a broad range of Islamic jurists, since the classical time to nineteenth century. In this study, it has been deliberately tried to look for non/pre-Ottoman jurists so that a meaningful comparison would become possible. The sources used are: Zeyle'î's (d.743/1343), *Tebyîn'ül-Hakâik*,[61] Tarâblusî's (d.1440), *Mu'în'ül-Hukkâm*,[62] Semerkandî's (d.539/1144), *Tuhfet'ül-Fukahâ*,[63] İbn Nüceym's (d.970/1563) *el-Bahr' ür-Râik* and *el-Eşbah*,[64] Kasani's (587/1191) *Bedayi*,[65] el-Bâberti's (786/1384) *El-İnâye*,[66] İbn'ül-Hümam's (p.861/1457) *Feth'ul-Kadir*,[67] and Es-Serahsi's (d.483/1090) *el-Mebsût*.[68]

A.1. Sulh According to the Pre-Ottoman Classical Jurists:

A lexicographic definition of the concept of *sulh* is peace, reconciliation, compromise, and amicable engagement.[69] Amicable peacemaking or reconciliation can involve any kind of disagreement or dispute among people, involving either material or

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[60] Furthermore, the fatwas in *sulh* chapter in Abdurrahim's compilation form 68 percent of the total number of the fatwas in all three compilations under study (235 out of 347).

[61] Özel, *Hanefi Fıkıh Alimleri*, p. 79:

[62] Özel, *Hanefi Fıkıh Alimleri*, pp.99-100.

[63] Özel, *Hanefi Fıkıh Alimleri*, pp.47-48.

[64] Özel, *Hanefi Fıkıh Alimleri*, p.125; Özel, "İbn Nüceym, Zeynüddin," *DİA*, XX. pp.236-37.

[65] Özel, *Hanefi Fıkıh Alimleri*, p.54; Ferhat Koca, "Kâsânî," *DİA*, XXIV, p.424.

[66] Özel, *Hanefi Fıkıh Alimleri*, pp.88-89; Arif Aytekin, "Bâbertî," *DİA*, IV. pp. 377-378.

[67] Özel, *Hanefi Fıkıh Alimleri*, pp. 102-3; Ferhat Koca, "İbnü'l-Hümâm," *DİA*, XXI. pp.87-90.

[68] Özel, *Hanefi Fıkıh Alimleri*, p.40; N. Calder, "Al-Sarakhsî," *EI*[2], IX, pp.35-36.

[69] Sir James Redhouse (ed.) *Turkish and English Lexicon*, 2nd Edition, Istanbul: Enes Matbaası, 2001.

non-material claims. *Sulh* in Islamic law, however, is limited to material disputes.[70] At the same time, *sulh* can refer to a "peace treaty" among Muslim communities, or between Muslim and non-Muslim communities.[71] This last denotation of the concept is excluded in this study. A definition of the concept in the Islamic law can be provided as "contract made by parties in order to end the disputes between them, in return for some amount to be paid (*bedel*)"[72] or "an agreement of reconciliation that terminates a dispute between disputants with their consent".[73]

In a *sulh* contract, there are two parties (*musâlih*): one is the plaintiff (*müdde'î*) and the other is the defendant (*müdde'â 'aleyh*) and the contract involves a disputed issue (*musâlah-un 'anh* or *müdde'â bih*) and a price to be paid for the settlement (*bedel* or *musalah-un 'aleyh*).[74] The abovementioned definitions and components of *sulh* explicitly indicate the necessity of a claim for the *sulh* contract.

In the Hanafi law, there are three categories of *sulh*: *sulh 'an-ikrâr*, *sulh 'an-inkâr*, and *sulh 'an-sükût*. These three categories are based on the way the defendant reacts to the claim of the plaintiff. If the defendant concedes that the plaintiff's claim is accurate, then the ensuing *sulh* contract is called a *sulh 'an-ikrâr*. The *sulh* cases in which there is some positive evidence such as testimony or a written document that proves the accuracy of the claim, are characterized as *sulh 'an-ikrâr*.[75] If the defendant denies the claim the ensuing *sulh* becomes a *sulh 'an-inkâr*. Finally, if the defendant remains quiet, giving neither a positive nor negative reaction to the claim of the plaintiff, then the ensuing *sulh* contract is called a *sulh 'an-sükût*.[76] In all three cases, whatever the

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[70] The rights disputed have material values; marriage, inheritance, ownership of slavery, corporeal integration, etc. are rights of such characteristic.

[71] M. Khadduri, "Sulh" *EI*^{2}, IX. p.845.

[72] Zeyle'î, *Tebyin'ül-Hakaik*, V. p.29, cited in Davut Yaylalı, *İslam Hukukunda Sulh*, (Istanbul: Taştan Matbaacılık, 1993), p.13.

[73] Aida Othman "'And *Sulh* is Best': Amicable Settlement and Dispute Resolution in Islamic Law," Unpublished Ph.D. Dissertation, Harvard University, 2005, p. 140.

[74] Dilmen, *Kamus*, VIII. p. 5; *Mecelle* Art. 1532, 1533, 1534.

[75] Zeyle'î, *Tebyin'ül-Hakâik*, V. pp. 30-31 and Tarablusî, *Mu'în'ül-Hukkâm*, p. 153, cited in Yaylalı, *Sulh*, p. 58; Es-Semerkandi, *Tuhfe*, III. 250-256, cited in Abdullah Ramazanoğlu, "1876 Nolu Trabzon Şer'iyye Sicili ve Bu Sicil Çerçevesinde Sulh Akdi," Unpublished M.A. Thesis, Karadeniz Teknik Üniversitesi, 2001, p.46.

[76] M. Khadduri, "Sulh," p.845; *Mecelle*, Art. 1535.

reaction of the defendant is, both parties specify the amount of *bedel* to be paid to the plaintiff by the defendant.[77]

Sulh ʻan-inkâr and its validity have been discussed among jurists of different legal schools. The Hanafi School accepts it as a valid type. The main logic behind this type of *sulh* is to give the defendant the right not to take oath. When the defendant rejects the claim, the plaintiff is asked to prove the claim. If he fails, then the defendant is asked to take oath. The defendant prefers to make *sulh* rather than to take the oath. Therefore, for the plaintiff, unlike the defendant, *sulh ʻan-inkâr* is like an exchange because the plaintiff receives the claimed article or a *bedel* for that. Hence, different rules are applied to the two parties of the *sulh*. For example, if *bedel* is real estate, then *şuf'a* right exists. The plaintiff is similar to one who purchases the real estate in exchange for his claimed right. However, there is no *şufʻa* right in *musâlahun ʻanh* because the defendant does not give the *bedel* to exchange for this real estate but to avoid taking the oath. Therefore, since it is not like a sale contract, there is no *şufʻa* right either.[78]

If it becomes clear that *musâlahun ʻanh* belongs to a third party, the *bedel* received by the plaintiff should be reimbursed.[79] However, after the conclusion of the *sulh ʻan-inkâr*, it can not be invalidated with new evidence brought by the plaintiff or the confession of the defendant.[80] However, if the plaintiff is a trustee (*vekîl*) of a minor, further evidence brought after the *sulh ʻan inkâr* is concluded is acceptable.[81] These rules regarding *sulh ʻan-inkâr* are applied to *sulh ʻan-sükût* as well.[82]

There is another category, *ibrâ*, which is usually studied under the chapter of *sulh* in Ottoman fatwa compilations used in this study.[83] *İbrâ* is a unilateral contract by

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[77] Eruğrul Koyunkalın, "İslâm Hukukunda Sulh," Unpublished M.A. Thesis, Marmara University, Istanbul, 1992, pp. 27-28; Ramazanoğlu, "Şer'yye Sicili ve Sulh Akdi," pp. 46-54.

[78] Zeyleʻî, *Tebyin'ül-Hakaik*, V. p. 33 andİbn Nüceym, *El-Bahr'ur-Raik* VII. p. 256, cited in Yaylalı, *Sulh*, pp. 65-66.

[79] Yaylalı, *Sulh*, p. 66.

[80] İbn Nüceym, *El-Bahr'ur-Râik* VII, p.256, cited in Yaylalı, *Sulh*, p.176.

[81] Yaylalı, *Sulh*, p. 67.

[82] Zeyleʻî, *Tebyin'ül-Hakaik*, V. p. 30, cited in Yaylalı, *Sulh*, pp. 68-69.

[83] All of the three compilations under the study have *ibra* as a subtitle in the Chapter of *Sulh*.

which one party releases the other of some or all of his rights.[84] It should be emphasized that it is the rights that are released not some or the whole of the disputed article (*‘ayn*).[85] In a *sulh* contract, if a plaintiff receives part of the article (*‘ayn*) she claims and releases the remaining part, the *sulh* is invalid and the plaintiff can claim the remaining part as well.[86]

A.2. Conditions of *Sulh*:

A *sulh* contract, in order to be valid, requires fulfillment of certain conditions. These conditions can be classified in three categories: conditions that pertain to the parties of the *sulh* (*musâlihûn*), conditions pertaining to what the *sulh* is made upon (*musâlahun ‘anh*), and conditions concerning the price (*bedel*).

A.2.a. Conditions concerning the *musâlihûn*

In the first category, the primary condition for *sulh* is the free will of both parties. Therefore, if a person is forced to make a *sulh*, the contract is null and void[87] unless the forced person gives his consent after force upon him is removed.[88] Similar to rent and sale, in *sulh* there is need for explicit utterance by both parties: offer (*îcâb*) and

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[84] Apaydın, “İbra” *DİA*, XXI, p. 263.

[85] In this case, it becomes grant (*hibe*), not *ibrâ*.

[86] El-Baberti, *El-İnaye*, VII. p.30 and İbn el-Hümâm, *Feth’ül-Kadir*, VII. p.30 cited in Yaylalı, *Sulh*, pp. 86-87.

[87] El-Kasani, *Bedayi* V. p. 176, cited in Yaylalı, *Sulh*, pp.40.

[88] Es-Serahsi, *El-Mebsut* XXIV. pp. 56-57; İbn Nüceym, *El-Eşbah* p.282, cited in Yaylalı, *Sulh*, pp.41-42.

acceptance (*kabûl*), which are called the pillars (*rükn*s) of *sulh*.[89] However, in *ibrâ* cases, only the offer suffices.[90]

In all compacts (*'akd*s), including *sulh*, explicit utterance by the parties involved indicating the free will requires the use of simple past tense (*mâzî*). Other tenses, for example present or future tenses (*muzâri'*), do not perform such a function. Therefore, if a tense other than the simple past tense is used, further evidence is required to make sure that the statement represents the will of the parties for the compact.[91] This expression can be either oral or written. *Îcâb* can be expressed via a messenger as well.[92] In case a party is dumb, he can express his will by signs.[93]

There are three conditions for the offer and acceptance: a) the acceptance should refer to the thing that is offered, b) the offer and acceptance should take place in the same meeting (*meclis-i sulh*), and c) the offer should not be renounced before the acceptance.[94]

The parties to *sulh* should have competence (*ehliyet*) to make a contract. Competence is defined as having the capacity to reason (*'akl*) and discern (*temyîz*).[95] Therefore, a minor who is competent can be a party to *sulh*. A minor who is capable of

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[89] Yaylalı mentions the distinction between fundamental principles (*rukn*s) and conditions (*shart*s). *Rukn* is a part of the compact; i.e. *îcâb* and *kabûl* are parts of the *sulh* compact; without which *sulh* compact does not exist. *Shart* is also necessary for the validity of the compact; however, it is not a part of the compact. pp. 27-28.

[90] İbn Nüceym, *El-Bahr'ür-Raik*; VII. p.255, cited in Yaylalı, *Sulh*, pp. 30-31; El-Baberti, *El-İnaye*, VIII, p.403, cited in Koyunkalın, "Sulh," pp.45-46.

[91] El-Kasani, *El-Bedayi* V. pp.133-134 cited in Karaman, *Mukayeseli İslam Hukuku*, (Istanbul: İz Yayıncılık, 2006), II, pp. 64; el-Kasani, *el-Bedâi*, V. p.133, cited in Ramazanoğlu, "Şer'yye Sicili ve Sulh Akdi," 28.

[92] El-Kasani, *El-Bedayi*, III. p.138, cited in Karaman, *Mukayeseli İslam Hukuku*, II. 68-69.

[93] Yaylalı, *Sulh*, p. 33.

[94] El-Kasani, *El-Bedayi*, V. p.136, cited in Yaylalı, *Sulh*, p.35.

[95] Although there are further elaboration on the concept of *ahliyat* and its further sub-classifications, I did not find it necessary to go further into the details. For more information see Laleh Bakhtiar, *Encyclopedia of Islamic Law: A Compendium of Major Schools*, (Chicago: ABC International Group, Inc 1996), pp.395-393; Schacht, *Introduction*, pp.124-5; J Johansen, Baber, "Secular and Religious Elements in Hanafite Law: Function and Limits of the Absolute Character of Government Authority," in his (ed.) *Contingency in a Sacred Law: Law and Ethical Norms in the Muslim* Fiqh, (Leiden, Boston, Köln: Brill, 1999), pp.194-200; Yaylalı, *Sulh* pp. 36-37.

making distinctions (*mümeyyiz*) and is permitted to engage in trade (*me'zûn*) can make *sulh* as long as the contract brings her absolute benefit; contracts that cause harm to her interests are invalid.[96] A *mümeyyiz* and *me'zûn* minor can be party to contracts that might both benefit or harm her interests by the permission of his guardian (*velî*). Any *sulh* made personally by incompetent minors and insane people are null and void.[97] *Sulh* made by an inebriated person is invalid.[98]

Representatives (*vekîl*s), guardians (*velî*s), or custodians (*vasî*s) of minor children or insane people can make *sulh* on behalf of those under their protection only if the *sulh* does not harm the latter's interests.[99]

Being a representative for a dispute, however, does not mean that the representative has automatically the right to make *sulh* on behalf of the person he represents (*müvekkil*). A *sulh* made by a representative who is not explicitly permitted to do so is null and void, unless the person who is represented later gives his consent.[100] When a *müvekkil* gives his consent, then he becomes responsible for the *bedel*.[101]

A self-appointed, unauthorized representative (*fuzûlî*) can make *sulh* on behalf of another person in four situations: when the unauthorized representative (a) guarantees the *bedel*, (b) makes *sulh* upon his own property, i.e. states that *bedel* will be from his property, (c) shows some present cash or non-cash, non-real estate property as *bedel*, or (d) makes *sulh* upon a certain amount of cash and pays it. In the latter case, if the unauthorized representative does not pay the *bedel*, then the validity of *sulh* depends upon the consent of the party represented. If he gives his consent, then he should pay the *bedel*. If he does not accept the *sulh*, then it is null and void.[102]

A person who is overwhelmed with debts and wants to make *sulh* upon some of his rights, needs the consent of his creditors. Similarly, a person who has a fatal disease

[96] El-Kasani, *Bedayi*, VI. p.40, cited in Yaylalı, *Sulh*, pp. 38-39.

[97] El-Kasani, *El-Bedayi*, VI. p.40, cited in Ramazanoğlu, "Şer'yye Sicili ve Sulh Akdi," p.31.

[98] For a debate on this issue see Yaylalı, *Sulh*, pp. 37-38.

[99] El-Kasani, *El-Bedayi*, VI. p.41, cited in Yaylalı, *Sulh*, pp. 39-40.

[100] Yaylalı, *Sulh*, p.43.

[101] Yaylalı, *Sulh*, p.44.

[102] Zeyle'î, *Tebyün'ül-Hakaik*, V. pp.40-41, cited in Yaylalı, *Sulh*, pp. 46-47.

can not give more than one third of his property to others without the permission of the heirs.[103]

A.2.b. Conditions of the *musâlahun ‘anh*:

According to Islamic law, the legal claims and liabilities are classified mainly in two categories: the legal “claims of God” (*Hukuk’ul-lah*) and the legal “claims of men” (*Hukuk’ul-‘ibâd*).[104] “Legal claims of God” are about guaranteeing the order in and interests of the society. These rights can not be released even partially. Therefore, individuals do not have the right to make *sulh* upon such rights. Rights of God are divided into two categories. First is those related to worshiping (*‘ibâdât*) such as the alms (*zakât*) or the prayer (*namâz*). The second is those related to punishments (*hudûd*) such as punishment for fornication, consumption of alcoholic beverages, highway robbery, and unintentional homicide.[105] Any *sulh* transaction made upon these rights is null and void.[106]

In the legal “claims of men” are included the law of transactions, the rules governing marriage family and inheritance and parts of the penal law,[107] all of which can be subject to *sulh*. Individuals have the right to make *sulh* on these claims in return for a *bedel* or without one. For example, possession of properties such as houses, land, or animals; usage of houses, shops, or house equipments; services such as doing some work; bequests belonging to heirs; and debts can all be subjects of *sulh*.[108]

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[103] El-Kasani, *Bedayi*, VI. P.40, cited in Koyunkalın, “Sulh,” p.48

[104] Johansen, “Secular and Religious Elements,” p.200; Hayrettin Karaman, *Mukayeseli İslam Hukuku*, II. p. 471.

[105] Since the amount of *diyet* is clarified in *shari‘a*, one can not make *sulh* upon this amount; because, any increase in this amount would mean *ribâ*. Yaylalı, *Sulh*, p.50. This issue will be further elaborated in the second chapter.

[106] El-Kasani, *Bedayi*, VI. pp. 48-49, cited in Koyunkalın, “Sulh,” p.51; El-Kasani, *Bedayi*, VI. p.48 and El-Zeyle‘î *Tebyin’ül-Hakaik*, V. p.37, cited in Ramazanoğlu, “Şer’yye Sicili ve Sulh Akdi,” pp.33-34; El-Kasani, *Bedayi*, VII, pp.483; Zeyle‘î, *Tebyin’ül-Hakaik*, V. p.482, cited in Othman, “*Sulh* is Best,” pp.28-29.

[107] Johansen, “Secular and Religious Elements,” p.200.

[108] Koyunkalın, “Sulh,” p.52.

There are some rights that involve a mixture of the rights of God and rights of men. In such cases, the regulation pertaining to the predominant element, either the rights of God or rights of men, is valid. For example, the punishment for slander to chaste women, the right of alimony, fatherhood, custody, and pedigree (*neseb*)[109] can not be subject to *sulh*. However, *sulh* can be made upon mixed rights such as retaliation (*kısâs*), blood money (*diyet*), dowry given to the bride by her husband for marriage (*mehr*), and the money that the wife gives up for divorce (*hul'*).[110]

Musâlahun 'anh should be a right belonging to the *musâlih*.[111] Furthermore, *musâlahun 'anh* itself should belong to the *musâlih*. For example, a *şuf'adar*[112] has the right of preemption of a neighboring house. However, this right does not give him the authority to make *sulh* on the neighboring house.[113] *Musâlahun 'anh* can be unknown, as long as it is not required to be given back.[114]

A.2.c. Conditions of *bedel*

Conditions of contracts that are most similar to the cases at hand are applicable in *sulh*. If *bedel* involves a benefit, then the contract is like rent.[115] Therefore, rules regarding rent are applied to this kind of *sulh* as well. For example, if one party to the

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[109] A divorced woman claims that a child belongs to her ex-husband. The man repudiates the woman's claim. In this situation, a *sulh* made upon the pedigree of the child by the woman and the man is invalid, because this right belongs to the child.

[110] Ramazanoğlu, "Şer'yye Sicili ve Sulh Akdi," p.35.

[111] El-Kasani, *Bedâyi*, VI. P.49 cited in Yaylalı, *Sulh*, pp. 52-53.

[112] *Şuf'a*: a right or claim of preemption in respect of an adjoining real estate; *şuf'adar*: a person who has such a right.

[113] El-Kasani, *Bedâyi*, V. 20 and Zeyle'î, *Tebyin'ül-Hakaik*, V. 257, cited in Yaylalı, *Sulh*, pp. 53-54.

[114] El-Kasani, *Bedayi*, VI. p.49, cited in Ramazanoğlu, "Şer'yye Sicili ve Sulh Akdi," p. 37.

[115] Zeyle'î, *Tebyîn'ül-Hakâik*, V.p. 257, cited in Yaylalı, *Sulh*, p.54; also see Serahsi, *El-Mebsut* XX, p.157 and El-Zeyle'î, *Tebyin'ül-Hakaik* V. p. 471, cited in Othman, "*Sulh* is Best," p.142.

sulh dies before the benefit is used, i.e. the *bedel* is delivered, the *sulh* is null and void.[116]

If *bedel* is a portion of what is claimed by the plaintiff, it means that the remaining part is donated to the defendant, i.e. it is like *ibrâ*. In fact, the only way to legitimize this kind of transaction is to perceive it as *ibrâ*, otherwise, it would be like *ribâ* (interest). Any concessions in the quantity and/or quality of the disputed article can be made by only the plaintiff.[117] Therefore, if the amount of *bedel* is more than the *musâlahun 'anh*, the *sulh* is null and void. Likewise, if the period of payment is shortened, the *sulh* is invalid again, even if the *bedel* is less than the *musâlahun 'anh*. [118] In the latter case, however, if the *bedel* is different than the *musâlahun 'anh* then abridging the time of payment does not invalidate the *sulh*.[119]

It is in this context that conditional *ibrâ* is invalid. If a plaintiff offers the defendant to release him of some of his rights in return for some concessions, for example on the condition that the defendant shortens the time of payment, the *sulh* will be invalid. However, if the plaintiff releases the defendant of some of the rights and asks him to give the rest in advance, this *sulh* is valid, because here the plaintiff does not base the *ibrâ* on a condition.[120] It is important to note that if the condition is not about a concession to be made by the defendant, then it does not invalidate the *sulh*.[121]

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[116] Abu Hanifa and Abu Muhammad Shaibani supported this idea; however, Abu Yusuf had some reservations. Zeyle'î, V. p. 30 cited in Yaylalı, *Sulh*, p. 74-75.

[117] Zeyle'î, V. p. 42, cited in Yaylalı, *Sulh* p.79.

[118] Yaylalı, *Sulh*, p.79.

[119] Yaylalı, *Sulh*, p. 80.

[120] Yaylalı, *Sulh*, p. 82.

[121] For example, the plaintiff promises the defendant that if he pays half of the debt until tomorrow, then he will be released of the other half, otherwise, he has to pay all the debt. If the defendant pays the half in one day, he will be released of the other half, otherwise he will not. However, if the plaintiff just says that the defendant will be released of half if he pays the other half in one day and does not mention what will happen if the defendant does not pay the half, then there are two possibilities: a) the defendant pays the specified amount in the specified time; b) he fails to pay. In the first situation, all Hanafites agree that if the defendant pays the half he will be released of the other half. In the second situation, there is a debate between Abu Hanifa and Imam Muhammed Shaibani on the one hand and Abu Yusuf on the other. The former support the invalidity of the *sulh*, i.e. they argue that the defendant should pay all the debt. The latter argues for the validity of such a *sulh* anyway. El-Kasani, *Bedayi*, VI. p.44 and Zeyle'î, *Tebyin'ül-Hakaik*, V. p.43, cited in Yaylalı, *Sulh*, pp. 84-85.

The *sulh* contract is similar to *bey'* (sale) if the *bedel* is *'ayn*[122] such as identified real estate; or specified *mekîl*,[123] *mevzûn*,[124] or goods; and the *bedel* is like *mebi'* (sold). If the *bedel* is a debt (*deyn*) such as unspecified *mekîl*, *mevzûn*, gold, and silver, again the *sulh* contract is like sale; and the *bedel* is like *semen*.[125] When the *sulh* contract is similar to sale, rules regarding sale such as *hıyar-ı şart*,[126] *hıyar-ı 'ayb*,[127] *hıyar-ı rü'yet*,[128] and the right of *şuf'a*[129] are applied to *sulh* as well.[130] Whatever is appropriate to be the *semen* or *mebi'* in sale, can be *bedel-i sulh* as well. As *semen* in sale can not be unknown, *bedel* can not be unknown either.[131] Again, similar to *semen* in sale, if the *bedel* will be paid later, the time for that should be precisely specified.[132]

One condition for *bedel* is that it should be *mütekavvim*.[133] Things that are non-*mütekavvim* such as carrion, blood, and wine can not be *bedel*. In case one such item has been used as *bedel*, the *sulh* contract is null and void. However, there is no need to

[122] *'ayn*: something of concrete external existence, such as a book, house, horse, furniture, certain amount of money or wheat. Mehmet Erdoğan, *Fıkıh ve Hukuk Terimleri Sözlüğü*, (Istanbul: Ensar Neşriyat, 2005), p. 40.

[123] *mekîl*: (adjective and noun) measurable according to its capacity, such as wheat, barley.

[124] *mevzûn*: (adjective and noun) weighable.

[125] *semen*: the price of a sold article.

[126] *Hıyar-ı şart*: the right of one or both parties of a contract to either invalidate or promulgate the contract in a certain period of time, Mehmet Erdoğan, *Fıkıh ve Hukuk Terimleri Sözlüğü*, p.195.

[127] *Hıyar-ı 'ayb*: If there is a deficiency in the *bedel*, the plaintiff can refuse it. Mehmet Erdoğan, *Fıkıh ve Hukuk Terimleri Sözlüğü*, p.194.

[128] *Hıyar-ı rü'yet*: If the plaintiff does not see the *bedel* while accepting the *sulh* agreement, he has the right to accept or refuse the *bedel* whe he sees it. Mehmet Erdoğan, *Fıkıh ve Hukuk Terimleri Sözlüğü*, p.195.

[129] See above note 112.

[130] Yaylalı, *Sulh*, p. 71.

[131] Yaylalı, *Sulh*, 61.

[132] Yaylalı, *Sulh*, p. 71.

[133] *Mütekavvim*: something that has financial value. This definition excludes: a) something too valuable to be subject for a transaction, such as human life; b) anything abject and sordid according to religion, such as pork and faeces; c) anything forbidden by religion, such as idols; d) too insignificant things, such as a cluster of grass; and e) something that is protected (*muhrez*) such as the fish in the seas, naturally grown fruits and grasses. Mehmet Erdoğan, *Fıkıh ve Hukuk Terimleri Sözlüğü*, p. 438.

reimburse the *bedel*, because such a contract is conceived as *sulh* without *bedel* or a kind of discharge (*afv*).[134]

Bedel should be the property of the *musâlih*. However, if *sulh* is made upon an identified item that belongs to a third person, the *sulh* is valid only by the permission of the owner of the item. In that case, the owner gets the price of the item from the *musâlih*. If a *sulh* is made upon an unidentified *'ayn* or *deyn* (debt) such as gold and silver that belongs to a third party, again the *sulh* is valid. In this case, however, it is the *musâlih* who should give the *bedel* to the plaintiff.[135] After a *sulh* is concluded, if it is revealed that the *bedel* belongs to a third person, the *sulh* is null and void; the *bedel* is given to its owner and the dispute remains.[136]

The *bedel* should be identified (*ma'lûm*). If the *bedel* is present, then it is sufficient to be pointed at without mentioning the amount and the quality of the item. However, if the *bedel* is not present, then it will be identified in one of these four ways: a) if it is cash, its type and amount should be clarified, otherwise, the money used commonly in the region will be assumed, b) if it is *mekîl* and *mevzûn*, then the amount and quality should be specified; c) if it is cloth, in addition to the amount and quality, the time of delivery should be mentioned as well. Here, it has the characteristics of *selem*.[137] And finally, d) if the *bedel* involves animals, it is not enough to mention the amount and quality, but also the type of the animal should be specified.[138]

If the *bedel* is something to be delivered to the plaintiff, then it should be deliverable and harmless. So a fugitive animal can not be *bedel*. A column of a building can not be *bedel*, because it will harm others.[139]

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[134] El-Kasani, *Bedayi*, VI. p. 42 and İbn el-Hümam, *Şerhu Feth'il-Kadir*, VII. p. 33, cited in Yaylalı, *Sulh*, p. 54.

[135] Yaylalı, *Sulh* p. 55.

[136] El-Kasani, *Bedayi*, VI. p.48, cited in Yaylalı, *Sulh*, pp. 54-55. However, if the *sulh* made upon something that can not be violated, then the plaintiff should claim the *bedel*, as is the case with retaliation (*kısas*), El-Kasani, *Bedayi*, VI. 48-54 and İbn el-Hümam, *Feth'ul-Kadîr*, VII, 29,cited in Yaylalı, *Sulh*, p.97.

[137] *bey'-i selem*: A contract to deliver at a future time a certain article of sale the price being paid down at once, Redhouse, *Lexicon*, p. 422.

[138] Yaylalı, *Sulh*, pp 56-57.

[139] El-Kasani, *Bedayi*, VI. p.48, cited in Yaylalı, *Sulh*, p. 55.

A.3. Halebi (d.956/1552)

Mülteka'l-Ebhur appears in complete agreement with the pre-Ottoman Hanafi texts on the issue of *sulh*. Halebi's chapter on *sulh*, however, is a concise one, lacking some details in the definition and conditions of *sulh* mentioned above. As already noted, *sulh* can be similar to sale, rent, or *ibrâ*, which are treated in separate chapters. Furthermore, themes such as homicide, bodily harm, inheritance have separate chapters as well. To give an example of issues not dealt in the settlement chapter of *Mülteka*, we can mention the conditions and competency of the *musâlih* or the conditions regarding the explicit utterance for the contract (*'akd*) are not dealt with in detail in *Mültekâ*.

Halebi talks about the three different types of *sulh*, *'an-ikrâr*, *'an-inkâr*, and *'an-sükût*,[140] he deals with the topics of *sulh* in debt (*deyn*), benefit, retaliation, blood money, slavery,[141] marriage,[142] inheritance (*tehârüc*),[143] and partnership (*müşareket*).[144] The last category is more detailed in *Mülteka* than pre-Ottoman legal texts.[145] Halebi, however, leaves out the cases in which further evidence emerges after the conclusion of *sulh 'an-inkâr*.[146]

Halebi refers to the conditions of parties to *sulh* in consistency with the classical legal texts. He touches upon the issues pertaining to representation (vekâlet), both appointed by the party to the dispute or self-appointed (*fuzûlî*).[147] However he does not deal with issues regarding the competency of the parties to *sulh*, or regarding the

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[140] Halebi, III. p.486.

[141] Halebi, III. p. 491.

[142] Halebi, III. p.491.

[143] Halebi, III. pp.501-2.

[144] Halebi, III. p. 501.

[145] It should be mentioned that this comparison is based on the secondary literature regarding the earlier Hanafi texts. Therefore, the findings are can say as much as the secondary literature reflects the content of the classical legal texts.

[146] See above note 80.

[147] Halebi, III. pp.491-92.

necessity of *îcâb* and *kabûl* and explicit utterance.[148] The reason can be the fact that these issues have been already discussed in other chapters such as sale.

Regarding the conditions of *musâlahun 'anh*, *Mülteḳâ* is in total agreement with the classical legal texts. There is only one exception where he asserts that *musâlahun 'anh* can be unknown, without mentioning "as long as it is not required to be given back".[149]

About the conditions of *bedel*, again Halebi follows the rules we find in pre-Ottoman classical legal texts. For him there are three different types of *sulh* contracts defined according to the nature of *bedel*: those that can be similar to sale, rent, and *ibrâ*. Here, he deals in detail with cases of conditional *ibrâ* and *sulh*.[150] Halebi, however, does not mention that *bedel* should be *mütekavvim*;[151] he limits himself to stating that *bedel* should be transferable.[152] *Mülteḳâ* also lacks the situations in which *bedel* is not present at the assembly of *sulh* (*meclis-i sulh*).

A.4. Abdurrahim (d.1128/1716)

The fatwa compilation of Abdurrahim, too, is generally in agreement with classical legal texts. The fatwas either approve the already existing points mentioned by the classical jurists or elaborate on them applying them to different new cases, as we see in the case of cash waqfs (*vakf-ı nükûd*).[153] However, there are some minor points of disagreement as well.

The fatwas of the compilation do not offer a definition of *sulh* or its different types. However, the answers given to the queries appear in agreement with classical jurists. For example, when there is some evidence to prove a case in favor of a party in a

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[148] See above notes 89-93.

[149] See above note 114.

[150] See above notes 120 and 121.

[151] See above note 133 and 134.

[152] Halebi, III. p.486.

[153] Abdurrahim, p.436.

dispute, then the ensuing *sulh* becomes a *sulh ʻan-ikrâr*.[154] In case of *sulh ʻan inkâr*, Abdurrahim adds that such a *sulh* does not mean that the defendant approves the claim of the plaintiff.[155] *İbrâ* is another area that Abdurrahim is in agreement with the classical legal texts; here he states that it is the right that is released not the disputed article itself (*ʻayn*).[156]

In pre-Ottoman classical texts, it is mentioned that once a valid *sulh ʻan-inkâr* is concluded, it is effective and can not be invalidated even if there is further evidence to prove the case in favor of one party.[157] Abdurrahim, however, invalidates such a *sulh* contract, when some further evidence emerges after the conclusion of the contract.[158] Here, it interestingly seems that the *şeyhülislam* prefers to follow the Maliki tradition of el-Haraşi (d.1101/1690)[159] rather than the Hanafi tradition.[160] In this context, it is very natural that Abdurrahim agrees with the classical texts in cases where the defendant is a trustee of a minor. In those cases, if there is further evidence in favor of the minor, then the *sulh* is invalidated.[161]

Conditions of *musâlihûn* are treated in further detail in the compilation compared to the classical texts; however, there is still a general agreement between them.

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[154] Abdurrahim, p.444.

[155] Abdurrahim, pp. 440, 455.

[156] Abdurrahim, p. 447.

[157] See above note 80.

[158] Abdurrahim, pp. 433, 439-440, 441, and 442.

[159] See Cengiz Kallek, "Haraşi, Muhammed b. Abdullah," *DİA*, XVI. p.110.

[160] Yaylalı, *Sulh*, p.96. In order to make sure of this extraordinary attitude of the Ottoman jurists, the original texts of pre-Ottoman jurists have been looked for as well. It was observed that generally the Hanafi jurists opine for the validity of *sulh ʻan-inkâr* even if threre are either further evidences or admission of the defendant. Kasani, *Bedayi'üs-Sanaiʻ fî Tertibi'ş-Şeraiʻ*, Beyrut: Dar'ül-Kitab el-Arabi, 1982, VI, p.55. Haraşi mentions in details the conditions where *sulh ʻan-inkâr* can be invalidated upon further evidence. Haraşi, *el-Haraşi ala Muhtasar-i Seyyid Halil*, Beyrut: Dâr-ı Sâdır, VI, pp.5-6. One more point to be considered is the fact that Haraşi was also a jurist in the Ottoman land (he was the first *şeyh* of al-Azhar University). The similarity between the ideas of Ottoman *şeyhülislam*s and that of a Maliki jurist living in the Ottoman land would have further implications pertaining to the issue of Ottoman legal homogeneity at an intra-madhhab level.

[161] Abdurrahim, pp. 434, 435, and 442.

Abdurrahim agrees that the primary condition for *sulh* is free consent.[162] In one case, he even further elaborates on a situation in which there is a language barrier. If such a barrier prevents the expression of the actual consent of the parties to the *sulh*, then *sulh* is not valid.[163] In this context, *sulh* cases concluded via force majeure (*ikrâh*) are invalid as well.[164] Abdurrahim goes over the details of what is meant by force. For example, to imprison a party means applying force majeure[165] while to blackmail does not have the same meaning.[166] If illegal force is used against a party before the conclusion of the *sulh* contract but not during the conclusion of the contract, the *sulh* is valid.[167]

Regarding the competence of the parties, Abdurrahim concentrates mainly on that of the minors. Here again, he follows the general principles mentioned by classical jurists. However, he adds one more criterion, and that is the physical appearance of a child. If the body of a minor by age resembles that of an adult and the minor claims s/he has become adult (*baliğ/a*), then her/his *sulh* and *ibrâ* are valid.[168]

Abdurrahim follows the classical jurists regulating the validity of the *sulh* contracts made by minors who are capable of distinction (*mümeyyiz*) and permitted to trade (*me'zûn*) as long as the contracts bring them absolute benefit.[169] Contracts that harm the interests of minors are invalid,[170] and contracts made by incompetent minors and insane people are null and void.[171] Abdurrahim provides a criterion for insanity: it should be observable (*ma'hûd*) while the contract is concluded. Otherwise, no party can claim the invalidity of the *sulh* contract on the basis of insanity.[172]

Abdurrahim has many fatwas on conditions of representation (*vekâlet*), guardianship (*velâyet*), and trusteeship (*vesâyet*). The primary concern in such fatwas is

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[162] Abdurrahim, p. 447.

[163] Abdurrahim, p. 456.

[164] Abdurrahim, pp. 445-446.

[165] Abdurrahim, p. 446.

[166] Abdurrahim, p. 451.

[167] Abdurrahim, p. 435.

[168] Abdurrahim, pp. 444, 445.

[169] Abdurrahim, p. 444.

[170] Abdurrahim, p. 445.

[171] Abdurrahim, p.445.

[172] Abdurrahim, p.445.

protecting the interests of the minors.[173] Abdurrahim adds that waqfs have the same status as incompetent individuals. A guardian (*mütevelli*), therefore, can not make *sulh* that harms the property of a waqf.[174]

There are further fatwas in Abdurrahim's compilation regarding the conditions of the representative, all of which are in agreement with the classical legal texts. For example, being representative in a dispute does not make one automatically representative for *sulh* regarding that debate;[175] there is need for the consent of the represented person to validate such a *sulh*.[176] Here, Abdurrahim adds that when a principal releases his representative of his responsibility, the debtor is not released automatically;[177] however, releasing the debtor also renders the representative free.[178]

The fatwas regarding self-appointed (*fuzûlî*) representatives follow the classical legal texts as well.[179] Abdurrahim resorts to analogy when answering queries regarding similar cases. For example, there are some cases which are not directly about self-appointed representation but are logically similar to it. In such cases, Abdurrahim does not hesitate to apply the regulation of self-appointed representation.[180]

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[173] Abdurrahim, pp. 434-435, 438, 456.

[174] Abdurrahim, pp. 435, 436.

[175] Abdurrahim, p. 456.

[176] Abdurrahim, pp. 436, 437, 455, 456.

[177] Abdurrahim, p. 443.

[178] Abdurrahim, p.443.

[179] Abdurrahim, pp. 437, 438.

[180] *Zeyd fevt olub veraseti zevcesi Hind'e ve kızı Zeyneb'e münhasıra olmağla terekesini beyinlerinde iktisam etdiklerinde Zeynebi'in hissesi mukabelesinde aldığı bir kıta bağa Amr müstehak çıkub istihkakını isbat sadedinde iken Zeyneb-i mezbure an-inkar bir mikdar akça bedel üzerine Amr ile sulh olub bedel-i sulhu Amr'a vermiş olsa hala Zeyneb Amr'a bedel-i sulh deyü verdiği meblağın semenini Hind'den taleb edüb almağa kadire olur mu?*

El-cevab: Olmaz.

In this case, when Amr was found to claim on the garden, both Zeyneb and Hind would be parties to that claim. However, Zeyneb makes *sulh* and gives the *bedel* without informing Hind. Therefore, it resembles *fuzûlî* representation of Hind on her share. According to the classical texts (see above note 102), this *sulh* is valid only if the representative gives the *bedel*; and s/he does not have the right to claim the *bedel* from *müvekkil*. Here, Abdurrahim (p.442) responds accordingly.

Abdurrahim deals also with the conditions of *musâlahun ‘anh* in detail, following the main principles stated by classical jurists. The main condition that is emphasized in the compilation is that the *musâlahun ‘anh* should be a right that belongs to *musâlih*.[181] He clarifies this in a fatwa, where he mentions that if evidence exists and is presented to prove the position of the defendant and judge also decides accordingly, then the claimant does not have any rights regarding the *musâlahun ‘anh*; therefore, any *sulh* made in this case is invalid.[182] Abdurrahim agrees also on the principle that *musâlahun ‘anh* can be unknown as long as it does not have to be given back.[183]

Abdurrahim takes a similar position to the classical jurists regarding the debate on *ribâ* in *sulh*. If there is concession to be made in a *sulh* contract, it should be only the plaintiff that makes it.[184] Therefore, if the plaintiff makes a concession in return for another concession, the *sulh* is invalid.[185]

Abdurrahim takes, however, a stricter position regarding conditional *ibrâ*. According to the classical texts, in certain conditions, in which the defendant does not make any concessions, conditional *ibrâ* can be acceptable.[186] Abdurrahim, nevertheless, prefers to invalidate any kind of *ibrâ* involving a condition.[187]

Parallel to classical jurists, Abdurrahim states that *bedel* should be property of the *musâlih*. After the conclusion of a *sulh* contract, if it is revealed that the *bedel* belongs to a third person, the *sulh* is null and void.[188] Retaliation is an exception for Abdurrahim as well.[189] However, for him this exception is not valid in cases of self-appointed representation in retaliation disputes.[190] Furthermore, in homicide cases involving more

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[181] Abdurrahim, pp. 430, 448, 454, 455, 456.

[182] Abdurrahim, p. 430.

[183] Abdurrahim, p. 450.

[184] Abdurrahim, pp. 431, 432.

[185] Abdurrahim, pp. 431-432, 435.

[186] See above note 121.

[187] Abdurrahim, p. 431.

[188] Abdurrahim, pp. 432-433.

[189] Abdurrahim, pp. 438, 444, 446, 452. See above note 136.

[190] Abdurrahim, p. 453. If a self-appointed representative makes *sulh* on the retaliation (*kısas*)debate of a person, this *sulh* contract can be invalidated if the plaintiff fails to accept the *sulh* made by the representative. In this case, the murderer can still be retaliated.

than one killer, if a *sulh* is made with one of the attackers, it does not release the others from retaliation.[191] Abdurrahim adds that *bedel* should not perish or disappear before its transfer; otherwise the *sulh* is null and void.[192] However, if *bedel* is counterfeit (spurious money), the *sulh* is valid; but the *bedel* should be reimbursed.[193]

The clear result of the scrutiny of the legal principles in Halebi's *Mülteka* and Abdurrahim's *Fetâvâ* is the fact that there is legal continuity between the two texts. The legal principles regarding the *sulh* contract after its formation period in the classical Islamic period does not go through significant changes in Ottoman 16th and 18th centuries. The findings of this dissertation indicate a continuing and stable doctrinal rigor in Islamic law over centuries. Therefore, it may lead us to the conclusion that, to the degree that doctrinal rigor influence legal practice, which was not a low one according to Gerber,[194] Islamic law can be considered as one that tries to regulate the actions of the individuals in the society rather than a being legal system that is influenced by or even reflects the social norms and practices, as claimed by Rosen.

B. Ottoman Law: A Court Model or Bargain Model?

The evidence regarding the concept of *sulh* in both pre-Ottoman and Ottoman legal texts show a high degree of formalism and continuity in the legal system on one hand and a high degree of individualism in society on the other. These points, however, are subject to debate among the students of law in general and those of Islamic law in particular.

Before dealing with those theoretical debates in the field of Islamic law, one significant issue regarding the selected methodology of the existing studies should be touched upon. The studies in Ottoman legal history have concentrated so far on the function of the court and performance of the *kadı*, as is the case for the historical studies by Haim Gerber, Boğaç Ergene, and Leslie Peirce, among others. In these studies, court

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[191] Abdurrahim, pp. 452, 453.

[192] Abdurrahim, p. 433.

[193] Abdurrahim, p.433.

[194] Gerber, *State, Society, and Law in Islam*, p.179.

registers have been used extensively while fatwas, another important source about Ottoman law has not been exploited sufficiently.[195] This preference of sources is understandably a consequence of particular research questions that make the scrutiny of *sicil*s more promising. In this respect, however, one should consider the pros and cons of each method to be followed. Unlike most of the existing studies on Ottoman law, in this thesis fatwa compilations are used as the primary sources. This preference is a corollary of an interest mainly in the Ottoman legal doctrines rather than the way they were actually practiced in different regions of the Ottoman polity. Furthermore, concentrating on legal principles and norms[196] is more useful to develop a taxonomy for Ottoman law, so that case studies on different provinces can be used to test the hypotheses provided by such a classification.

Boğaç Ergene provides positive and negative aspects of presenting classifications germane to the Ottoman law. Classifications are useful tools for generalizations. Although their capability to characterize the particular is limited, they form frameworks within which we can make our observations of the particular. [197] In this context, I find it useful to refer shortly to the debates related to such classifications in order to clarify the argument of this study and its location in the already existing secondary literature on the Ottoman law and legal practice.

The disputes among individuals in a society can be solved in many different ways. Weberian formal rational law is only one such way. There are many alternative ways of resolving disputes within or without the courts. Usually, the Eurocentric perspective in the field of conflict resolution simply divides these solutions into two as legal and extralegal according to whether or not they appear in the court.[198] *Sulh*, in the first glance, resembles the extralegal ways of conflict resolution, i.e. alternative dispute resolution (ADR). After all, it involves an agreement reached after a process of

[195] Among these historians, Haim Gerber attributes a considerable significance to the fatwa compilations for the students of not only legal but also social and economical history of the Ottoman Empire. *State, Society, and Law in Islam*, p.23. However, his own studies are mainly based on the *sicil*s rather than fatwas.

[196] Here, what I mean by legal principles is not legal theory, i.e. *usûl al-fiqh*, but the principles as they appear in the fatwas.

[197] Boğaç Ergene, *Local Court, Provincial Society and Justice in the Ottoman Empire: Legal Practice and Dispute Resolution in Çankırı and Kastamonu (1652-1744)*, (Leiden, Boston: Brill, 2003), pp.206-7.

[198] For a detailed discussion, see below the section on 'Court versus Bargain Model'.

negotiation between the disputing parties. However, it is unlike negotiation as an ADR mechanism in that the rules and regulations regarding the process and consequences of *sulh* have been scrupulously laid down by law. Therefore, it is very difficult to claim that *sulh* is an extralegal mechanism of conflict resolution. The reason is the fact that Islamic law perceives *sulh* as a contract; and therefore, similar to all other contracts, the regulations regarding *sulh* have been laid out meticulously.

There is a debate among the students of Ottoman law about the actual activities of the *kadı* court. On one extreme point of the debate stands Haim Gerber who claims that the distribution of justice by the Ottoman court involves a procedure very similar to what Weber calls 'formal rational legal system': it is highly predictable, based on very clear-cut rules and regulations.[199] On the other side of this debate we can mention Boğaç Ergene, who is skeptical about the Ottoman *kadı* justice as it has been depicted by Gerber. Ergene focuses mainly on the activities of the courts in the provinces of Çankırı and Kastamonu and the courts' interaction with the community. His observations demonstrate the existence of a high degree of "corruption" in the courts. Further, he tries to analyze how this corruption was used by the litigants to manipulate judicial decisions. He, also, observes that the courts had more than a neutral relationship with the communities they were located in through either scribes (*kâtib*s), deputies (*na'ib*s), or witnesses (*şuhûdülhâl*). A consequence of this is the reflection of the local communal power balance in the courts favoring the powerful and prosperous against the weak and the poor. In this debate, Ergene takes side with Lawrence Rosen's findings in his studies on Moroccan sharia courts. Rosen in a recent study[200] argues that what distinguishes Islamic law from other legal regimes is its capability to remain identifiable while accommodating predominant social and cultural pressures.

Gerber bases his theoretical framework on the critiques of Weber and those he calls neo-Weberian scholars, among them especially Lawrence Rosen. Gerber accepts the incorporation of customary law into the Ottoman law: he argues that Ottoman law was an amalgam of sharia, *kânûn*, and customs. However, once the rules were formulated, they were not negotiated anymore; they were more or less strict and

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[199] For a further elaboration of Weberian terminology and Gerber's argument see Gerber, *State, Society, and Law in Islam*, pp.27-40.

[200] Lawrence Rosen, "Common Law, Common Culture, Commonsense: An Introduction to Arab Legal Reasoning," *POLAR: Political and Legal Anthropology Review* **2** (19), 1996 p. 53 cited in Ergene, "Local Court," pp.203-204.

stable.[201] This is what leads him to harshly criticizing Rosen in his overgeneralization about Islamic law as a system in which the *kadı* does not adjudicate, but simply puts the litigants in a position of bargaining for themselves.

It is possible to consider these opposing perspectives in light of models of conflict resolution. Gulliver presents a dichotomy of "judicial process" versus. "political process" in conflict resolution.

> By a judicial process I mean one that involves a judge who is vested with both authority and responsibility to make a judgment, in accordance with established norms, which is enforceable as the settlement of a dispute. …
>
> The purely political process, on the other hand, involves no intervention by a third party, a judge. Here a decision is reached and a settlement made as a result of the relative strengths of the two parties to the dispute as they are shown and tested in social action. The stronger gains the power to impose its own decisions, but it is limited by the degree to which its opponent, though weaker, can influence it. In this case the accepted norms of behavior relevant to the matter in the dispute are but one element involved, and possibly and unimportant one.[202]

In another study Gulliver offers a classification of the systems of dispute settlement according to the type of outcome, i.e. compromise or decision, and the mode of settlement, i.e. negotiation or adjudication.[203] A similar classification is offered by Aubert, who comes up with two different models: Court Model and Bargain Model.[204] The two models are summarized below:

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[201] Gerber, *State, Society, and Law in Islam*, pp.179-80.

[202] P.H. Gulliver, *Social Control in an African Society: A Study of the Arusha: Agricultural Masai of Northern Tanganyika,* London: Routledge & Kegan Paul, 1963, pp.297-98 cited in Richard L. Abel, "A Comparative Theory of Dispute Institutions in Society," p.232.

[203] P.H. Gulliver, "Dispute Settlement without Courts: The Ndendeuli of Southern Tanzania" in Laura Nader (ed.) *Law in Culture and Society*, (Berkeley, Los Angeles, London: University of California Press, 1997), pp.24-68.

[204] Vilhelm Aubert, (n.d.) Some notes after the Burg Watenstein conference on the ethnography of law. Cited in Laura Nader, "Styles of Conflict Resolution: To Make the Balance", in Laura Nader (ed.) *Law in Culture and Society*, p. 87.

Court Model	*Bargain Model*
a. Triad	a. Dyad
b. Coercive power	b. No coercive power
c. Application of highly valued norms	c. Pursuit of interests (values)
d. Establishment of past facts (guilt)	d. Not necessary to establish the past facts
e. Retroactively oriented reasoning	e. Prospectively oriented reasoning
f. Legal experts participate (judge)	f. No legal experts participate
g. Conclusion is a verdict	g. Conclusion is an agreement
h. Purely distributive decision	h. Distributive/generative decision
i. Either/or decision	i. A compromise
j. Reaffirmation	j. No necessary implication concerning validity
k. Affinity to legal scholarship	k. Affinity to science or utilitarian thinking[205]

Ergene finds Rosen's model of Islamic law close to the Bargain Model, since the way disputes are settled in Moroccan courts depends on "the types of the disputes, the characters of those involved in the case, the nature of the relationships between the disputants, and local values and traditions."[206] Therefore for Rosen, justice is but a "regulated reciprocity" among members of the community who freely make contracts. In this context, mediation and arbitration are the major means to regulate the reciprocity among the members of the community.[207]

Ergene shows Haim Gerber along with some other Ottomanists who base their studies on court records[208] as champions of the Bargain Model. In the court records of Çankırı and Kastamonu, Ergene finds information in conformity with the Bargain Model,[209] and he criticizes these scholars for "implicitly ignoring the extra-judicial ties

[205] Nader, "Styles of Conflict Resolution," p.87.

[206] Ergene, "Local Court," p.193.

[207] Ergene, "Local Court," p.193.

[208] Ronald Jennings, "Kadi, Court, and Legal Procedure in 17th C. Ottoman Kayseri: The Kadi and the Legal System," *Studia Islamica*, **48**, 1978, pp.133-172; Jennings, "Limitations of the Judicial Powers of Kadi in 17th C. Ottoman Kayseri," *Studia Islamica*, **50**, 1979, pp.151-184; Ahmet Akgündüz, *Mukayeseli İslam ve Osmanlı*; Bayındır, *İslam Muhakeme Hukuku*; and Kemal Çiçek and Abdullah Saydam, *Kıbrıs'tan Kafkasya'ya Osmanlı Dünyasında Siyaset, Adalet, ve Raiyyet* cited in Ergene, "Local Court," p.195.

[209] Ergene, "Local Court," pp.196-198.

between the provincial courts and the local community."[210] He argues that a further concentration on these ties demonstrates that the Ottoman court can be represented by a mixture of the elements of both Court Model and Bargain Model.[211] For example, the important roles in judicial processes were not only played by the legal functionaries (*kadı*, *na'ib*, *katib*, *mufti*, etc), but also by some other people who cannot be considered as legal experts such as military administrative authorities, nobility, and a group of *müslimûn* (Muslims) functioning as "*muslihûn*," i.e. mediators,[212] or "*şühûd*," i.e. witnesses.[213] Ergene argues that judges did not confine themselves to adjudication alone: "they also acted as mediators and arbitrators on various occasions and forced opposing parties to settle their differences amicably."[214]

Ergene's argument regarding the applicability of the Bargain Model to the Ottoman legal system is not unproblematic. The judicial role played by governors was a part of their responsibility that was fulfilled in accordance with established legal norms and procedures.[215] Ergene states that court registers are usually silent about the important roles played by those who are not members of the court.[216] He also cites Najwa al-Qattan that court records streamline "unique events of human interaction into formularies" and, therefore, almost certainly discriminate against selective aspects of the processes that took place in the court.[217] He adds that

> the court records cannot affirm or deny the possibility that *kadı*s and other members of the court participated in negotiations or that people outside the court played active roles

[210] Ergene, "Local Court," p. 195.

[211] Ergene, "Local Court," p. 199.

[212] *Muslihûn* emerges in many court registers registering the settlement disputes, which shows the existence of some form of community mediation in addition to as well as direct negotiation among individuals. See Ramazanoğlu "Şer'yye Sicili ve Sulh Akdi;" Jennings, "Kadi, Court, and Legal Procedure," pp. 147-48.

[213] Hülya Canbakal, *Society and Politics in an Ottoman Town: 'Ayntâb in the 17th Century*, (Leiden, Boston: Brill, 2007), pp.130-133; Jennings, "Kadi, Court and Legal Procedure," p.136.

[214] Ergene, "Local Court," p.199.

[215] Engin Deniz Akarlı, Book Review on "Boğaç Ergene, *Local Court, Provincial Society and Justice in the Ottoman Empire: Legal Practice and Dispute Resolution in Çankırı and Kastamonu (1652-1744)*, Studies in Islamic Law and Society Series, 17, Leiden: Brill, 2003" in *Islamic Law and Society*, **11** (3), 2004, p.413.

[216] Ergene, Ergene, "Local Court," p.199.

[217] Ergene, Ergene, "Local Court," pp.199-200.

> in the proceedings. Silence is not denial; it is likely, for example, that at least some of the amicable settlements in the court records are the products of – and therefore, muted witnesses to – those processes in which *kadı*s took upon themselves meditative roles.[218]

Engin Akarlı criticizes Ergene for paying too much attention to sporadic evidence for speculation purposes while it is necessary to look for general themes.[219] Although the case of Hans Ulrich Krafft[220] provides valuable information regarding the different ways of judge's intervention in the disputes, including mediation, it is very difficult to find further similar information to construct a generalization about the Ottoman legal system.

C. Conflict Resolution

One other field that partakes, though implicitly, in the debates concerning Islamic legal system is a group of anthropologists who work on the methods of conflict resolution in the Middle East. While the debate about the nature of Islamic law among Ottoman legal historians continues, ethnographic studies in the filed of conflict resolution conducted in various Muslim societies unanimously support the validity of the Bargain Model for processes of dispute resolution in the Middle East. This advocacy of the Bargain Model is understandable in light of the academic and normative concerns of the scholars. Their main concern has been to emphasize the existence of indigenous methods of alternative dispute resolution (ADR) in the Middle East. ADR is defined as "those alternatives to the legal system that use a third party intervenor in a non-coercive manner,"[221] though Avruch and Black add "adjunctive-like" (authoritative third parties,

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[218] Ergene, Ergene, "Local Court," p.200.

[219] Akarlı, Book Review, 413.

[220] Ergene, Ergene, "Local Court," pp.116-19.

[221] J. Scimecca, "Conflict Resolution in the United States," in Kevin Avruch, Peter Black, and J Scimecca (ed.s) *Conflict Resolution: Cross-Cultural Perspectives*, (Westport, Connecticut London: Praeger, 1998), p.30.

including all forms of arbitration) to the definition as well.[222] Methods of ADR have been well-studied in the Western cultural context. Absence of such works in the Middle Eastern context has instigated some scholars to fill this gap.

These scholars follow Gulliver in his anthropological study on negotiation for dispute settlement among members of the Arusha in Northern Tanzania. The case he observes is a way of dispute settlement without recourse to courts, judges, or official authority;[223] i.e. a typical ADR method. Scholars of Islamic conflict resolution are keen to follow a similar path. Daniel Smith, who observes the ritual of *sulha* among the Arab Palestinians in the village of Galilee, states that "The language of jurisprudence and adjudication, and therefore the definitions of justice that draw heavily on that language, is singularly incapable of providing the appropriate symbolic resources for a peace that is socially *reconstructive*." (italic original)[224] Irani and Funk in their anthropological work on reconciliation in Lebanon see *sulh* as one of the most important "unofficial responses" to conflict in the Middle Eastern societies. According to them, the *sulh* ritual which takes place within a communal framework has its origins in tribal and village contexts.[225] Smith defines "*sulha*" as a ritual that involves mediation efforts, which are "strictly dictated by traditional steps."[226] Similarly Antoun, in his study on the tribal peasants in Jordan, provides an account of "*sulha*" as a local ritual of conflict resolution.[227] The definition provided by Abu-Nimer in his comparative study of conflict resolution approaches in Western and Middle Eastern contexts is also similar.

[222] Kevin Avruch and Peter Black, "ADR, Palau, and the Contribution of Anthropology" in Alvin W. Wolfe and Honggang Yang (ed.s) *Anthropological Contributions to Conflict Resolution*, (Georgia: Georgia University Press, 1996), p.48.

[223] P.H. Gulliver, Negotiation as a Mode of Dipute Settlement: Towards a General Model," *Law & Society Review*, **7** (4), Summer, 1973, p.670.

[224] Daniel L. Smith, "The Rewards of Allah," *Journal of Peace Research*, **26**(4), November 1989, p.386.

[225] George E. Irani and Nathan C. Funk, "Rituals of Reconciliation: Arab-Islamic Perspectives," Kroc Institute Occasional Paper, #19: OP:2, August 2000, pp.21-26

[226] Smith, "The Rewards of Allah," p.387.

[227] Antoun, "Institutionalized deconfrontation: a case study of conflict resolution among tribal peasants in Jordan" in Paul Salem (ed.), *Conflict Resolution in the Arab World: Selected Essays*, (Beirut: American University of Beirut, 1997), pp.163, 172.

He sees "*solha*" as a social ritual that provides a public forum where the settlements take place.[228]

In the field of conflict resolution there are two main camps. One group believes in the universality of the methods of conflict resolution, which is exemplified in books such as *Social Conflict*, and *Getting to Yes*.[229] The second group believes, however, in the existence of distinct methods in different cultural contexts.[230] These methods should be taken into consideration especially when a third party wants to intervene in a conflict case to be settled.[231]

The abovementioned anthropologists working on conflict resolution in the Islamic Middle East stand obviously in the second camp. These scholars try to demonstrate the inadequacy of the application of Western methods of Conflict Resolution in non-Western contexts, a concern that is explicitly stated in the majority of these works. Antoun notes that "unless attention is given to the often very different cultural foci of different societies and the values that underlie such foci, students of conflict resolution and politics are unlikely to understand the unfolding process."[232] George Irani and Nathan Funk assert that in the Middle East "peacemakers need to draw upon local cultural resources and harmonize their practices with Arab-Islamic culture"[233]

Abu-Nimer makes a similar statement:

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[228]Abu-Nimer, Mohammed, "Conflict Resolution Approaches: Western and Middle Eastern Lessons and Possibilities," *American Journal of Economics and Sociology*, **55** (1); 1996a, p.47.

[229] Dean G. Pruitt and Sung Hee Kim, *Social Conflict: Escalation, Stalemate, and Settlement*, 3rd edition, (Boston: McGraw-Hill, 2004); John W. Burton, *Conflict: Resolution and Provention*, (New York: St. Martin's Press, 1990); Roger Fisher and Danny Ertel, *Getting to Yes Workbook*, (New York: Penguin Books, 1995); Roger Fisher and William Ury with Bruce Patton (ed), *Getting to Yes: Negotiating Agreement without Giving In*, 2nd edition, (New York: Penguin Books, 1991).

[230] See Kevin Avruch, Peter W. Black, and Joseph A. Scimecca (ed.s) *Conflict Resolution: Cross-Cultural Perspectives*, (Westport, Connecticut London: Praeger, 1998); Kevin Avruch, *Culture & Conflict Resolution*, (Washington, D.C.: United States Institute of Peace Press, 1998).

[231] See Kevin Avruch and Peter Black, "ADR, Palau, and the Contribution of Anthropology" in Alvin W. Wolfe and Honggane Yang (ed.s) *Anthropological Contributions to Conflict Resolution*, Athens and London: The University of Gregoria Press, 1996, pp. 47-63.

[232] Antoun, "Institutionalized deconfrontation", p.171.

[233] Irani and Funk, "Rituals of Reconciliation," pp.13-14.

> "Scholars and practitioners should be aware of, investigate, and understand the existing procedures of conflict resolution which have been implemented in the local community. In the Middle East, adopting such a perspective means the acceptance and recognition of the proposition that Islam and Islamic societies contain beliefs, customs, attitudes, and a history which can serve as rich bases for indentifying constructive conflict resolution frameworks and processes … Without an examination of local culture and political context, there is little opportunity to apply effectively conflict resolution strategies that will aid researchers and policymakers in understanding and improving the communication between Western and Islamic societies."[234]

The concept of *sulh* has been studied by these anthropologists bearing in mind such considerations regarding the differences in the cultural contexts of the West and the Middle East and hence, the different methods and processes of conflict resolution. Ironically, while trying to emphasize the indigenous methods of conflict resolution in the Middle East and, therefore, to criticize the attempts to apply the Western methods in the Middle East, these scholars themselves fall in the trap of Orientalism. They base their arguments on the fact that West and the Middle East have completely different assumptions and perceptions concerning conflict and conflict resolution. One important reason for such differences is stated to be the lack of the notion of individualism and respect for law in the Middle East.

Abu-Nimer makes a distinction between the basic assumptions of the West and the Middle East. First he emphasizes how law is important in the Western context both for the intervening third party and the communities; not only the process of dispute settlement but also "the outcomes had to be according to legal procedures."[235] All parties perceive the dominance of judicial institutions as legitimate. For example, official documents are used and an agreement similar to a legal contract is constructed. In the Middle East, however, the parties meet in a public setting with numerous witnesses instead of signing papers. Abu-Nimer analyzes this as a strong instrument

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[234] Abu-Nimer, "Conflict Resolution in an Islamic Context," 1996b, *Peace and Change*, **21** (1), 1996b, p.24.

[235] Abu-Nimer, "Conflict Resolution Approaches," p.40.

providing the social influence necessary to guarantee the parties' commitment to the agreement.[236]

Abu-Nimer misses the point that it is through oral utterance that contracts are formed according to Islamic law, and the testimony of the witnesses is a guarantee for the existence of such a contract. It is not a sign of lack of respect for judicial institutions or of their legitimacy. Here the issue is just two different ways of perception regarding the conclusion and validity of contacts in these two legal systems. Abu-Nimer's hasty conclusion of his observation shows the necessity of combining anthropological studies with knowledge of Islamic law. A similar critique can be posed against historians of Ottoman law who do not deal with the theoretical aspects of Islamic law.[237]

Abu-Nimer goes on with the comparison of rational behavior in the Western and the Middle Eastern societies. Westerners assume that the behavior of individuals is based on rational calculation and, therefore, the language of emotions and values is perceived as an impediment to conducting an agreement.[238] However, it is spontaneous and emotional acts that characterize not only the process of conflict resolution in the Middle East but also the Arab society as general, Abu-Nimer argues.[239]

Fatwas used for this thesis do not support Abu-Nimer. While fatwas are full of information about the legal procedure and legal relationships among the individuals involved in the disputes, there is no single piece of information regarding the expression of the emotions of the parties. Nor does the mufti uses a language of emotions and values himself. The language used is absolutely formal legalistic. Although, it is true that the queries in the compilations do not reflect original wording of the applicants, [240] the modification of the queries to an absolute formal legalistic form demonstrates the legal mentality of the Ottoman judicial system.

[236] Abu-Nimer, "Conflict Resolution Approaches," p.47.

[237] Engin Akarlı Book Review, pp.412-413, criticizes Boğaç Ergene for the very same reason.

[238] Abu-Nimer, "Conflict Resolution Approaches," p.40.

[239] Abu-Nimer, "Conflict Resolution in an Islamic Context," p.30.

[240] Wael Hallaq, classifies fatwas in two groups: primary fatwas are those preserving the original form of query and answer; and secondary fatwas are those whose queries and answers have undergone systematic changes. "From *Fatwâs* to *Furû'*," pp.31-32. Ottoman fatwa compilations, in this classification, appears in the latter category.

One more point that Abu-Nimer mentions in his comparison of Western and Middle Eastern assumptions is the notion of individualism. In the West, it is the individuals who have conflict with one another, and the process of resolution is to serve their individual interests. That is why the general public is separated from the process.[241] The aim of conflict resolution in the Middle East, however, is to restore the social order. That is how disputes soon escalate in a way to involve entire communities, even though they might start between two individuals.[242] Irani's and Funk's position is similar to Abu-Nimer's: "Individuals are considered to be enmeshed in webs of relationships that must be preserved; the preservation of social harmony and the building of consensus sometimes require individual sacrifices."[243] Therefore, in such circumstances, the focus of intervention is not concrete and substantive compensations; rather it is the nature of the relationship between the parties.[244]

Antoun states that the main function of the court, as the locus of the conflict resolution in the US, is to "determine guilt and innocence after piling up and assessing evidence within the framework of strict rules and an adversarial procedure" while the in rural Jordan the focus of conflict resolution is achieving consensus in a forum through open-ended give and take, mediation, and the delegation of elders. For him the notions of guilt and innocence, winning and losing are totally alien in rural Jordan.[245]

Communitarianism in the Middle East, according to these studies, is one explanation for the observation that *sulh* is mainly a process of mediation rather than negotiation.[246] However, Islamic legal texts define the concept narrowly as a process of negotiation between the disputing parties, recognizing the parties as independent individuals. It seems that there is a big gap between the legal meaning of the term and

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[241] Abu-Nimer, "Conflict Resolution Approaches," p.40.

[242] Abu-Nimer, "Conflict Resolution Approaches," pp.45-46.

[243] Irani and Funk, "Rituals of Reconciliation," p.19.

[244] Abu-Nimer, "Conflict Resolution Approaches," p.46.

[245] Antoun, "Institutionalized deconfrontation", p.172.

[246] Althouhg the Islamic law does not leave the option of mediation out. In fact, in the Ottoman legal practice, the community members, called *muslihûn*, occured to help the disputants to reach a settlement. See Canbakal, *Society and Politics in an Ottoman Town*; Jennings, "Limitations of Judicial Power," p.179; and Ramazanoğlu, "Şer'yye Sicili ve Sulh Akdi." Still, the legal principles refer to the settlement only as a negotiation process, without a single referrence to a third party.

what the anthropologists have observed about the practice in the Middle East. The general anthropological observation is that *sulh* is a ritual through which reconciliation takes place.

Rosen, however repudiates the argument of lack of individualism. He sets the individual at the center of social life in the Middle East.[247] However, he warns that this similarity between Moroccan society and western cultures concerning the notion of individualism should not mislead one, because individualism in Morocco is based on different assumptions and therefore has different implications. In the west, it implies "the capacity of each person to fashion his or her own inner self and then to take that self and grant it a full range of political and religious support." In Arab culture, "the individual is the unit into which the features of background, context, and association are poured and through which the characteristic ways of forming ties to others are played out."[248]

Rosen makes an analogy between social life on the one hand and legal practice in Morocco on the other. According to him, the individual who bargains in the marketplace for every aspect of her life behaves similarly in the law court as well. What qadi does is to put the disputants in the position of negotiating for their causes.[249]

Rosen criticizes the scholars of Islamic law who believe in the lack of a rigorous set of logical links among various aspects of the overall body of Islamic law. These scholars claim that there is not a general concept of contract around which judges and scholars could refine their conceptual categories as logic. Therefore, they think that in a situation where rigorous standards and principles are missing, the decision of *kadı* seems to depend simply on his own sense of equity or his personal opinions of the matter, which might be prejudicial.[250]

This lack of doctrinal rigor, however, is not a cause of inconsistency for Rosen. According to him scholars who claim the presence of such a deficiency in doctrine miss the point that "Islamic law is indeed highly consistent and refined but that it is so not by

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[247] Lawrence Rosen, *The Anthropology of Justice: Law as Culture in Islamic Society*, (Cambridge University Press, Cambridge, New York, Melbourne, 1996), p.11.

[248] Rosen, *The Anthroplogy of Justice*, p. 15.

[249] Rosen, *The Anthroplogy of Justice*, p. 17.

[250] Rosen, *The Anthroplogy of Justice*, p. 18.

reference to its own developed doctrines but to the cultural assumptions about negotiated social ties."[251] In other words, he modifies the Weberian argument about "qadi justice", which refers to unlimited discretion of the *kadı* and hence judicial arbitrariness, by concentrating on the individualistic nature of the Middle Eastern societies and its reflection in courts of law. In such a context, the absence of institutions or rigorous doctrines is irrelevant for a smooth and consistent process of legal discretion.

The present study on Islamic classical and Ottoman legal texts demonstrates that Islamic law permits the disputants to take the initiative themselves to settle their disputes. However, it is not a sign of lack of doctrinal rigor. In contrast, the negotiation is put under rigid control of well-defined Islamic legal principles, as presented at the first part of this chapter.

Ottoman fatwas of 18th century contain a lot of detailed information about the legal aspects of a dispute to be settled; however, they lack information about the origins of the disputants. The fatwas do not contextualize individuals in a web of relationships, except for those necessary merely for legal purposes. In other words, there are only *individuals* and their legal relationships in the fatwas, for which some historical evidence is provided by a study of Cemal Kafadar, observing rise of individuality and decline of group embeddedness from seventeenth century onward.[252]

Rosen observes that "regularity lies not in the development of a body of doctrine which is consistent with other elements of that doctrinal corpus itself, but rather in the fit between the decisions of the Muslim judge and the cultural concepts and social relations to which they are inextricably tied"[253]. He is right in stating that the judge's discretion is not arbitrary and unbounded, however the reason he provides does not fit in the Ottoman context. For Rosen, it is the attachment of judge's discretion to his world that creates a form of consistency and regularity. In the Ottoman context, however, the source of consistency and regularity is the existence of well-structured and well-

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[251] Rosen, *The Anthroplogy of Justice*, p. 66.

[252] Cemal Kafadar, 1989, "Self and Others: The Diary of a Dervish in Seventeenth-Century Istanbul and First-Person Narrative in Ottoman Literature," *Studia Islamica*, **79**, pp.121-150.

[253] Rosen, *The Anthropology of Justice*, p.18.

established legal principles according to which the disputants and judges have to function.

D. Conclusion

The Court Model vs. Bargain Model taxonomy is made about the legal practice rather than legal doctrine. Ergene mentions that when judge makes decision according to Islamic law, this comes close to the Court Model and it is the usage of alternative sites as well as the judge's action as mediator or arbitrator instead of adjudicator that make the Ottoman court more similar to the Bargain Model.

Gerber thinks that formal legal behavior of the Ottoman courts is the norm; therefore for him, Ottoman legal practice was in accordance with the Court Model. At the other extreme of the spectrum stands Rosen, who delineates Islamic court as a scene for mediation and negotiation rather than adjudication, i.e. a good example of the Bargain Model. Rosen bases his argument on the denial of the ontological existence of a body of Islamic doctrines. My findings, however, show the existence of a detailed and well-structured body of Islamic legal principles which were continuous over centuries. Although further studies is required to test the degree of match between the law as reveals in the compilations and the legal practice, Gerber observes a high "far-reaching" degree of such a match in his study of seventeenth and eighteenth centuries in Bursa and Istanbul.[254]

In response to Ergene's point about the correlation between behaving in accordance with Islamic law and similarity of the Court Model, my observation regarding the concept of *sulh* demonstrates that behaving according to Islamic law does not necessarily mean to be similar to the Court Model. *Sulh* is *within* the Islamic law. Encouraging making *sulh* is a sign of the Bargain Model for Ergene, which means not behaving exactly according to the Islamic legal principles. However, making *sulh* is allowed by the Islamic law and the rules and regulations about conditions of negotiation for settlements are established well in very detail. Therefore, in the Bargain Model, a

[254] Gerber, *State, Society, and Law in Islam*, p.179.

judge does not have to necessarily step out of the sharia, since Islamic legal principles contain both the Bargain Model and the Court Model. Being formal legalistic does not necessarily imply that Islamic law and practice are similar to the Court Model; and likewise, containing elements of the Bargain Model does not render Gerber's argument about the formal legalistic nature of Islamic law invalid.

CHAPTER 2

The primary concern of this chapter is to present a descriptive picture of the issues examined in the three fatwa compilations of the eighteenth century: *Fetâvâ-yi Abdurrahim*, Yenişehirli's *Behcet el-Fetâvâ ma'an-Nükûl*, and *Netice el-Fetâvâ ma'an-Nükûl*, dealing with the major themse covered in the three compilations. Secondarily, as in the first chapter, these findings are briefly evaluated in light of the secondary literature on Islamic Hanafi law to test the degree of legal consistency between the classical texts and the compilations.

A. An Overview of the Content of the Compilations:

As mentioned in the first chapter, any legal claim included in *hukûk'ul-'ibâd* (legal claims of men) can be subject to settlement. Law of transactions, the rules governing marriage, family and inheritance, and partially penal law are included in the 'claims of men'.[255] All these topics, as seen in the Table1, have been dealt with in the *sulh* chapters of fatwa compilations under study, though with different proportions. The topics examined consist of two main groups: property related disputes over debt and inheritance and disputes over penal matters, i.e. homicide and injury.

Table 1. Thematic Scheme of the Fatwas

	debt	iheritance	Homicide	injury	divorce	Total number of fatwas
Netice	17	8	5	1		39
Abdr.	91	52	33	19	2	73
Yenş.	22	17	6	4		235
Total	130	77	44	24	2	347

[255] Johansen, "Secular and Religious Elements," p.200.

Table 1 shows the thematic description of the fatwas in the compilations.[256] The major theme dealt with is disputes related to debt, followed by inheritance. Cases involving penal law also form a considerable section in the *sulh* chapters of the compilations under study. However, cases of family law, including divorce, do not occur frequently as subjects of settlement in the compilations. The remaining fatwas are mainly about legal principles themselves rather then different topics of dispute, dealing with, for example, the conditions of the validity of a settlement upon denial or cases of representation to make settlement on behalf of a minor.

A.1. *Sulh ʻan-inkâr* Controversy

"The most esteemed settlement is the one made upon repudiation."
Abu Hanifa[257]

Before embarking on a detailed examination of the themes dealt with in the compilations, it is useful to bring to light a legal debate over one particular form of settlement: *sulh ʻan-inkâr*. As mentioned ealier, the way the defendant responds to the accusation defines three types of settlement:: concessional settlement (*sulh ʻan-ikrâr*), settlement upon denial (*sulh ʻan-inkâr*), and settlement upon silence (*sulh ʻan-sükût*).

Table 2. Types of settlements based on the reaction of the defendant

	an-inkar	an-ikrar	an-sükût	Total number of fatwas
Netice	6	2	0	39
Abdrurrahim	48	15	0	73
Yenişehirli	16	3	0	235
Total	**70**	**20**	**0**	**347**

[256] Some cases appear in more than category: For example, a case of inheritance when the deceased person is indebted to others appears in both debt and inheritance columns.

[257] Serahsi, *Mebsut*, XX, p. 143 and Kasani, *Bedayi*, VI, p.40, cited in Koyunkalın, "Sulh," p.41.

In the three compilations under study (Table 2), there are 20 fatwas on settlement upon concession, 70 on settlement upon denial, and none on settlement upon silence.[258] These figures show the queries in which the terms '*'an-inkâr*' and '*'an-ikrâr*' are explicitly mentioned, but certainly, the number of concessional settlements is quite higher, since in many instances, unless otherwise stated, the case is taken as a settlement upon concession. One example can be seen in a fatwa of Abdurrahim:

> Zeyd claims Amr owes him some amount of money. Zeyd asks for the money. If Amr says "let's make settlement upon this portion of the mentioned amount" does it indicate concession on Amr's part regarding the mentioned debt? Answer: Yes.[259]

There are also a significant number of cases of settlement upon denial. There is a debate among the jurists concerning this type of settlement. Settlement upon denial happens when the defendant refuses the plaintiff's claim and neither of the parties has evidence to prove their case. The parties reach a settlement so that the defendant pays a *bedel* to the plaintiff and the dispute is over. Legally, the defendant can set herself free simply by taking an oath. But in a considerable number of the cases (70 cases, i.e. 20 percent) settlements are based on the refutation of the claim by the defendant. The question to be answered is why the defendant accepts to pay such a *bedel* even though there is no evidence to support the plaintiff's claim.

Schools of law are divided on the issue of settlement upon denial. While the Shafiis are totally against such contracts, the Maliki, Hanbali, and Hanafi jurists rule for their validity. The legal methodological debate over the issue exceeds the scope of this study.[260] However, it is important to mention the different attitudes towards law and ethics which lead the jurists to become for or against the settlement upon denial. If adhering to legal norms and justice is the prominent concern, then settlements upon denial can be opposed, because it would lead to unfair enrichment of one party. On the

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[258] Similarly, no settlement on silence has been found in the eighteenth-century court registers of Trabzon. Ramazanoğlu, "Şer'yye Sicili ve Sulh Akdi," p.54.

[259] "*Zeyd Amr'dan zimmetinde şu kadar akça hakkım vardır ver deyü taleb etdikde Amr Zeyd'e ol kadar akçadan şu kadarı üzerine sulh olalım deyüb meblağ-ı mezburdan sulha talib olsa Amr deyn-i mezburu ikrar etmiş olur mu? El-cevab: Olur.*" Abdurrahim p.444.

[260] For that debate see Othman, "*Sulh* is Best," pp.145-162; Ramazanoğlu, "Şer'yye Sicili ve Sulh Akdi," pp.48-53; Yaylalı, *Sulh*, pp.62-68; Koyunkalın, "Sulh," pp.40-42.

other hand, if establishing social harmony and ending the extant disputes is the primary concern, then settlement upon denial can be used as a significant tool to reach that aim. Aida Othman summarizes the debate between these two approaches: "that of forgiving and setting aside the misunderstanding and mistakes of the other in favor of restoring harmony; and that of ensuring the lawfulness of gain as well as preventing the unjust enrichment of an untruthful party."[261]

Therefore, the answer to the question above, namely why the settlements upon denial should take place, may be that the importance attached to the restoration of social harmony was higher than establishing precise justice. The fact that appearance at court was perceived as something dishonrabe, especially for the people of high status,[262] might form another explanation for the acceptability of settlement upon denial or because they want to settle the dispute as soon as possible.[263] Looking at the absolute and irreversible validity of the *sulh 'an-inkâr* in the Hanafi classical texts, these explanations seem reasonable. A defendant, who believes she is right in a dispute, and who does not go to the court and instead accepts to pay a *bedel* for the settlement she reaches with the plaintiff, should have concerns more important than mere justice when she knows that the settlement will not be reversed.

However, the Ottoman *şeyhülislam*s studies here prefer a different attitude regarding this legal issue, which necessitates alternative explanations for repudiation settlements in the Ottoman context. Yenişehirli and *Netice* compilations follow Abdurrahim's compliance with the Maliki el-Haraşi's tradition, rather than that of Hanafi classical jurists in invalidating repudiated settlement contracts after further evidence was provided by either of the parties.

> Zeyd dies and, Amr, the grandson of his father's uncle is the only heir who gets all the bequest. Then Bekr emerges and claims to be son of Zeyd's uncle's father. Amr repudiates and Bekr does not have any proof for his claim. They make a settlement on some of the rights claimed by Bekr [as *bedel*]. If, later, Bekr proves his claim, does the

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[261] Othman, "*Sulh* is Best," p.155.

[262] Jennings, "The Office of Vekil (Wakil) in 17th Century Ottoman Sharia Courts," *Studia Islamica*, **42**, 1975, p.149.

[263]; Koyunkalın, "Sulh," p.43.

settlement get invalidated and can Bekr take his share of the bequest from Amr? Answer: Yes.[264]

The abundance of such cases where a repudiation settlement contract is invalidated after emergence of further evidence by either of the parties may demonstrate the fact that in the Ottoman society, the repudiation settlement had a function broader than the mere maintenance of the social harmony or avoidance of the disgrace of showing up in a court. The legal preference of the Ottoman jurists made it possible to use repudiation settlement as a strategy to gain time for either of the parties. A plaintiff, who does not have any proof, does not hesitate to make a repudiation settlement even if she is sure that she is right. In the future, if she can not find any proof, the *bedel* she receives will be a gain anyway. If she will be able to prove her case, then she will have the opportunity to present the evidence and invalidate the original settlement contract. The same is true on the defendant's side. If, for the defendant, the maintenance of social harmony is one reason for agreeing to a repudiation settlement, the fact that she will have the right to provide further evidence in the future is a further encouragement to partake in such settlements.

This attitude of Ottoman *şeyhülislam*s demonstrates how seeking and applying the attainable evidence was significant in the Ottoman legal system, which makes Ottoman law closer, as Gerber claims, to formal legalistic type. While restoring social harmony is one important goal of the pre-modern legal systems, as is shown by Abu-Nimer and Irani and Funk in their studies in the Middle Eastern context,[265] Ottoman law emphasized attaining justice based on facts at least as much as restoring social harmony.

[264] *Zeyd fevt olub Zeyd'in babasının hali [dayısı] oğlunun oğlu Amr hısran varisi olmak üzere tereke-yi Zeyd'i kabz etdikden sonra Bekr zuhur edüb ben Zeyd'in babasını hali oğluyum deyü dava ve inkar edüb Bekr müddeasına ikamet-i beyyine edememekle Amr ile 'an-inkar dava-yı mezabureden şu mikdarı üzerine sulh olsa hala Bekr müddeasını vech-i şer'i üzere isbat edicek sulh-u mezbur batıl olub tereke-yi Zeyd'i tamamen Amr'dan almağa kadir olur mu? El-cevab: Olur*. Yenişehirli, p.447.

[265] Abu-Nimer, "Conflict Resolution Approaches," pp.45-46; Irani and Funk, "Rituals of Reconciliation," p.19.

A.2. Debt:

Financial disputes over debt are the most frequent cases in the *sulh* chapters of the three compilations. Among the total number of 347 fatwas regarding *sulh* in the compilations, 116 fatwas (33%) concern debt disputes (Table3). Almost all of these fatwas are cash-related; only in two fatwas cash is not mentioned at all. An overwhelming majority of these fatwas (87%) are absolutely cash-based disputes in which either the *bedel* is cash as well, or the disputed amount of cash is released (*ibrâ*). Only in 13 fatwas there are non-cash elements including real-estate, and other properties such as wheat, rice, cloth, and animal. Even in the majority of these cases, the non cash properties are *bedel* for cash disputes. There are only three fatwas where the disputed item is not cash.

Table 3: Disputed items in debt cases

	cash	real-estate	other property	Total number of debt cases
Netice	16	1	0	17
Abdurrahim	78	5	1	79
Yenişehirli	20	3	3	20
Total	114	9	4	116

As pointed out in the first chapter, any details, which are legally unnecessary, about the context of the disputes are left out. Netice and Yenişehirli never mention the amount of the money involved in a debt dispute. Abdurrahim's compilation, however, has some examples whereby the amount disputed and paid for a settlement is specified. The amounts Abdurrahim cites range from 10,000 gold coins[266] to 80 *guruş*.[267] This information can be a sign of the availability of the capital's fatwa institution for people of a wide range of prosperity.

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[266] Abdurrahim, p.429.

[267] Abdurrahim, p.429.

Sale is considered a prototype for all transactions,[268] including *sulh*. However, the information in the *sulh* chapters of the compilations shows that most of the cases are similar to *ibrâ*, rather than to sale. In other words, for example in most of debt cases both *musalahun ‘anh* and *bedel* are cash. In those cases, the only way to make *sulh* is through the concession made by the plaintiff, which is considered as a form of *ibra*. In some cases, one item is exchanged for another, for example cash for real estate. These cases are perceived as similar to sale.

The debt cases in the compilations deal with issues such as conditions for the validity of settlement; issue of further evidence in the settlements upon denial; conditional release; and inheritance. The cases about the conditions of the validity of settlement depict the general framework of the legal principles, mentioned in the first chapter. In the compilations under study, issues dealt with in regard to the conditions of validity are usage of force (*ikrâh*), the right to annul the contract in case the *bedel* is deficient (*hıyar-ı ‘ayb*), the ruin of the *bedel*, interest (*ribâ*), representation (*vekâlet*), and competence (*ehliyet*). Legally, these cases follow both pre-Ottoman classical legal texts as well as Halebi’s *Mülteka*.

One more issue that was dealt with was issue of *tapu*, upon which settlement is invalid.

> Zeyd has lent some money to Amr. In lieu of this amount of money, Amr wants to make settlement with Zeyd and give up a farm under his possession as *bedel* to Zeyd. Is such a *sulh* valid? Answer: No.[269]

The rationalization (*şerh*) provided here states “settlement is valid on any thing whose sale is valid and it is invalid on anything whose sale is invalid such as pork, wine, etc.”[270] It is in line with Abdurrahim’s fatwa on this issue, forbidding *sulh* on the

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[268] Frank Vogel and Samuel L. Hayes, *Islamic Law and Finance: Religion, Risk, and Return*, (The Hague, London, Boston: Kluwer Law International, 1998), p.97; E.H. Hamid, “Islamic Law of Contract or Contracts” *Journal of Islamic and Comparative Law*, 1969, **3**, p.1; Schacht, *Introduction*, pp.151-2

[269] *Zeyd Amr zimmetinde olan şu kadar akçasından Amr’ın tapu ile tasarrufunda olan tarlası üzerine sulh olub Amr dahi ol tarlayı bedel-i sulh olmak üzere Zeyd’e firag eylese sulh-u mezbur sahih olur mu? El-cevab: Olmaz*. (Yenişehirli, p.445)

[270] It refers to *Netf*, fi el-sulh.Yenişehirli, p.445.

right of possession of *tapu*.[271] We see here an example of *ictihâd*, where the jurists resort to analogy to rule on new issues.

Conditional release (*ibra*) is another controversial issue. The position taken by these three Ottoman *şeyhülislam*s is neither the same as the position of the pre-Ottoman classical jurists nor that of Halebi in *Mülteka*. These compilations annul any kind of conditional release.[272] However, one striking point of inconsistency has been observed between a fatwa issued by Yenişehirli and one appearing in *Netice* regarding a release with a condition of doing something. Yenişehirli does not distinguish this situation from other cases of conditional release and proclaims it as invalid.[273] However, a fatwa by Muhammed Piri-Zade in *Netice* presents a different attitude:

> Zeyd tells his debtor Amr that if he does something that Zeyd wants, he will be released of the debt. However, Amr does not do the job and that affair disappears. Zeyd asks Amr to pay his debt. Can Amr refuse paying based on the mentioned release? Answer: No.[274]

The reason for the invalidation of the fatwa could be either a) the existence of conditional release that would be invalidated anyway, or b) Amr's failure to perform what Zeyd had posed as condition. In the latter case, conditional release would have been accepted as valid. Fortunately, that information is provided in the rationalization section. It is mentioned clearly that there is an exception: if the condition stipulates someone an action, for example that of someone should carry something, then the release is valid.[275]

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[271] Abdurrahim, pp.455-56.

[272] An account of the debate is given in above note 121.

[273] *Zeyd Amr zimmetinde olan şu kadar akça hakkından Amr'ı ibra eder oldukda Amr filan fi'li işlersen meblağı mezburdan seni ibra etdim deyü bu vecihle ibra eylese sahih olur mu? El-cevab: Olmaz.*

[274] *Zeyd şu kadar akça medyunu Amr'a falan maslahatımı görürsen meblağ-ı mezburdan seni ibra etdim deyüb lakin Amr asla ol maslahatı görmeyüb maslahat fevt olsa Zeyd meblağ-ı mezburu Amr'dan taleb etdikde Amr ibra-i mezbura binaen vermemeğe kadir olur mu? El-cevab: Olmaz. Netice*, p.433.

[275] *Netice*, pp.433-434.

A.3. Inheritance:

Inheritance is the second largest category in the fatwa compilations.[276] Fatwas regarding inheritance deal with issues such as the conditions of the validity of settlement on the inheritance right, including cases in which the *bedel* is owned by a third party, the appearance of interest (*ribâ*) in the settlement contract, lack of intention to make a settlement, the cases of unknown *musâlahun 'anh*, release from *'ayn*, or the use of blackmail to exclude a party from her right to inheritance, as in the following fatwa by Abdurrahim:

> Hind dies and leaves her husband, Zeyd, and her daughter, Zeyneb, as heirs. Zeyd appropriates the entire bequest. Amr marries Zeyneb. Zeyd tells Zeyneb to acknowledge that she has received her share of the bequest and release her right; otherwise, he would not let her go to her husband. If Zeyneb admits the reception of her share and releases her right can Zeyneb still claim her share in her mother's bequest? Answer: Yes.[277]

This fatwa is significant to show the attitude of the Ottoman muftis to preserve the property rights of the individuals. The *şeyhülislam* issues the fatwa to secure the interest of the daughter, invalidating the release because it is not based on her free will. There is another type of fatwa which is also issued to secure the rights of the heirs, in this instance, those of people who are about to die. If a person has terminal illness, any release or legacy affecting more than one third of the entire bequest is invalid.[278]

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[276] In the court registers of eighteenth century Trabzon, however, the settlement cases for inheritance form the overwhelming majority of the entire settlemet cases. Koyunkalın, "Sulh," p.16.

[277] *Hind fevt olub zevci Zeyd'i ve kızı Zeyneb'i terk eyledikde tereke-i Hind'in cümlesini Zeyd kabz edüb badehu Amr Zeyneb'i tezevvüc eyledikde Zeyd Zeyneb'e validenden filan hisseni kabza ikrar ve zimmetimi ibra etmedikce zevcine salıvermem demekle Zeyneb dahi ol-vecih üzere ikrar ve zimmeti ibra eylese hala Zeyneb validesinden intikal eden malını Zeyd'den taleb edüb almağa kadire olur mu? El-cevab: Olur.* Abdurrahim, p.447.

[278] Schacht, *Introduction*, p.169.

> Zeyd bequeaths his son's son one third of his estate, after which he dies. Can Zeyd's heir disobey the legacy? Answer: No.[279]

The main issue dealt with in the inheritance-related fatwas is exclusion, i.e. *tehârüc* which is defined as "withdrawal of one or more heirs from the bequest in return for a part of their share or some other thing."[280] Fatwas in the three compilations considered here show explicitly that release from the right of inheritance is invalid, because such right is absolute and compulsory.[281] However, a person can make settlement on this right and receive some *bedel* in return. A number of exclusion-related fatwas are about the conditions of the validity of such settlements,[282] representation,[283] and the issue of the free will of the parties to the settlement.

The majority of exclusion fatwas are about guaranteeing the rights and interests of the excluded:

> The bequest of the deceased Zeyd involves real-estate, cash, and non-cash property. Amr, one of the heirs, is excluded by the rest of the heirs in return for 5,000 *akça*. In case the *bedel* received by Amr is less than his cash share in the bequest, is such a settlement valid? Answer: No.[284]

The amount an excluded heir receives as *bedel* can not be less than her share in one of the items of the bequest.[285] The cases of inheritance have a larger portion of non-cash property and real estate than debts, as seen in the Table 4. For example a deceased

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[279] *Zeyd süls-ü malını oğlunun oğlu Amr'a vasiyet etdikden sonra mısran fevt olsa Zeyd'in oğulları vasiyeti tutmamağa kadir olurlar mı? El-cevab: Olmazlar.* Yenişehirli, p. 445.

[280] Mehmet Erdoğan, *Fıkıh ve Hukuk Terimleri Sözlüğü*, p.559.

[281] Abdurrahim, p.447.

[282] For example, exclusion is valid only if both parties to the settlement are heirs and have shares on the same bequest. Abdurrahim, p.430.

[283] Abdurrahim, p.437.

[284] *Terekesi akar ve nükud ve uruz olan Zeyd-i müteveffanın veresesi içlerinden Amr'a terekeden 5,000 akça verüb Amr'ı bi-tarik'it-teharüc sulh ve ihrac eyleseler hala Amr'a verilen bedel-i sulh Amr'ın tereke-i Zeyd'den olan akçadan hissesinden ekal olucak sulh-u mezbur sahih olur mu? El-cevab: Olmaz.* Abdurrahim, p.450.

[285] Yaylalı, *Sulh*, pp.118-9.

person leaves cash and real-estate as bequest. The share the excluded heir receives should not be less than her share in either of the cash or real-estate property.

Table 4. Disputed items in inheritance cases

	cash	real-estate	other properties	Total number of inheritance cases
Netice	5	1	1	8
Abdurrahim	23	12	16	52
Yenişehirli.	5	2	2	17
Sum	33	15	19	77

Similarly, if the deceased has some outstanding credit to be collected, exclusion can not take place until the loan has been received and added to the bequest, from which exclusion will take place.[286]

> The deceased Zeyd has loans on people. Can rest of the heirs make a settlement with an heir, Amr, and exclude him, giving him some cash [as *bedel*] while the loans would belong to the rest of the heirs? Answer: No.[287]

Another measure to guarantee the interests of the excluded is explicitly demonstrated in cases where the deceased is indebted. In that case, exclusion can take place only if the excluder(s) guarantee to pay the debt of the deceased. Otherwise, if the excluded is asked to pay the debt of the deceased, or if the fate of the debt is left in obscurity, then the settlement is invalid.

Guaranteeing the rights of the excluded can be seen in conformity with the general attitude of the Islamic law in securing the rights and interests of the disadvantaged within the limits of its given social universe, i.e. without given limits of

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[286] Yaylaı, p.119.

[287] *Zeyd-i müteveffanın zimem-i nasda akçası var iken verese içlerinden Amr'a zimemde olan düyûn kendilerin olmak üzere bir mikdar akça verüb ala tarik'it-teharüc Zeyd'in terikesinden hissesinden Amr'ı ıslah ve ihrac eyleseler sulh-u mezbur sahih olur mu?El-cevab: Olmaz.* Abdurrahim, p. 448.

social inequality. The excluded person in the settlement on the inheritance is already in a disadvantageous position; so the law tries to prevent any further defraudation. The same position is taken while dealing with the rights of minors as in the following fatwa.

> Zeyd dies and leaves his minor wife and others as heirs. Other heirs appropriate the entire bequest and make an extortionate settlement (*gabn-i fahiş ile*) with the minor's father in return for some money. Is such a settlement valid? Answer: No.[288]

A significant number of inheritance-related fatwas are based on repudiation, which can be divided into two groups. The first group contains queries about presenting further evidence after a repudiation settlement. The answers to these queries are consistent in all related fatwas. Repudiation in inheritance cases, among others, can be used not only as a means of restoring social harmony but also as a strategy of gaining time.[289] There is a second group of repudiation cases:

> The deceased Zeyd leaves his two sons, Amr and Bekr, as the only heirs. Amr and Bekr claims that a ship, which is under Bishr's control, is Zeyd's property. Bishr repudiates, saying it is his own property. Amr, however, makes a settlement with Bishr upon his alleged right in the ship in return for some money and receives the *bedel*. Bekr, on the other hand, does not make a similar settlement. Can Bekr claim to have a right in the *bedel* received by Amr? Answer: No. [290]

Such cases resemble settlement in partnership (*müşareket*): when a partner makes a repudiation settlement on her share, the *bedel* she receives can not be claimed by other partners.

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[288] "*Zeyd fevt olub zevcesi Hind-i sagireyi ve sair-i veresesini terk etdikde tereke-i Zeyd'in cümlesini sair-i verese kabz edüb badehu sagirenin babası Amr, sagirenin hissesinden gabn-i fahiş ile şu kadar akça üzerine sulh olsa sulh-ı mezbur sahih olur mu? El-cevab: Olmaz."* Yenişehirli, p. 448.

[289] See above.

[290] *Zeyd'i müteveffanın hısran varisleri oğulları Amr ve Bekr, Bişr'in yedinde olan sefine için Zeyd'in mülküdür deyü dava ve Bişr benim mülkümdür deyü inkar edüb yalnız Amr sefine-yi mezbureden hissesinden şu kadar akça üzerine sulh ve kabz-ı bedel edüb Bekr sulh olmasa Bekr bedel-i mezbureden Amr'a müşarekete kadir olur mu? El-cevab: Olmaz.*Yenişehirli, p.442.

A.4. Homicide and Injury

> Retribution is prescribed for you in cases of killing … But if something of a murderer's guilt is remitted by his brother this should be adhered to in fairness, and payment be made in a goodly manner."[291]

As mentioned above, for a dispute to be subject to settlement, it has to involve the legal claims of men. Where the claims of God are concerned, no one has the permission to make a settlement.[292] There is a third category, however: disputes involving both rights of God and rights of men. In this latter situation, regulations that apply to the predominant element, either the rights of God or rights of men, are valid. Homicide and injury are in this third category. On the one hand, they involve humans who have been harmed or killed, so there exists the right of retaliation. On the other, they are among the *hukûk'ul-lah*, because restriction of such penal crimes is in the benefit of the political community.[293] The legal question to be asked is in which cases settlement is valid for homicide and injury. Classical jurists consider homicide and injury as disputes in which the rights of men are predominant,[294] therefore they rule for the validity of settlement.[295] However, since intentional and unintentional homicide and injury have different legal consequences, settlements made upon each signify some differences as well.

The principal (*aslî*) punishment for intentional homicide is retaliation (*kısâs*). The heirs of the deceased person, however, have the right to forgive the murderer(s) or make a settlement in return for some *bedel*. This last option can only take place, according to the Hanafi as well as Maliki law, by the consent of the attacker.[296] This

[291] Quran, 2:178, traslated by Zafar Ansari, available at Kur'an website http://www.quranm.multicom.ba/translations/Zafar%20Ansari.htm, August 1, 2007

[292] Schacht, *Introduction*, p.176.

[293] Johansen, "Secular and Religious Elements", p.209.

[294] Johansen, "Secular and Religious Elements", p.209.

[295] Schacht, *Introduction*, p.178.

[296] Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century*, (Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, Sâo Paulo: Cambridge University Press, 2005, 46-47; Colin Imber, *Ebu's-su'ud*, p.237).

seems to be one reason for the overrepresentation of intentional homicide cases in *sulh* chapters, because *sulh* is only another way of naming the last option mentioned above, i.e. asking for financial consideration with the consent of the defendant.

However, unlike cases of unintentional killing, there is no set *diyet* for cases involving retaliation. Therefore the *bedel*,[297] in settlements can be any amount, more or less than the *diyet* specified in law for unintentional killing.[298]

> Zeyd murders Amr, which necessitates retaliation [i.e. it is intentional]. Zeyd makes settlement with Amr's heirs giving *bedel* being 2,000 *guruş*. Later, Zeyd claims that since the *bedel* is more than *diyet*, the additional amount of *bedel* is invalid. Can he take the additional amount? Answer: No.[299]

If one heir makes settlement with the murderer, the right of retaliation drops for other heirs, but they have the right to take *diyet*.[300]

> Zeyd and Amr together killed Bekr using an injuring tool. Bekr's heirs are exclusively his wife Hind and his minor daughter Zeyneb and his brother's son Bishr. Zeyd and Amr make settlement with the mentioned Bishr on the dispute of retaliation in return for some cash [as *bedel*]. Can the mentioned Hind demand retaliation against Zeyd and Amr? Answer: No.[301]

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[297] It should be noted that in the cases of intentional homicide, the terms *diyet* and *bedel* are used interchangeably. The term *diyet*, whose amount is specified by the *sharia*, will be further elaborated below.

[298] Schacht, *Introduction*, p.181; El-Serahsî, *El-Mebsût*, XXI., p.9, Zeyle'î, *Tebyin'ül-Hakaik*, VI.113, and El-Baberti, *El-İnaye*, VIII., p.275, cited in Yaylalı, *Sulh*, p.126.

[299] *Zeyd Amr'ı mucib-i kısas olan katl ile katl etdikden sonra Zeyd Amr'ın veresesiyle kısasdan iki bin guruşa sulh ve def'-i bedel eylese hala Zeyd bedel-i sulh diyetden ziyade olmağla ziyadesi batıla olmuş olur deyü bedel-i merkumenin diyetinden ziyadesini vereseden almağa kadir olur mu? El-cevab: Olmaz.* Yenişehirli, p. 442.

[300] Halebi, IV., p.381; Peters, *Crime and Punishment in Islamic Law*, p.44; El-Kasani, *Bedayi*, VII. p.248 cited in Yaylalı, *Sulh*, p.127.

[301] *Zeyd ve Amr alet-i cariha ile me'an Bekr'i amden carh ve katl etdiklerinden sonra Bekr'in veraseti zevcesi Hind ile sağire kızı Zeyneb'e ve li-ebeveyn er karındaşı oğlu Bişr'e münhasıra oldukdan sonra Zeyd ve Amr Bişr-i mezbur ile dava-yı kısasdan bir mikdar akça üzerine sulh olsalar Hind-i mezbure Zeyd ve Amr'ı kısas etdirmeğe kadire olur mu? El-cevab: Olmaz, diyetden hissesini alur.* Abdurrahim, p.452.

This kind of settlement is observed frequently in the compilations.[302] There are less than ten cases in which the murderer escapes from retaliation. In one case the heirs of the murdered forces (*ikrâh*) the murderer for a settlement. While the *bedel* asked in such a settlement should not be paid to the heirs since force settlement is invalid, the retaliation can not take place either.[303] In a more interesting case, the heirs of the murdered are forced for a settlement. Even though the heirs provide evidence for the fact that the settlement has been made via use of force, they can not claim the blood (retaliation) of the murdered person:

> Zeyd and Amr claim that Halid has intentionally murdered their testator, Bishr. Halid, after denial, uses force to makes a settlemen with the said Zeyd and Amr for the mentioned claim on some cash [as *bedel*], and has [Zeyd and Amr] get the said amount of cash under duress. After Zeyd and Amr prove legally that the settltment was done under duress in the way written [above], can they claim the mentioned murdered person, Halid's blood? Answer: No. [304]

This can be a sign of the negative attitude of the Ottoman jurists regarding the application of retaliation, using every opportunity to limit its practice, parallel to the early Islamic law's attitude prohibiting the pre-Islamic tradition of blood feud and at the same time recommending the heirs of the intentionally murdered person to waive their right to retaliation.[305] However, this does not mean that the Ottoman muftis abolished retaliation as a rule. There is one case in which the mufti rules for the continuation of

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[302] Similar cases are observed in *Fetâvâ-yı Âli Efendi*, II.p.289 cited in Örsten, "Osmanlı Hukukunda Fetvâ" Unpublished M.A. Thesis, Ankara University, Faculty of Law, 2005, p.85.

[303] *Zeyd Amr'ı alet-i carihe ile amden katl etdikden sonra veresesi Zeyd'e kısasdan bizimle şu kadar akça üzerine sulh ol deyü cebren ve ikrah-ı muteber ile kerh etdiklerinde Zeyd dahi mükrehen sulh olsa hala verese-i katîl [maktul] Zeyd'den bedel-i sulhu almağa veyahud Zeyd'i kısas etdirmeğe kadir olurlar mı?El-cevab: Olmazlar*. Abdurrahim, p.446.

[304] *Zeyd ve Amr murisimiz Bişr'i Halid amden katl eyledi deyü dava etdiklerinde Halid dahi bad'el-inkar mezburan Zeyd ve Amr'ı dava-yı merkumelerinden şu kadar akça üzerine ikrahen sulh edüb ve bedel-i sulhu ikrah ile aldırsa hala Zeyd ve Amr vech-i muharrer üzere sulh-u mezburun ikrahla olduğunu vech-i şer'î üzere isbat etdiklerinden sonra sulh-u merkumu tutmayub maktul-u mezburun demini Halid'den dava etmeğe kadir olurlar mı? El-cevab: Olmazlar.* Abdurrahim, p.446.

[305] Schacht, *Introduction*, p.185.

the heirs' right to retaliate even after a settlement. This is a settlement, however, made by an unauthorized representative (*fuzûlî*).[306]

In cases when a group of people murder a person and the heirs of the deceased person make settlement with one of the murderers, the heirs' right to retaliate other murderers continues.[307] In the fatwa compilations, there are three cases that confirm to this ruling of the classical jurists[308]:

> Zeyd and Amr and Bekr intentionally hit and killed Bishr using an injuring tool. The heirs claimed against the mentioned people and proved their claim. Zeyd makes a settlement with the Bishr's heirs giving them some cash [as *bedel*]. Does the fact that the heirs had made settlement with Zeyd drop the retaliation from Amr and Bekr? Answer: No.[309]

The pre-Ottoman Hanafi texts and Halebi's *Mülteka* have a similar position regarding the situation where there are some minors or insane people among the heirs. In those cases, the competent heirs can ask for the retaliation of the murderer, and hence, have the right to make a settlement with the perpetrator as well.[310] In these cases, the insane or the minor heirs' right to retaliate drops. However, they will have the right to get their share of *diyet*.[311] If all the heirs are minors, then their guardians (*velî*s) can make settlement instead of them. The rule here is that the settlement should not harm the interest of the minors. The amount of the *bedel* should not be less than the *diyet*,

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[306] *Bir kaç kimesneler Zeyd'i ma'an alet-i cariha ile amden carh ve katl etdiklerinden sonra Zeyd'in veraseti sağir oğulları Bekr ve Bişr'e münhasıra olmağla Zeyd'in karındaşı Halid ol kimisneler ile fuzulen dava-yı kısasdan bir mikdar akça üzerine sulh olsa hala siğâr baliğler olduklarında ol kimesneleri kısas etdirmeğe kadir olurlar mı? El-cevab: Olurlar*. Abdurrahim, p.453.

[307] El-Kasani, *Bedayi*, VII. p.248, cited in Yaylalı, *Sulh*, p.127.

[308] The very same observation is made by Örsten in *Fetâvâ-yı Âli Efendi*, "Osmanlı Hukukunda Fetvâ," p.86.

[309] *Zeyd Amr ve Bekr Bişr'i alet-i cariha ile amden urub katl etdiklerinde veresesi mezburlardan mucibini dava ve müddealarını isbat etdiklerinden sonra Zeyd verese-i Bişr ile şu mikdar akça üzerine sulh olmuş olsa sair-i veresenin yalnız Zeyd ile sulh olmaları ile Amr ve Bekr'den kısas sakıt olmuş olur mu? El-cevab: Olmaz.* Abdurrahim, p.452.

[310] Halebi, IV. p.370; According to the Hanafi shcool, the minor's father or other close relatives can speak for him if they are also heirs of the victim. See Peters, *Crime and Punishment in Islamic Law*, p.45.

[311] El-Kasani, *Bedayi*, VII. pp..242-43, cited in Yaylalı, *Sulh*, p.127.

unless the proof of intentional homicide is impossible.[312] In line with earlier Hanafi jurists, Ottoman *şeyhülislam*s recognize the guardians' right to make a settlement and display similar sensitivity to protect the rights of the minors:

> Zeyd commits homicide against Amr, which necessitates retaliations [i.e. it is intentional]. Amr leaves his minor son Bekr as the only heir. Bishr, the guadian (*vasî*) of Bekr makes settlement with Zeyd upon the intentional homicide in return for a *bedel* less than *diyet*. When the minor becomes adult, can he ask for the entire amount of Amr's *diyet*? Answer: Yes.[313]

Parallel to the importance attached to the distinction between cases that involve intention and those that do not, in the fatwa compilations, the term "intentionally" (*'amden*) is very explicitly mentioned for cases of intentional homicide. Alternative ways to refer to intention can be "homicide dispute which necessitates retaliation" (*mûcib-i kısâs olan dâ'vâ-yı katl*) or simply "retaliation dispute" (*dâ'vâ-yı kısâs*). Other auxiliary words to mention the tool used and, therefore, to support the idea of intention are utilized in most of these cases.

While the rule for intentional homicide is very clear, the terms under which intention takes place is a matter of dispute between the Hanafi jurists. The jurists agree on the fact that the use of a tool to kill a person is a vivid sign of the existence of intention. However, there is also the question of what tool is regarded as indicative of the involvement of intention. While Abu Yusuf (d.798) and Shaibani (d.805) have a broad understanding of 'tool', i.e. the weapons that would normally result in death, Abu Hanifa (d.767) limited the meaning of the 'tool' to a sharp weapon or instrument that could cut through the body.[314]

Halebi's attitude is one of impartiality when there is lack of consistency among the three prominent Hanafi imams. In such cases, he simply presents the different

[312] El-Serahsi, *El-Mebsut*, XI., p.4 and Zeyle'î, *Tebyin-ül-Hakaik*, VI.,p.107, cited in Yaylalı, *Sulh*, p.128.

[313] *Zeyd Amr'ı mucibi kısas olan katl ile katl edüb Amr hısran varisi sagir oğlu Bekr'i terk etdikde Bekr'in vasisi Bişr Zeyd'i kısasdan Amr'ın diyetinden ekal şu kadar akça üzerine sulh olsa sagir baliğ oldukda Amr'ın diyetini tamamen Zeyd'den almağa kadir olur mu? El-cevab: Olur.* Yenişehirli, p.449.

[314] Halebi, IV.,p.370; Peters, *Crime and Punishment in Islamic Law*, p.43.

arguments; therefore, he is not among the Ottoman jurists[315] who obey the strong opinion, i.e. that of Abu Hanifa, as is the norm in the Ottoman legal system.[316] This norm, however, is followed in the fatwa compilations. The majority of the cases mention the use of an injuring/wounding tool (*âlet-i câriha*). The two tools mentioned fit the position of Abu Hanifa: spear and gun.[317]

Cases of unintentional killing are referred to as "homicide dispute which necessitates *diyet*" (*mûcib-i diyet olan dâ'vâ-yı katl*). In the compilations under study, the shares of unintentional homicide cases is very small compared to intentional homicide. Among the total number of 45 fatwas pertaining to homicide disputes, only four fatwas (nine percent) are about unintentional homicide, while in 34 fatwas (76 percent) it is explicitly mentioned that the dispute is about intentional homicide. In the remaining cases, the element of intention is not specified.

Unintentional homicide is punished by *diyet*, which is defined by Al-Babarti as "the property (*mâl*) taken in return for the life of a murdered person in homicide crimes or for the organ cut from a person's body in injury crimes."[318] This definition should be extended to cover many forms of wounds not leading to amputation, such as *me'mûme* (a head wound laying bare the cerebral cavities,) *câ'ife* (a wound in the body that reaches one of the inner cavities), *münakkıle* (a wound whereby a bone is displaced) *mûdıha* (a wound that lays bare the bone.)[319] Halebi provides a further detailed list of the wounds and harms that necessitate *diyet*.[320]

For unintentional homicide and injury, *diyet* is the principal (*aslî*) punishment.[321] The amount to be paid is determined by the sharia. A settlement can take place on this

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[315] Among them is also Çatalcali Ali Efendi: "*Zeyd Amr'ı bi-gayri hakkın ip ile boğup katl eylese Zeyd'e ne lâzım olur?* El-cevab: *Diyet*." Örsten, "Osmanlı Hukukunda Fetvâ," p.89. Here, although the homicide seems intentional, since the tool does not fit the definition of Abu Hanifa, the jurist does not rule for retaliation, but for bloodmoney.

[316] Peters, *Crime and Punishment in Islamic Law*,p.71. Peter argues that for the Ottoman jurists, there is a hierarchy between the three Hanafi imams, namely Abu Hanifa, Abu Yusuf, ve Shaibani respectively.

[317] Halebi, IV. p.381.

[318] El-Babertî, *El-İnâye*, cited in Yaylalı, *Sulh*, p.129.

[319] Peters, *Crime and Punishment in Islamic Law*, p. 52.

[320] Halebi, IV.pp.409-411.

[321] Yaylalı, *Sulh*, p.130.

specific amount; therefore, in line with the general logic of settlement, the *bedel* can be less, but not more than the *diyet*. Any amount more than *diyet* is perceived as interest, and therefore such settlement is considered invalid. For intentional homicide and injury, *diyet* is a substitution punishment (*bedelî*), since it substitutes the principal punishment for intended homicide or injury, i.e. retaliation. The heirs of the person who is murdered intentionally can make settlement with the murderer(s), as shown above, so that the heirs receive *diyet*, which is also considered as *bedel* for the settlement. The amount of this *diyet* can be either higher or lower than the amount specified by the sharia. Thus, the straightforward rule regarding unintentional homicide can be one explanation for the underrepresentation of such cases in the compilations. The amount of *diyet* is pre-determined by the sharia and relevant settlements are made upon this specific amount, while in intentional homicide cases, the settlement does not involve a specific amount, but a right, namely, retaliation.

While in the earlier Hanafi law, the general attitude towards the involvement of intention in homicide and injuring was similar, one condition was mentioned for retaliation of injury: The retaliation should be exactly equivalent to the original bodily harm.[322] This condition renders many intentional injuries practically impossible to retaliate, which is clearly reflected in the Ottoman fatwa compilations under study as well. In most cases of harm, it is not explicitly mentioned whether or not intention is involved. Only in three of the total number of 24 cases, it is explicitly mentioned that the injuries were effected intentionally, and only in two of them, lack of intention is stated clearly. In most of the rest, one finds pieces of information implying the existence of intention: for example either the tool used is mentioned, [such as a baton (*değnek*), knife, gun, or axe], or the action of attack is specified, [such as "a fist in the chin" or simply "beating" (*darb etmek*.)] While it can be understood that the cases of intentional bodily harm constitute an overwhelming majority, not stating it explicitly may be a sign of the fact that, in practice, intention was not a decisive factor in determining the penal process in bodily harm cases.

A considerable number (46%) of bodily harm cases are about the ensuing damage after the original injury caused by the perpetrator. If the settlement is made for

[322] Schacht, *Introduction*, p.185; Colin Imber, *Ebu's-su'ud*, p.237.

the original injury and not for its consequences, the perpetrator is held responsible for the ensuing harm as well.[323]

> Zeyd after injuring Amr with gun makes settlement with him only for that harm in return for some cash [as *bedel*]. If Amr dies because of that injury, can his heirs ask Zeyd for the entire *diyet*? Answer: Yes.[324]

Another issue that is dealt with frequently in the fatwas is related to the healing of the harm caused by a perpetrator. After the perpetrator makes a settlement with an injured person, if the wound heals completely, the *bedel* received by the injured person should be reimbursed.

> Zeyd hit Amr with baton and injured his eye. Zeyd made settlement with Amr for this harm in return for some cash [as *bedel*]. After the transfer of the *bedel*, Amr's eye healed and no impact of the harm remained. Can Zeyd claim back the amount he had paid as *bedel* to Amr? Answer: Yes.[325]

Here again, the general attitude of the Ottoman jurists can be followed in debates among the three prominent imams of the Hanafi school.[326] While Abu Yusuf argues for the necessity of *diyet* for pain and Shaibani rules for payment for the medication, Abu Hanifa's position is against any kind of *diyet* in case of healing.[327] The *şeyhülislam*s of 18th century adhere exactly to this latter position.

One more question to be answered is how it is possible to make settlement for disputes on injuries which do not lead to *diyet*. The answer lies in another concept, *tazir*, i.e. discretionary punishment by the *kadı*, rather than in *diyet*.

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[323] Halebi, IV. p.385.

[324] *Zeyd Amr'ı tüfenk ile urub mecruh etdikden sonra Zeyd Amr ile ancak ol cerahatdan bir mikdar akça üzerine sulh olub ol cerahatdan hasıl olacakdan sulh olmasa hala Amr ol cerahatdan müteessir fevt oldukda sulh-u mezbur batıl olub veresesi tamamen diyet almağa kadir olurlar mı? El-cevab: Olurlar.* Abdurrahim, p. 454.

[325] *Zeyd Amr'ın değnek ile gözüne urudukda Amr'ın ol gözü mecruh olmağla Zeyd Amr ile ol carhın erşinden bir mikdar akçaya sulh olub bedelini Amr'a teslim etdikden sonra Amr'ın ol gözünün carhı öğülüb asla eseri kalmasa Zeyd Amr'dan bedel-i sulh namına aldığı akçayı istirdad ve ahza kadir olur mu? El-cevab: Olur.* Abdurrahim, pp.454-55.

[326] Peters, *Crime and Punishment in Islamic Law*, p.71.

[327] Halebi, IV. p. 411.

Zeyd reviles Hind so that *tazir* is required. Zeyd makes settlement with Hind for *tazir* in return for some cash [as *bedel*]. After the transfer of the *bedel*, can Zeyd demand reimbursement of the *bedel* based on the invalidity of the settlement? Answer: No.[328]

Tazir or *hükûmet ʻadl* is defined as "disciplining (*te'dîb*) or punishment (*ceza*) for crimes that do not have a specific punishment in sharia."[329] Halebi mentions some cases where *hükûmet ʻadl*, i.e. discretion by the judge should take place.[330] An important question is what kinds of crimes were punished by *tazir* in Ottoman society. The answer to this question would provide information regarding the *ictihâd* of the Ottoman jurists, since it shows the attempt of the jurists to interfere in the grey areas which have not been dealt previously. There are two cases which explicitly mention that settlement is done for *tazir*. In these cases, it is clear that hitting and reviling someone leads to *tazir*. In view of the definition of *diyet* and *tazir*, it apperas that some other cases regarding injury are settlements for *tazir* rather than *diyet*, even though it is not explicitly stated that they are so.

Zeyd fists his wife Hind in the chin and wounds her. Hind makes settlement with Zeyd for that wound and the ensuing consequences in return for some cash [as *bedel*]. If the wound becomes aggravated and leads to some other sickness, can Hind rescind the mentioned settlement? Answer: No.[331]

This is a case of domestic violence and the settlement is made for an injury caused by the husband's punching in the wife's chin. Nothing is mentioned about a

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[328] *Zeyd Hind'e şetm etmekle Zeyd'e tazir lazim geldikde Hind ile tazirden şu kadar akça üzerine sulh olub def'-i bedel etdikden sonra Zeyd sulh-u mezbur caiz değidir deyü bedel-i mezburu istirdada kadir olur mu? El-cevab: Olmaz.* Yenişehirli, p. 441.

[329] Mehmet Erdoğan, *Fıkıh ve Hukuk Terimleri Sözlüğü*, p.551.

[330] See Halebi, IV. pp. 409-411.

[331] *Zeyd zevcesi Hind'in çenesine yumruk ile urub mecruha oldukda Hind Zeyd ile carh-ı mezkur ve ma-yehaddesu minhu'dan bir mikdar akça üzerine sulh olmuş olsa hala ol carh müşted olub andan bazı emraz hadis oldukda Hind sulh-u mezburu feshe kadire olur mu? El-cevab: Olmaz.* Abdurrahim p.454.

broken bone or peeled skin; therefore the settlement made can not be for *diyet*, but for *tazir*. As the entire fatwa shows, there is no difference in the ruling between the settlements for *diyet* and *tazir*: in both cases, if the settlement is made merely for the immediate injury, the ensuing consequences will be under the attacker's responsibility.

B. Conclusion

An overview of the *sulh* chapters of the *şeyhülislam* compilations under study, Halebi's *Mülteka'l-Ebhur*, and the earlier Hanafi legal texts helps us in understanding the evolution of law over centuries. The evidence at hand shows a high degree of consistency among the mentioned legal texts. However, they are not identical: Halebi appears to have stood closer to the earlier jurists than did the eighteenth-century *şeyhülislam*s. For example, he defended the same position as the earlier jurists on the issue of conditional release. The eighteenth-century *şeyhülislam*s, however, could deviate from the Hanafi regulations, as seen in their position regarding this issue. One other point of divergence was that of settlement upon denial, an account of which has been provided above. On this issue, the Ottoman jurists made a preference, not in favor of a Hanafi jurist, but a jurist who belonged to another legal school.

Furthermore, Halebi and the eighteenth-century *şeyhülislam*s differed in their attitude towards issues upon which the three prominent Hanafi imams had different ideas. While Halebi did not take side and only presented the existing different views, the eighteenth-century *şeyhülislam*s studied here usually took side in accordance with the hierarchy mentioned by Peters, i.e. close to the original position of Abu Hanifa.[332] This form of *ictihâd*, i.e. legal reasoning of individual jurists, eliminating uncertainties can be a sign of further standardization of Islamic law by the Ottoman jurists, which can also be observed in the high degree of consistency among the fatwas of these

[332] It is from the nature of the sources that we see Halebi just mentioning different positions while the fatwa compilations take side with one particular position, as mentioned by Johansen, "Legal Literarue," p.449. However, it is rather the conformity of the position taken by the *şeyhülislam*s that matter here.

*şeyhülislam*s.[333] This standardization and homogeneity in legal principles, as long as the judges followed the fatwas, may have decreased the personal discretion of the judges.

İctihâd does not take place through preference alone. The *şeyhülislam*s under study also used analogy as a tool to rule about new issues, as is the case with *tapu*.[334] Another way through which the *ictihâd* of the Ottoman jurists can be observed is their decisions on grey areas of the law, i.e. areas where a crime exists but does not fall in a category of crime that is well-defined by the sharia.[335] The *şeyhülislam*s' maneuver in these areas may have limited, at least theoretically, the extent of the judges' judicial discretion. Among the actions proclaimed as crimes to be punished by *tazir*, many forms of physical abuse and cursing can be mentioned.[336] This concern of the Ottoman jurists to formulate legal principles can be explained in the context of seventeenth and eighteenth centuries when the Ottoman polity was getting further bureaucratized and centralized.[337] With the establishment of the office of *fetvahane*, fatwas became the main source of law-making for the Ottoman polity. Further expansion of the sharia to cover more aspects of every-day life of the Ottoman subjects would have resulted in more extensive state control over the individuals through applying the legal principles.[338]

These examples of *ictihâd* in the fatwa compilations should be evaluated in light of the discussion on the "closure of the gate of *ictihâd*." The Muslim jurists' claim that in the tenth century, *ictihâd* came to an end formed the basis for some scholars to argue for stagnation in Islamic legal systems.[339] This view has been criticized by Rudolph

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[333] There is only one fatwa of inconsistency in the whole data studied.

[334] See above note 269.

[335] "*Zeyd, Hind'i ahz ve Amr'a teslim edüb, Amr dahi Hind'e zinâ' eylese, Zeyd'e ne lâzım olur?* El-cevab: *Ta'z'ir ve habs.*" *Fetâvâ-yı Âli Efendi*, I. pp.155-157 cited in Örsten, "Osmanlu Hukukunda Fetvâ," pp.101-102.

[336] "*Zeyd Hind'e bre anasını falan ettiğim deyü cima' lafziyle şetm eylese, Zeyd'e ne lâzım olur*? El-cevab: *Ta'zîr*." *Fetâvâ-yı Âli Efendi*, I. pp.152-156, cited in Örsten, "Osmanlı Hukukunda Fetvâ," p.101.

[337] For bureaucratization in the Ottoman polity in this period see Haim Gerber, *State, Society and Law in Islam*.

[338] See Yaycıoğlu, "Ottoman Fatwâ," p.102.

[339] Schacht, *Introduction*, p.70; Coulson, p.75, 80, 85.

Peters[340] and Wael Hallaq,[341] who showed that there was an unbroken chain of prominent Muslim jurists who stood for the right to exercise *ictihâd*. These two authors, however, have been criticized by Johansen for neglecting the process of change in actual legal ordinances and focusing exclusively on this claim for the continuous existence of *ictihâd*.[342] According to Johansen, this might beget the danger of "identifying the jurists' claim to the right of *ijtihâd* with their capacity to effectively change the legal doctrine."[343] To be able to trace the changes in the legal doctrine, other legal genres, including fatwas, should be taken into consideration. According to Johansen, the contribution of the muftis to the evolution of legal principles took place in two ways: 1) They had to make a choice from among different legal opinions of previous Muslim jurists, 2) They issued fatwas that did not reflect the views of any earlier jurist, but were based merely on their personal authority.[344] The compilations studied here contain good examples of both ways of contribution to the changes in legal principles.

The fatwa material depicts a picture of the Ottoman society as it was (meant to be) regulated by the legal principles. Emphasis on the rights and obligations of the individual is of primary concern in the fatwas. A good example for the preservation of individual rights is the attitude of the Ottoman *şeyhülislam*s regarding the cases of settlement upon denial. It demonstrates vividly the significance attributed by the Ottoman jurists to evidence, hence, not jeopardizing the rights of individuals for the sake of social harmony.[345]

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[340] Rudolph Peters, 1984 "*Ijtihâd* and *Taqlîd* in 18th and 19th Century Islam" *Die Welt des Islams*, **20** (3/4), pp. 131-145.

[341] Wael Hallaq, "Was the Gate of Ijtihad Closed?"

[342] Baber Johansen, "Legal Literature and the Problem of Change: The Case of Land Rent," in his *Contingency in Sacred Law*, 1999, p.447.

[343] Johansen, "Legal Literature," p.447.

[344] Johansen, "Legal Literature," p.447. pp.447-453. Kürşad U. Akpınar's findings support the idea that fatwas functioned as a medium of change and development in law after the so-called closure of the gate of *ictihad*, "*İltizam* in the *Fetva*s of Ottoman Şeyhülislams," p.72.

[345] Ottoman muftis encouraged the plaintiffs to raise the same claim also in the court more than one time in case they have further evidence. Johansen, "Legal Literature," p.451.

An important indicator of the emphasis put on individual obligation by the Ottoman jurists is absence of *'âkıle* (communal group) in the fatwas related to the *diyet* for homicide. *'Âkıle* is defined as a group of people such as kins (*'asabe*), tribe, members of the same payroll in the early Islamic state (*dîvân*), and occupational groups who pay the bloodmoney for unintentional homicide.[346] Although the communal group did not have a specific definition, the fundamental criterion for the formation of an *'âkıle* was the existence of solidarity within that group, so that members of the same garrison, the same village, or the same neighborhood were also taken as the communal group by the earlier Hanafi jurists of different times. [347] In the Ottoman legal system, however, *'âkıle* did not have a place, as explicitly stated by a fatwa of Ebu's-su'ûd (1490-1574):

> "When a killer cannot pay, is his communal group (*'aqila*) liable for blood-money? *Answer*: There are no *'aqila* in these lands."[348]

However, it should be noted that a type of communal responsibility existed in the fatwa compilations: *kasâme*, which is defined as communal compurgation and payment of bloodmoney for a person found slain in a quarter or village.[349] This communal responsibility survived in the texts of the Ottoman jurists, perhaps, out of necessity, where no individual was found to be responsible.

Halebi, a contemporary of Ebu's-su'ûd, refered to *'âkıle* in different parts of *Mülteka*.[350] Such a difference of view on this issue might be a sign of the lower degree of standardization in the sixteenth century compared to the eighteenth century. Another explanation might be the difference in the careers of these two sixteenth-century jurists.

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[346] Peters, *Crime and Punishment in Islamic Law*, pp.50-51; Peters, "The Islamicization of Criminal Law: A Comparative Analysis," *Die Welt des Islams*, New Ser. **34** (2), 1994, p.248; Mehmet Erdoğan, *Fıkıh ve Hukuk Terimleri Sözlüğü*, p.20; also see el-Mergınânî*, Hidaye*, X. p.240 cited in Colin Imber, *Ebu's-su'ud*, pp.239-240.

[347] Colin Imber, *Ebu's-su'ud*, p.240.

[348] Colin Imber, *Ebu's-su'ud*, p.247.

[349] Colin Imber, *Ebu's-su'ud*, p.241.

[350] *Mülteka*, IV. p.381, 385.

While Halebi has devoted his life to learn and teach Islamic law,[351] Ebu's-su'ûd had additional official duties, serving as the judge of Bursa and Istanbul, the Military Judge of Rumelia and, for about three decades, as *şeyhülislam*.[352] The political career of Ebu's-su'ûd may have been a reason for his taking into consideration the current situation and social changes of the society which rendered some legal principles incompatible with the realities of the society. The process of urbanization decreased the importance of tribes and clans, at least in the cities and towns. The increase of economic transactions conducted by individual proprietors[353] had led to rise of the notion of individual as opposed to social embeddedness.[354] Whether law was the leading factor in creating the individual proprietor or the rise in economic contracts among individuals led to the relevant formulation in law is a question whose answer is beyond the scope of this study. However, it seems reasonable to suggest the existence of a symbiotic relationship and mutual influence between the two.

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[351] Ahmet Özel, *Hanefi Fıkıh Alimleri*, pp.122-3.

[352] See more on Ebu's-su'ûd's biography in Colin Imber, *Ebu's-su'ud*, pp.8-20.

[353] Johansen, "Secular and Religious Elements," p.191, refers to individual proprietors as the prorotype of the legal person in Hanafi law.

[354] The rise of individualism at the expense of group embeddedness since seventeenth century is observed by Cemal Kafadar's study, "Self and Others," on diaries and personal narratives.

CONCLUSION

This thesis depicts an extra-court, but at the same time legal mechanism of dispute settlement as demonstrated in the *sulh* chapters of three eighteenth-century Ottoman fatwa compilations. However, the question of legal continuity has been another driving force behind throughout this study. The continuity between legal principles in classical Hanafi texts, and those by prominent Ottoman jurists of the sixteenth and eighteenth centuries has been questioned in light of secondary literature. In both chapters, this question was borne in mind: Did the Ottoman jurists follow exactly the legal principles put forward by the classical Hanafi jurists? If not, was there any general logic behind their deviation from earlier Hanafi texts? The answer to these questions has implications in the fields of Ottoman law and Islamic law. Especially, it is directly related to the debate on the "closure of the gate of *ictihâd*."

In the first chapter, a detailed account of the legal principles surrounding *sulh* in Islamic and Ottoman law was presented not only for the sake of comparison answering the question of legal continuity, but also to show the Ottoman and Hanafi law's attitude towards the negotiation of the individuals to settle their own disputes. In the first chapter, it was shown that while Islamic and Ottoman law had a positive attitude towards the settlement of disputes in the community without recourse to the court, it did not leave this field totally in the hands and initiative of the individuals. In contrast, the limits of individuals' legal activities were precisely defined by the law. After all, the *sulh* is perceived as a contract. Although there is not a theory of *sulh* contract,[355] the law regarding similar contracts is applied to *sulh* as well. For example, if a *sulh* contract is similar to a sale, it follows the regulations of sale contract. In this context, this study is

[355] According to Hamid there is not a theory of contract in Islamic law. That is why the reltaed rules are referred as "the law of contracts" rather than "law of contract." Hamid, "Islamic Law of Contract or Contracts."

presenting further evidence in the history of Islamic dispute settlement, which might be used, in the debates regarding Weber's '*kadijustiz*', at least in the Ottoman context.

One important contribution of the first chapter was clarification of the legalistic attitude of the Islamic/Ottoman law towards dispute settlement. This legalistic attitude did not necessitate the settlement of the disputes in the court; instead, it provided a very well-defined ground on which the individual could act as a legal person, in line with the general attitude of Islamic law towards the rights and responsibilities of individuals vis-à-vis one another. In this respect, there is a need to re-evaluate the attempts to situate the attitude of Islamic/Ottoman law towards unofficial acts of dispute settlement in one of the dual categories, e.g. Court Model vs. Bargain Model, provided by students of legal anthropology and conflict resolution. Not being in the Court Model does not situate Islamic legal practice, as can be observed in the practice of settlement contract, in the Bargain Model.

In the first chapter, an effort has been made to modify the meaning of the concept of *sulh* as perceived by the students of conflict resolution in Islamic contexts. These scholars present a description of *sulh* as a ritualistic process of mediation and an indigenous method of alternative dispute resolution (ADR.) Their normative concern regarding the proof of the existence of such indigenous mechanisms and, therefore, the futility of blind application of western mechanisms in the Middle Eastern societies has led these scholars to broad generalizations, reflecting some Orientalist stereotypes about Muslim societies, such as the absence of the notion of individualism or low significance attached to systematic legal codification, if at all. The data at hand can be used to present a critique of such generalizations: the pre-Modern Ottoman society was seen by jurists as an amalgamation of individuals with rights and responsibilities towards one another, and these rights and responsibilities could not be disregarded for the sake of social harmony.

The second chapter has presented a thematic picture of the fatwas in the *sulh* chapter of the compilations. It has been observed that most of the cases were related to debt disputes, an overwhelming majority of which were cash-based. The debt disputes were followed by inheritance, homicide, and bodily harm. These legal disputes fall in the category of *hukûk'ul-'ibâd*, i.e. the private "claims of men." In Ottoman/Islamic

law, private law not only covers laws regarding transactions, family, and inheritance, but also parts of penal law, namely those related to homicide and injury.[356]

This chapter has also tried to answer the question of continuity within Ottoman legal thought on the one hand and between the earlier Hanafi law and the Ottoman law on the other. A high degree of consistency has been observed between the texts of the Ottoman jurists and those of the earlier Hanafi texts. However, there are some points of deviation and innovation in the Ottoman legal texts that need to be analyzed. This observation is in line with Hallaq and Johansen's argument that in the post-classical period, necessary changes in Islamic law came through fatwas.[357] The relevant findings in the current study, first, are useful to see the change in legal principles from the sixteenth to the eighteenth century. It sheds further light on the debate regarding the "closure of the gate of *ictihâd*." Secondly, the direction of change in the legal principles shows that Ottoman jurists of the eighteenth century paid closer attention to the legal personality of the individuals and establishment of legal rights and obligations through exploitation of all possible evidence. The preservation of the rights of proprietors forms the basis of the Hanafi private law,[358] an attitude which was furthered by the Ottoman jurists: in cases where there was a kind of trade-off between social harmony and the rights and obligations of the individual proprietor, the Ottoman jurists opted for the protection of the latter.

Another observation in the second chapter was a high degree of homogeneity among the fatwas of different Ottoman jurists of eighteenth century. Does it mean that in the eighteenth century Ottoman law as a whole was in the process of standardization? The findings of this study are not sufficient to answer this question. Canbakal states that looking for fatwas in the local courts may be a good method to trace legal integration.[359] Another way would be looking for parallelism between the legal decisions of the local judges and the principles in the compilations. This takes us to the broader discussion of the relationship between theory and practice.

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[356] Seda Örsten classifies homicide and bodily harm under the category of public law. "Osmanlı Hukukunda Fetvâ", pp.83-90.

[357] Wael Hallaq, "From *Fatwâs* to *Furû'*," pp.29-65; Johansen, "Legal Literature," p.448.

[358] Johansen, "Secular and Religious Elements," p.200.

[359] Canbakal, "Bir Kaç Fetva Bir Soru," p.260.

Legal Practice:

The material used in this thesis, namely Halebi's *Mülteka* and the three fatwa compilations of the eighteenth-century *şeyhülislam*s, present an account of the legal principles that were meant to guide the practice of settlement. However, the important question to be asked here is the degree of consistency between these legal principles on the one hand and the everyday legal practice on the other. It is well-known that *Mülteka* was a handbook used widely by judges and muftis in the Ottoman lands. It has been argued that fatwa compilations were taken seriously into consideration by the judges, at least in the central parts of the empire.[360] Furthermore, these compilations were also used as legal handbooks for the judges,[361] since fatwas "are meant to be religious guidance in everyday life."[362] The role of fatwas in legal practice was not confined to constructing a legal base for judges. Fatwas were used as an independent tool of dispute settlement as well.[363] Therefore, it seems reasonable to state that the material used in this study had direct implications for legal practice as well.

However, it should be noted that the material at hand reflects the legal principles produced at the center of the empire. Therefore, further studies on local muftis would assist us to delineate a more comprehensive picture of the Ottoman legal principles. Comparative studies are necessary not only to compare *şeyhülislam*s with local muftis, but also the local muftis among themeselves. Yaycıoğlu in his scrutiny of two biographical works by 'Atâ'î and Şeyhî, in seventeenth and eighteenth centuries respectively, finds out that muftis of Arab provinces, except Aleppo, are not mentioned. He concludes that the muftis of those provinces may not be a part of Ottoman official learned hierarchy.[364] The degree to which non-official muftis adhere to the legal

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[360] Gerber, *State, Society, and Law in Islam*, p.179.

[361] Horster, *Zur Anxendung des Islamischen Rechis im 16. Jahrundert* pp.23-24 cited in Yaycıoğlu, "Ottoman Fatwâ," pp.24-25. Yaycıoğlu (p.27) states that existence of thousands of *şeyhülislam* fatwa compilations may lead us to think that fatwa were highly used by the Ottoman judges in the courts.

[362] Johansen, "Legal Literature," p.449.

[363] M. Akif Aydın, *İslam-Osmanlı Aile Hukuku*, p.77.

[364] Yaycıoğlu, "Ottoman Fatwâ," pp. 29-30.

principles produced by the central jurists might be another question tu pursue, to be followed by another one regarding the role of those provincial muftis in the legal practice.

In this regard, it is necessary to note that further studies based on the court registers[365] are needed in order to ascertain the degree of compatibility between the doctrines laid out by the muftis and the actual legal practice in the courts during the same period. Such an examination should not be confined to identifying the actual usage of fatwas in the courts. Therefore, students of Ottoman law should be sufficiently knowledgeable in legal principles in order to look for and identify the degree of compatibility between legal theory and practice also in records of cases where there is no reference to fatwas. Since the actual presentation of, or explicit reference to fatwas in court registers was relatively infrequent, knowledge of legal principles helps the students of Ottoman law to look within the court registers for relevant information to test the degree of consistency of legal theory and practice.[366] Among the functions of the Ottoman court was notary activities, which involved certification of already existing contracts among the individuals. For the same reason, settlement cases can be found in the court registers.[367] Ramazanoğlu observes a high degree of overlap between the legal principles put forward by classical Hanafi jurists and the legal practice in the Ottoman context.[368] The same is true with Heyd's study on Bursa court registers. Unlike the eighteenth-century Trabzon *sicil*s, however, the sixteenth-century Bursa *sicil*s involve records of extra-sharia fines imposed by *kanûn*, even in cases of settlement for homicide.[369]

The necessity of cross-reading the topic of *sulh* is emphasized by Aida Othman as well. On the one hand, without the court registers, it is very difficult to establish the

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[365] Abdullah Ramazanoğlu's "Şer'yye Sicili ve Sulh Akdi" is a good example of a study which presents the cases of settlement as they appeared in the court registers of Trabzon in the early eighteenth century. For usage of fatwas in Ankara courts in late 16th and early 17th centuries see Ali Yaycıoğlu, "Ottoman Fatwâ," pp.104-132.

[366] A good example is Gerber's study, *State, Society, and Law in Islam*.

[367] All of the settlement cases in Ramazanoğlu emerge in the courts for the sake of certification. The disputants in those cases did not use the court, for example, in order to seek the support of the court to settle their disputes. Ramazanoğlu, "Şer'yye Sicili ve Sulh Akdi," p.15.

[368] Ramazanoğlu, "Şer'yye Sicili ve Sulh Akdi," p.89.

[369] Heyd, *Studies in Old Ottoman Criminal Law*, pp.247-250.

link between the legal principles and legal practice. On the other hand, a study on the concept of *sulh*, not informed by the legal principles, might mislead one to the conclusion that *sulh* is an extra-legal mechanism of dispute resolution in Ottoman society.[370]

[370] Othman, "*Sulh* is Best," p.205.

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