# Ebū's Su'ūd's Definitions of Church *vaḳfs:* Theory and Practice in Ottoman Law

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Despite the significant role the institution of *vaḳf* has played in Islamic societies, research has not yet managed to fully expound its complex nature. Studies tend to either concentrate on the theoretical/juridical stipulations governing the foundation and function of *vaḳfs* or to examine its role in political and socio-economic structures independently of contemporary theoretical debates. In addition, as Richard van Leeuwen has argued historians following the Weberian approach have utilised the institution of *vaḳf* in order to characterise Islamic society as 'stagnant' and 'irrational'.[1]

Complementing this diffusion of opinions with the already diverse character of the implementation of law in the Ottoman Empire, one can understand the lack of coherence in views related to *vaḳf.* When examining institutions in the Ottoman Empire, one should bear in mind that custom, *'urf*, most of the time a preservation of pre-Ottoman practices, was the dominant factor in the application of law within the boundaries of the Empire.[2] Thus, attempting an overall approach which would be applicable to all regions of the Empire and throughout the centuries of Ottoman presence concerning the institution of *vaḳf* would be rather misleading.

In Ottoman times, people made gifts of their personal property in order to provide the means to serve the community through paying or supplementing the salaries of religious functionaries such as *imāms*, *müezzins* or teachers. They paid for the construction or maintenance of religious buildings or of schools, hotels, hospitals, *'imārets* (soup kitchens), or to support their staff. Other pious gifts were used for the construction of fountains, wells around mosques or in commercial and residential quarters of cities.[3] All the aforementioned endowments were essential for the well being of Ottoman society since they

covered most aspects of public life, both religious, by the construction of mosques and *medreses* (religious schools), and lay. The purpose of all endowments, though, ought to be pleasing to God (*ḳurba*). Those endowments with a distinct religious or public nature were *vaḳf ḫairī*. Apart from those, there were other endowments where the *ḳurba* was not as apparent. These were *vaḳf ḫurrī*, family trusts for the benefit of children, grandchildren and other relatives.[4] The founder could stipulate that the income of the trust should be assigned to himself and his descendants in perpetuity.[5] Since wealthy descendants were as eligible for the trust's benefits as poor ones, the basic definition of *vaḳf* as *ṣadaḳa* was contravened.[6] By quoting an opinion, allegedly of Abū Yūsuf, that family *vaḳfs* were permissible on the ground that ultimately they benefited the destitute, Ḥanafī jurists circumvented the problem of illegality by arguing that these endowments were valid so long the ultimate beneficiary, after the extinction of the founder's line should be the indigent.[7]

Monastic trusts in mortmain were a common practice in the Balkans even before the conquest. Since the beginning of monasticism in the Mediterranean basin, a common issue of concern and negotiation between the monasteries and the regional and central authorities was that of the status of the properties owned by monastic communities and their privileges.[8] Over the centuries and, in particular, before the fall of Constantinople in 1453, influential monastic communities in the Balkans were among the most powerful landowners in the region.[9] After a period of unrest following the Ottoman conquest, most of the monasteries managed to restore part of their privileges. In certain cases monasteries undertook a more influential role, that of the representative of the *ẕimmī* (non-Muslim peasantry) communities within their jurisdiction.[10] It was a very favourable arrangement for both sides. The Ottoman administration managed to extract, with the least possible inconvenience taxes due to the Porte and the monasteries retained privileges held for many centuries, as well as a spiritual and political role in their communities.

Thus, since monastic/church *vaḳfs* not only continued to exist during the Ottoman period but some of them actually thrived, the main question to be addressed is that of their legal status. From the definitions of the different types of *vaḳfs*, it is certain that church *vaḳfs* could not fall into the category of *vaḳf ḫairī* since that would not constitute *ḳurba*. A number of scholars faced with the problematic term 'church *vaḳf*' have reached different conclusions. Wittek and Lemerle, in referring to a *firmān* for Koutloumousiou Monastery,

dated 1491, argued that the word '*vakıf* was used to denote 'propriéte' as they translated the term with some reservations.[11] However, they were reluctant to compare it fully to a Muslim religious *vaḳf* that was the property of Allah and had a certain religious/social character. Their justification for such an awkward term was based on the privileged status of Athonite monasteries. Wittek and Lemerle argued that the Ottoman state respected practices and granted exemptions and privileges to the monasteries which they had enjoyed under the Byzantine Emperors.[12] Thus, 'the monasteries had retained the status of *ṣāḥib-i ard* (the master of the land) on their properties.'[13]

Fotić, on the other hand, argues that 'the Arabic term *waḳf* was used in the Ottoman Empire in its most general sense to denote every endowment (bequest), most often that made for religious, God pleasing purposes, regardless of whether it was a Muslim or a non-Muslim (Christian, Jew) who made it'.[14] He substantiated his argument that Christian *vaḳfs* were permitted in the Hanafi interpretation of the *Sharī'a* with reference to A. Akgündüz. According to Akgündüz, a Christian could bequeath his property to churches/monasteries and 'he could also bequeath something for common good and other purposes considered to be God pleasing according to Islam: for fountains, hospitals etc.'[15] Fotić then quotes Boskov's documents from the Archives of the Monastery of Chilandari where the term *vaḳf* was used in a case of dispute between two monasteries in the *ḳādī* court in order to conclude that the term was used to 'denote even the endowments and bequests made before the establishment of Ottoman rule in the Balkans, at the time of Serbian and Byzantine rulers' in order to conclude that 'if, in the same way, we understand the term *vaḳıf* exclusively as bequeathed property, then it is quite clear how the monastery and its estates could be both a monastery *vaḳıf* and belong to a *timar*, or even how a monastery *vaḳıf* could be on a Muslim land *vaḳıf*'.[16] Akgündüz's view (adopted by Fotić) that a Christian could donate his property to a church/monastery so long as the ultimate beneficiary is the indigent is in accordance, as we will see below, with the *firmāns* from Mount Athos and the Monastery of Saint John the Theologian in Patmos.[17] However, Fotić's argument that the term *vaḳf* means bequeathed property on the basis that the term was used 'before the establishment of Ottoman rule in the Balkans' fails to take into consideration the fact that the terms were used by a monk presenting his case in the *ḳādī* court. Thus, it is understandable to use terms like *vaḳf* and *vaḳıfnāme* that would be familiar to the judge. In addition, Fotić's statement that if we view

*vaḳf* 'exclusively as bequeathed property, then it is quite clear how a monastery *vaḳıf* could be on a Muslim land *vaḳıf* could rather serve better as an example of dual ownership common in the Ottoman Empire, that of the real substance (*raḳaba*) of a property and of its usufruct (*taṣarruf*).[18]

Van Leeuwen, on the other hand, argues that 'in Hanafite jurisprudence the prescriptions concerning waqfs founded by Christians do not fundamentally differ from those concerning Muslim waqfs'.[19] The main limitation for these *vaḳfs* was that their revenues should constitute *ḳurba*. By declaring 'the poor' as the beneficiary of the *vaḳf* they were permitted. However Christian *vaḳfs* could never be founded for the benefit of mosques or for the repair, upkeep and expansion of religious buildings nor for the sustenance of the clergy or monks 'as these designations were clearly incompatible with the Muslim's conception of piety.'[20] Furthermore, according to van Leeuwen 'the limitations set upon the founding of Christian waqfs in the Ottoman Empire were originally intended to prevent the clergy and the church, as an institution, from acquiring a strong independent economic basis.'[21] Undoubtedly, Van Leeuwen's study is quite complex since he is dealing with the case of Christian laymen founding monasteries and registering them as *vaḳfs*. In his theoretical approach towards these *vaḳfs* he is also at pains to explain how, although the *vaḳfs* were following the prescriptions of Ḥanafī jurisprudence, they were considered valid and irrevocable. His argument in favour of a compromise, whereby these *vaḳfs* are accepted in the category of 'pious purpose' with a limitation as to the utilisation of their revenues, would seem plausible. However, he includes in the limitation *vaḳfs* founded for the benefit of clergy/monks, a point contrary to information included in *firmāns* from monastic communities in Serbia, Mount Athos and the Aegean.[22] In addition, van Leeuwen's view that limitations upon the founding of these *vaḳfs* reveal the intention of the Ottoman administration to prevent church and clergy from acquiring a strong independent economic basis contradicts the views of the Ottoman *Şeyhü'l-islām* Ebū's Su'ūd who, in 1569, faced with the threat that monasteries in Mount Athos would be evacuated by their monks unless their demands were met, found a compromise solution that was acceptable to both sides.[23] The only way we could perhaps determine under which categorisation the *vaḳfs* examined by van Leeuwen were legally accepted would be through the formulae used in their *vaḳıfnāmes*. Since, though, his prior concern was the political struggle over the control of the *vaḳfs*, he does not include any such details. He only informs us that the foundation

documents 'did not essentially differ from in his book documents drafted by Sunnis or others'.[24]

One final point has to be clarified before embarking upon the way an Islamic authority the *Şeyhü'l-islām* Ebū's Su'ūd, dealt with the problem of church/monastic *vaḳfs*. Although these *vaḳfs* were indeed tolerated in the Empire and efforts were made to accommodate them, they never came under the umbrella of specific privileges given to the *zimmīs* by the Ottoman administration.

Ebū's Su'ūd came to the office of *Şeyhü'l-islām* in October 1545 at the age of fifty-five. He was an intimate of Süleyman I and enjoyed his patronage until the latter's death. Ebū's Su'ūd continued to offer his services to Selīm II (1566–74) who succeeded his father in 1566. When Selīm came to the throne, Ebū's Su'ūd aged seventy five was still among the most powerful figures in the Empire. He controlled the senior judicial appointments and secured offices for relatives and students. He died on 23 August 1574.[25] The most important body of Ebū's Su'ūd's legal writings during his twenty eight years in office was his *fetvas*. Following the tradition of Ḥanafī jurists like Qāḍīkhān, Ibn Bazzāz and especially Kemālpaşazāde, he endeavoured to redefine the basic laws of land tenure and taxation in terms which he borrowed from the Ḥanafī legal tradition.[26] Such a task was essential since in the Ottoman Empire two systems of law were operational and had grown up independently of one another, the *Sharī'a* (Holy Law) and the *ḳānūn* (secular law) which in most cases was a systematisation of pre-existing customary law. Ebū's Su'ūd's rulings on land tenure and taxation became the predominant concepts in the Ḥanafī legal theory on land and were included in the compilation of a new land code in 1673, the *Ḳānūn-i Cedīd* which remained the official law until the promulgation of the Ottoman land Law of 1858.

His main concern was the misappropriation of land and its revenues and his first attempt to address the problem was in the *ḳānūnnāme* for Hungary in 1541.[27] However customary practices proved tenacious. The opportunity to re-enforce his rulings introduced in the *ḳānūnnāme* for Hungary and to ensure their implementation came in 1568, two years after the accession of Selīm II to the throne. Ebū's Su'ūd supervised the promulgation of a new *ḳānūnnāme* for Thessaloniki and Skopie (1568–69) and ordered the confiscation of church *vaḳfs*, at least, to our knowledge, in the Balkans. It was customary for the new Sultan to validate documents issued by his predecessors and one of his first commands was the re-registration of properties and

taxes in new *defters*. As a consequence of this new registration all *firmāns* and *hüccets* validating possession, including those validating monastic property, had to be renewed. This provided the opportunity for Ebū's Su'ūd to affirm the Sultan's status as sole owner on behalf of the Fisc of arable land in the Empire.

In the introductory paragraph of the *ḳānūnnāme* Ebū's Su'ūd attacks the 'mistaken suppositions' of *re'āyā* and even *ḳādī*s on the issue of land ownership:

> But in the previous Noble Registers, no attention was paid to the detailed circumstances of the land in the Protected Realms. No investigation or clarification was made of the essence and truth of the matter: whether [these lands] are *'uşrī* or *ḫarācī*, and whether or not they are the freeholdings of the occupiers. For this reason, the *re'āyā* thought that the lands in their possession were *'uşrī* lands and disputed payment of 1/8th [of the produce in tax]. They thought that these lands were their freeholdings (*mülk*) and bought and sold them among themselves in accordance with their own [mistaken] suppositions. Governors and judges were not aware of the truth of the situation, and immense damage was done to the good ordering of affairs and to the welfare of the people by their issuing, contrary to the *Sharī'a*, certificates of sale and purchase, and *vaḳfiyes*.[28]

In this *ḳānūnnāme* Ebū's Su'ūd repeats the juristic theory of land and tax which he had formulated in the *ḳānūnnāme* for Hungary. He identified Ottoman *mīrī* land with the Ḥanafī term 'royal demesne' (*aradī'l-mamlaka*) and distinguished between the real substance of the land and the usufruct. In his theory, the real substance was *de jure* the property of the Treasury and therefore, *de facto* the property of the Sultan on behalf of the Treasury.[29] The cultivators had acquired the ownership of the usufruct as a loan (*'arīyya*).[30] The *tapu* (entry fee) a new occupant paid for land to the *sipāhī* was identified as advance rent (*ücret-i mu'accele*).

In this interpretation it was legally justifiable to confiscate monastic *vaḳfs* where the capital consisted of arable land, as the monks had only the usufruct of this by way of a loan. They could not, therefore, convert the land to *vaḳfs* since it was not their freehold. They could, nevertheless, retain their right to the usufruct by paying *tapu* for what had previously been freehold property. In this way they could by paying *tapu* to the *sipāhī*, in this case, the Sultan, acquire the ownership of the usufruct. It is for this reason that the monasteries were required to pay *tapu* before they could re-possess their former trusts.

In the *ḳānūnnāme*, Ebū's Su'ūd includes a paragraph that was also applicable to the monasteries:

> ... None of these persons has the power to dispose [of their lands] in any way contrary to what is set forth. Their giving or taking freehold possession [of them] or making them *vaḳf*, by purchase, sale, gift or any other means are all void, and the documents proving title (*hüccet*) and *vaḳfiyes* which judges have issued to this effect are, every one of them, invalid ...

The major concern here was to curtail the cultivators' practice of treating land as freehold property which they could dispose of at will. For this reason, sale, pledge and deposit were strictly forbidden.[31] The monasteries' practice of obtaining certificates of validation of the conversion for landed properties to *vaḳf* was, therefore, illegal.

The two phases of the confiscation of monastic *vaḳfs* are recorded in two *firmāns*, the first from the Saint John the Theologian Monastery in Patmos (Aa40), 6 Cemāẕī'eş-aḫīr 977/17 November 1569 that initiates the confiscation, and the second from the Mount Athos Monasteries, 13 Şaban 976/25 January 1569, dealing with negotiations between the Porte and the monks on practical issues arising from the confiscation order. The fact that the *firmān* from Athos, although anterior to the one from Patmos, deals with the second phase of the case indicates that the process was slow and it was not initiated simultaneously for all monastic communities in the Balkans.

In the *fetva* included in the *firmān* Aa40 for Patmos, Ebū's Su'ūd lays out clearly which monastic *vaḳfs* are valid and which are not:

> When a legal opinion was sought from the *Müfti* of the Age in my Protected Realms, he issued the following *fetva*: 'It can never be valid for the *ẕimmīs* to make the fields and meadows which they have the use of, or their freehold vineyards, orchards, mills, houses and shops, *vaḳf* for their churches; it is a major offence; they should be confiscated. If the *ḳādīs* give a *vaḳfiye*, that too is absolutely invalid. If their founders or heirs are alive it is their freehold; they should take it and have the use of it and pay their *şer'ī* and the *'urfî* taxes to the *mīrī*. If their founders and heirs are not alive, all of it belongs to the Treasury. It should be confiscated, and must be sold for its (true) price to anyone who requests it. If the aforementioned persons have not made the aforesaid valid freeholdings *vaḳf* for their churches, but if they have made that *vaḳf* for the monks, the indigent, or for bridges and fountains; and, if the *ḳādīs* have judged their *vaḳfiyes* to be valid; and made a valid (entry in the) *sicill*, it is valid and *şer'ī*. They have the use of them on the said conditions and pay in full the *şer'ī* and *'urfî* taxes for each one of them'.[32]

There are therefore two possible scenarios: i) Properties were made *vaḳfs* for the monks, the indigent, bridges and fountains, ii) Properties were made *vaḳfs* for the churches. In the first case the donation is

valid and legal, provided the trust is recorded in a *sicill*. In the second case, all *vaḳfs* for churches are confiscated. If the *ḳādī*s had provided *vaḳfiyes* they were absolutely invalid. In the latter case the fate of the properties differed according to whether the founders or heirs of the *vaḳf* were alive or not: i) if the founders or heirs are alive then they could take back the properties and fulfil their tax obligations; ii) if the founder or heirs were not alive then all the properties belonged to the Treasury and should be confiscated and sold at the market price.[33] The legal arguments used to order the confiscation are evident. Monastic *vaḳfs* had offended two legal principles. Firstly, they consisted largely of rural land which, in Ebū's Su'ūd's definition, was *mīrī* land and secondly, such trusts were founded for the benefit of churches and monasteries.

Ebū's Su'ūd's ruling on the abolition of church *vaḳf* was not arbitrary: making a *vaḳf* for the benefit of a church contravenes basic Ḥanafī doctrines. As we mentioned before, there are two kinds of *vaḳf*: *vaḳf ḫairī*, endowments of a definite religious or public nature (mosques, *medreses*, hospitals, bridges, fountains), and *vaḳf ahlī* or *ḫurrī*, family endowments, for children or grandchildren or other relations.

Monastic *vaḳfs* cannot belong to the first category since their purpose was incompatible with Islam. They could therefore be created only as family *vaḳfs*, in which case, the 'heirs', besides the poor and travellers benefiting from the endowment, were the body of the monks residing in a monastery. Clearly, a definition in Islamic law of Christian religious endowments as family *vaḳfs* entails a number of problems and Ebū's Su'ūd was not wholly at ease in accepting this definition. This is evident in a *fetva* following an enquiry as to whether monks can bequeath properties to other monks residing in the same monastery:

> *Question*: Is it permissible for the monks in a monastery to bequeath the vineyards, houses and lands which they bought from the fisc, to the monks who will live in the monastery after them?
>
> *Answer*: Provided there are no heirs, and provided they bequeath all their property, apart from lands, to the monks living in the monastery; and provided the monks [in question] are limited to a well-defined group, whether they are rich or poor, their bequests are valid. No one from the fisc may intervene. If, however, they are innumerable and make up a large group, it is valid to make a bequest to all of them. It is necessary, in order that no one may intervene, to make the bequest to the poor among them. If they have heirs, these are able to refuse any [bequest] beyond the third [which the testator may freely dispose of]. They cannot interfere in the

> third. In this way, no one may intervene. If their heirs accept [this arrangement], it is in its entirety a valid bequest and no one may interfere. Nevertheless, a Sultanic decree is necessary in order to prevent anyone intervening in their lands.[34]

The first hurdle to be overcome, then, was the fate of properties in case of a bequest. In this *fetva*, Ebū's Su'ūd insists on imposing the Ḥanafī laws of inheritance on the monastic community. According to the *fetva*, only if all the remaining heirs of a deceased monk forgo their portion of the property, can the monks in a monastery inherit it. This would be almost impossible since inheritance, in Ḥanafī law, is not confined to direct descendants and each heir has a canonical right to a fixed share of the deceased's property. But, then, Ebū's Su'ūd specifies that in a case where there are no heirs alive, the whole estate can be bequeathed to monks living in the monastery, regardless of whether they are rich or poor, but on the condition that they are a *limited and well defined group*. If they are a large group, he continues, the bequest should be made to *the poor among them*. Unfortunately, the *fetva* is not dated and so we cannot be certain whether it was drawn up at the beginning of the process of confiscation or as a result of complications arising from it. In either case, Ebū's Su'ūd comes as closely as possible to recognising the monks as a collectivity, within the constraints of a legal tradition which does not recognise corporations as legal entities.

However, in the *fetva* incorporated in Selīm II's *firmān*, dated 31 January 1569, to the monks of Mount Athos, Ebū's Su'ūd is more daring. The monks requested the recognition of their Byzantine right to inherit *ab indiviso* and *in common* the properties of deceased or departing monks, threatening to vacate their monasteries and to deprive the Treasury of its taxes if their request was not granted. They made this request in order to safeguard their properties and trusts from arbitrary interference by local authorities wishing to extract more money:

> At the present time the monks of the monasteries on the shores of the peninsula of Ayonoroz in your *ḳadīlık* have presented a petition to the exalted Porte. 'Our *çiftliks* and vineyards and orchards, fields and mills and shops, houses and wine-shops, our animals and winter pastures in the plain of Longos and goats and all we have always possessed from old days, in part and in whole, up till now in the aforementioned *ḳadīlıks*, the *mülks* and animals of our monasteries [these] were [all] sold by the *mīrī*. By mutual co-operation, all of us have borrowed and acquired a debt of 14,000 golden coins. We, the monks who are living in our monastery, have taken possession

of the aforementioned lands and animals which we bought in order to hold, on the following condition. According to the previous decision none of the monks in our monasteries has the freehold of our aforementioned possessions (*emlāk*), fields, vineyards, wind mills, orchards, *çiftliks* and animals. They belong in their entirety to the monasteries in order to feed travellers. *Emīns*, *emīns* of the Public Treasury, *mevḳūfātçis*, *voyvodas* and *subaşıs* should not interfere in any way whatsoever with the aforementioned possessions and animals. When one of the monks in the monasteries dies or leaves for another region, the *emīns* and employees of the Public Treasury and the *mevḳūfātçis* and *voyvodas* and *subaşıs* should not come and bother the other monks, saying 'A monk died or left for another region. His property is missing, what happened to his possessions clothes and animals?'. If the previous decision is confirmed, in accordance with the Noble Commands in our possession from the time of the late Sultan, Sultan Murād Ḫan; and if an Imperial Confirmation is granted, each one of us will go out into the world and strive to collect *aḳçes* as alms, and all of us will pay the debt of 14,000 gold coins which we have as a loan. Each year in accordance with the customary *Ḳānūn*, we will bring the 70,000 *aḳçes* fixed on us as *ḫarāc*, and deliver them each year on New Year's day (March 22) to the Imperial Treasury. We have bought for 130,000 *aḳçes* from the *il-emīni*, in the manner set forth in the Noble Decree, our *çiftliks* in Limnos and other places which are outside the aforementioned monasteries. At threshing time we will give the tithe on our tithe-lands with the knowledge of the *ḳādī*, in accordance with the *vilāyet defter*. We will take the residue to the said peninsula in accordance with the Noble Command, and provide the means of subsistence to the people of the peninsula and to travellers. And if you do not order an Imperial document of confirmation to be bestowed according to the previous decision and if we again sell the possessions and we pay back the gold which we borrowed each one of us will be scattered all around the world and it is certain that our monasteries will be deserted and our taxes, which we have been customarily paying as *maḳṭu* each year, will be lost'.

When they said this, a noble *fetva* was issued on the matter ... You should examine the *vaḳfs* for ... their offspring, the indigent in the monasteries and travellers who come and go and those who serve them (?). What is raised from their revenues and expenses [bestowed]? After it has [been] made *vaḳf*, and delivered to the *mütevelli*, and after the *vaḳfiye* has been judged [valid] according to the *Sharī'a* no one may interfere ever. You should not change the conditions. But they are not their freeholdings. The fields and meadows, summer and winter pastures which they have received from the *mīrī* by *tapu* or which they have received by so-called "purchase" from the *re'āyā*, are all on the lands of the sovereign. They may never become the freehold of anybody, whether or not they are Muslims. The *re'āyā* have *taṣarruf* by way of rent, and are neither capable of buying or selling or

pre-emptying nor of any other way. In this matter, the *vaḳfs* of the aforementioned monks and their conditions are absolutely invalid. However *mīrī* has been merciful to the aforementioned [monks]. They should sow and reap the aforementioned meadows, pay the tithe like other *re'āyā*, and graze their animals in the summer and winter pastures. No one should interfere after they have paid their *muḳaṭa'as* registered in our Imperial *defter*. If one of them dies [his share] should not be given by *tapu*, on the grounds that he has his [own] share in the said places, [but] the rest of them should have *taṣarruf* of the deceased's share. It is permissible by the *Sharī'a* to ratify in this manner and for a noble decree to be given as set out in detail. No one should interfere provided that they do not transgress the Imperial *firmān*. The reason for interfering now is that they acquired private possession[s] by selling and buying royal domains from the *re'āyā* making them into so-called *vaḳf* of the monasteries, and acquiring hüccets and the *vaḳfiyes*. They were not paying the tithes obligatory by the *şer'*, but paying a tiny *muḳaṭa'a*. It is patently obvious they have damaged the Treasury of the Muslims, clearly acted contrary to the Noble *Sharī'a* and shamefully betrayed the glory of the Sultanate.[35]

The implications of this statement are of paramount importance. By denying the possible natural heirs of the deceased their share, Ebū's Su'ūd seems, at first sight, to oppose the Ḥanafī rules of inheritance. However, since the remaining monks of a monastery do not pay an entry fine (*tapu*) to acquire the usufruct of the land, in practice they are treated similarly to the son of a deceased peasant who can inherit his father's rights to the usufruct without any entry fine. The monks are not treated as outsiders, who would have to pay a *tapu* to the *sipāhī*. This amounts to the treatment of the monks in a monastery as a family. Like in a family trust they can make *vaḳfs* for the benefit of their poor members as well as for the indigent, travellers, the dependants of the monastery and their offspring, which means, in practice, the remaining monks. This is a fine example of Ebū's Su'ūd's ingenuity. He follows the Ḥanafī doctrines of inheritance, but re-defines the monks of a monastery as a family. He thus recognises their collectivity which was a basic element of Byzantine monastic tradition while, at the same time, ordering the monks to make *vaḳfs* in their own names and not in the name of the monastery.

Ebū's Su'ūd is aware of the implications of his concessions towards the monks of Mount Athos. He recognises the pitfalls of this legal 'technasma', and so hurriedly issued a *fetva* restricting similar claims from other monasteries. When he was asked whether monks could make a trust out of flocks, vineyards, orchards and mills for the

benefit of the poor and travellers, Ebū's Su'ūd answered that this was permissible provided it was not a trust for the benefit of the church and arable land was not donated.[36]

> *Question:* Some Christian subjects become monks in a monastery. The registrar of the province takes from them the flocks, vineyards, orchards and mills, which are in their ownership, and sells them back to them. If they convert the said property into a trust for the poor and travellers, can any outsider later interfere in the said trust?
>
> *Answer*: If what they have converted into a trust are things like animals, vineyards, mills or shops, and so long as they do not put them in trust for the monastery but in trust for the poor and travellers, no one may intervene. Fields and arable lands can never be [converted into] a trust, but they may receive them from the fisc on payment of a *tapu* tax, and no one may intervene, provided there is an entry in the [cadastral] register as follows: 'The monks should have possession [of the land] and, after they have paid all their dues like other subjects, no one may intervene. When monks die, the ones who take their place should have possession, and provided [the fields] are not [recorded] as trust.

In this *fetva*, Ebū's Su'ūd recognises the poor and travellers as beneficiaries of a *vaḳf*, which could not, however, be made out of arable land. So far, he follows the Ḥanafī rules on trusts and his own stipulations forbidding arable land to be converted into trusts. However, he then allows monks to be considered as a collective body, entitled to the same privileges as the beneficiaries of a family *vaḳf*, i.e. monks can receive property belonging to deceased monks without any interference by the local authorities, provided there is an entry in the cadastral *defter* stipulating that this is the case. What he does, in effect, is to disguise his ruling as if it derived uniquely from a cadastral register when, as we know, he would have been the one who advised the Sultan to include the said entry in the register, in the first place. This is the argument that must have been used to exclude small monastic communities from the privilege.

The conclusions to be drawn out of the confiscation of monastic *vaḳfs* in 1568–69 are quite interesting. It is obvious from the correspondence between the monks of Mount Athos and the Porte that the case we are dealing with was a mere rearrangement and redefinition of the conditions of an agreement by both sides. The issue of concern was the legal status of the monastic properties at the end of the sixteenth century in the Balkans. Of course, it was not solely an argument concerned with legalistic terms describing the ownership and the usufruct of lands and properties but mainly

represented the concern of the Ottoman administration at losing financial benefits through the irregularities in obtaining and exploiting land that belonged to the *mīrī*.

Ebū's Su'ūd recognised that traditionally monasteries operated as a collective body. Thus, when the monks requested to be treated as such, in particular on the issue of whether they should pay *tapu* tax in order to acquire the usufruct of the possessions of deceased or departed monks, he ruled in favour of the monasteries. His task was difficult since, firstly, monastic *vaḳfs* were not permitted in Islamic law and he would therefore have had to categorise them differently and secondly, this new categorisation would have to recognise the collective character of a monastic community. The solution he gave was both practical and legitimate. He categorised monastic *vaḳfs* as family *vaḳfs*, treating the monks of a monastery as the offspring of the deceased monks. By this legal fiction, monks can be treated as members of a family and thus, they can enjoy benefits such as the exemption from the requirement of paying *tapu*, in the same way as a son inherits the *tapu* on his father's possessions. Ebū's Su'ūd, however, tried to make sure that monasteries could not revert to their previous 'misconceptions'. He insisted that monks could convert their *mülks* to *vaḳfs* individually, but that monastic *vaḳfs* remained invalid. Ebū's Su'ūd's legal fictions employed in the confiscation of monastic properties is proof of his willingness to treat the incident as an administrative issue and justifies his fame as the jurist who reconciled custom with Islamic legal theory.

However, following the arguments of the first part of this article, it would be rather adventurous to claim that all monastic/church *vaḳfs* in the Empire were allowed to operate on the basis of the same legal device. Further research on *vaḳfs* from different regions of the Empire would allow us to acquire a more comprehensive view of the institution of *vaḳf*, provided, of course, that we relinquish the idea that Islamic legal theory in the Ottoman Empire was stagnant and unresponsive to the call of society in general.

## Notes

1 Richard Van Leeuwen, *Notables and Clergy in Mount Lebanon: The Khāzin Sheikhs and the Maronite Church, 1736–1840* (Leiden, 1994), 24.

2 Uriel Heyd, *Studies in Old Criminal Law*, V. L. Menage, ed., (Oxford, 1973); Joseph Schacht, *An Introduction to Islamic Law* (Oxford, 1966); Uriel Heyd, 'Some Aspects of the Ottoman Fetva', *British School of Oriental and African Studies*

32 (London, 1969), 35–56; Haim Gerber, 'Sharia, Kanun and Custom in the Ottoman Law: The Court Records of 17th-century Bursa', *International Journal of Turkish Studies* 2 (1981), 131–47.

3 Roland Jennings, 'Kadi Court and Legal Procedure in 17th century Ottoman Kayseri', *Studia Islamica* 48 (1978), 133–72; and Ibid., 'Limitations of the Judicial Powers of the Kadi in 17th century Ottoman Kayseri', *Studia Islamica* 50 (1979), 151–84.

4 Heffening, 'Waqf or Ḥabs', *EI1*, pp. 1096b–1098a.

5 Abū Yūsuf had accepted the endowment for oneself. The Shāfi'īs provide a legal device (*ḥīla*) to evade this condition: the thing which is to be the subject of the endowment is to be presented or sold at a low price to a third person. The latter can then create a trust in favour of the original owner. Ibn Ḥajar mentions a further subterfuge which is rejected by others: the *vakf* is created in favour of the children of the benefactor's father and in the deed he is described. Ibid., p. 1096b.

6 Joseph Schacht, 'Early Doctrines on Waqf', *60. doğum yılı münasebetiyle Fuad Köprülü Armağanı; Mélanges Fuad Köprülü* (Istanbul, 1953), 443–52.

7 Colin Imber, *Ebu'ssu'ud and the Islamic Legal Tradition* (forthcoming), 2

8 In particular, almost all the monastic archives in Mount Athos and in Patmos contain series of documents regulating the relationship between the Byzantine Emperor and the monasteries. Petitions for granting of privileges or favourable, for the monasteries, imperial intervention in case of a dispute with local clerical and lay dignitaries are commonly found. See, Era Vranousi, 'Byzantina eggrapha tes Mones Patmou' (Byzantine documents of Patmos monastery), (Athens, 1980), vol. 1; Nikolaos Oikonomidès, *Actes de Dionysiou = Archives de l"Athos* (Paris, 1968) vol. IV; Jacques Lefort, *Actes d' Esphigménou = Archives de l"Athos*, (Paris, 1973), vol. VI.

9 There is a extensive bibliography covering the role of the monastic communities as *pronoiarioi* (recipients of theoretically non-hereditary fiscal revenues in return for service) and the agricultural exploitation of monastic lands during the 13th and 14th centuries. See A. L. Thomadakis, *Peasant Society in the Late Byzantine Empire, a Social and Demographic Study* Princeton, 1977); P. Charanis, 'The monastic properties and the State in the Byzantine Empire', *Dumbarton Oaks Papers* 4 (1948), 53–118; G. Ostrogorsky, *Pour l'histoire de la féodalité byzantine* (Brussels, 1954), vol. 1; and *Quelques problèmes d'histoire de la paysanerie byzantine* (Brussels, 1956).

10 According to the *millet* system of autonomous self-government under religious leaders, the Orthodox Church found itself in a more powerful position than before. The church dignitaries were playing an important role when a delegation was sent to Istanbul to petition the Sultan. In the case of Patmos Monastery, the monks were collectively responsible for paying the taxes of all the *re'āyā* (peasant population, Christian or Muslim) of Patmos island, see, E. Zachariadou, 'Symbole sten historia tou Notianatolikou Aigaiou' (Contribution to the history of southeast Aegean) in E. Zachariadou, *Romania and the Turks, c.1300–c.1500* (London, 1985), 197.

11 P. Wittek and P. Lemerle, 'Recherches sur l'histoire et les status des monastères athonites sous la domination turque', *Archives d'histoire du Droit Oriental* 3 (1947), 428.

12 Ibid., p. 428.

13 Ibid., p. 430.

14 A. Fotić, 'The official explanations for the confiscation and sale of monasteries (churches) and their estates at the time of Selım II', *Turcica* 24 (1994), 43.

15 Ibid., p. 3. Ahmet Akgündüz, *Islâm Hukukunda ve Osmanlı Tatbikatında Vakıf Müessesesi* (Ankara, 1988), 173–4.

16 Fotić, 'Confiscation and Sale of Monasteries', p. 43.

17 See Eugenia Kermeli, 'The Confiscation of Monastic Properties by Selīm II 1568–1570' (unpublished Ph.D. thesis, Manchester, 1995).

18 The issue of dual ownership is dealt with by two *Şeyhü'l-islāms*, Ebū's Su'ūd in the *ḳānūnnāme* for Hungary in 1541 and Kemālpaşazāde in a *fetva*, both published in 'Ḳānūn-i Cedīd', Fuad Köprülü, ed., *Millī Tetebbü'ler Mecmuası* (Istanbul, 1913), 49–50 and 54–5 respectively. For the translation of the documents and the full argument see also, Imber, *Ebu'ssu'ud*, pp. 5–23.

19 Van Leeuwen, *Notables and Clergy*, p. 30.

20 Ibid., p. 30.

21 Ibid., p. 31.

22 For Serbia see Fotić, 'Confiscation and Sale of Monasteries', pp. 36–7; for Mount Athos Monasteries and Patmos Monastery see Kermeli, 'Confiscation', pp. 278–314.

23 See below, his *fetva* included in the *firmān* for Mount Athos monasteries.

24 Van Leeuwen, *Notables and Clergy*, p. 32.

25 For Ebū's Su'ūd's life see Imber, *Ebu'ssu'd*, pp. 6–19; Richard Cooper Repp, *The Müfti of Istanbul: A Study in the Development of the Ottoman Learned Hierarchy* (Oxford, 1986), 272–96.

26 Imber, *Ebu'ssu'ud*, pp. 20–44.

27 'Ḳānūn-i Cedīd,' ed Fuad Köprülü, *Millī Tetebbü'ler Mecmuası* (Istanbul, 1913), 49–50. For the islamization of Ottoman Laws see Halil Inalcik, 'Islamization of Ottoman laws on Land and Land Tax', *Festgabe an Josef Matuz: Osmanistik-Turkologie-Diplomatik* (Berlin, 1992), 101–18.

28 Ömer Lütfi Barkan, *Kanunlar*, pp. 298–9.

29 Imber, *Ebu'ssu'ud*, p. 74.

30 Barkan, *Kanunlar*, p. 298. The *ḳānūnnāme* for Thessaloniki and Skopie includes an addition to the one of Hungary. Ebū's Su'ūd tried to explain how 'tribute land' came into royal ownership. He does not follow the popular notion of the 'death of the proprietors'. Instead his interpretation depicts his strong sense of practicality attested throughout the monastic confiscation:

> There is another category which is neither *'uşrī* nor *ḫarācīye* as set forth above. It is called 'royal demesne' (*aradī'l mamlaka*), and in origin is *ḫarācīye*. However, if it were given to its owners (*ṣāḥib*), it would be divided on their

deaths among many heirs, so that each one of them would receive only a tiny portion. Since it would be extremely arduous and difficult, and indeed impossible to distribute and allocate each person's *ḫarāc*, the real substance (*raḳaba*) of the land has been kept for the Muslim Treasury (*beytü'l-māl-i Müslīmīn*), and it has been given to the *reʿāyā* by way of loan (*ʿarīyya*). It has been commanded that they cultivate and till and tend vineyards, orchards and gardens, and pay the *ḫarāc-i mukāseme* and *ḫarāc-i muwazzaf* for the produce.

31 For a *fetva* dealing with the same problem see, 'Ḳānūn-i Cedīd', *MTM*, 57.

32 Patmos. File. Aa40.

33 This was the case for all the properties belonging to Patmos Monastery as depicted in the *hüccets* of sale, see, Kermeli, 'Confiscation', Appendix.

34 Ertuğrul Düzdağ, *Sheyhülislâm Ebussuud Efendi fetvaları ışığiuda 16. asır Türk hayatı* (Istanbul, 1972), D.452, 103.

35 For the entire text of the *firmān* see Kermeli, 'Confiscation', Appendix.

36 Düzdağ, *Fetvaları*, D.453, p. 103.