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Prof. Tayyib Gökbilgin Hatıra Sayısı

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THE STATUS OF ORCHARDS AND FRUIT-TREES IN OTTOMAN LAW

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Özet:

Osmanlı toprak yasasında toprak tasarrufu ile o toprakta biten ağaçların tasarrufu, fiilen bir tek kişinin elinde olsalar bile, kanunen birbirinden ayrı olurdu. Bir kişi, bir başkasının toprağında ağaç dikse, toprak sahibinin o ağaçları kaldırmak hakkı olmazdı; ağaç sahibi ise ağaçlarının dibindeki toprağı işletmek hakkını kazanırdı. Bir kişi, bir yabani ağaç aşılasa, o ağaç kendi mülkü olurdu.

Halkın bu karışık kurallardan çıkardığı netice şu idi ki, ağaç dikmekle veya aşılamakla, hem ağaç hem ağacın bittiği toprak kendi mülkü olurdu. İşte halkın inandığına göre mîrî toprakta ağaç dikmekle ya da aşılamakla o mîrî toprak mülke çevirilirdi. Bununla birlikte bu halk kavramı Osmanlı yasasına aykırı olup 16 ıncı ile 17 nci yüzyıllarda halk ile devlet arasında bir çelişmeye yol açtı.

In his «Economic and Social History of Turkey» Professor Mustafa Akdağ made the observation that, in the period under discussion (1453-1559), «a factor encouraging the cultivation of orchards was the rule that ... with the planting of orchards or cultivation of trees ... a field ceased to be *mīrī* land and acquired freehold status.»[1] This remark highlights one of the most complex issues in 16th - century Ottoman landlaw - the status of orchards - but is, at the

1 Mustafa Akdağ, *Türkiye'nin iktisadî ve içtimaî tarihi*, vol. II, Ankara, 1971, p. 166.

same time, an over-simplification. It was a popular belief rather than a legal rule that planting orchards created freehold, but this belief undoubtedly stemmed from the complexity of the law itself.

The problem arose in the first place because Ottoman law, unlike many (most?) legal systems makes a distinction between the ownership of trees and the ownership of the land on which they grow. Furtermore, if a person planted trees on another's land, the owner of the land did not automatically acquire the ownership of the trees. In this respect, Ottoman practice accorded with the rules of *ḥanafī* law. In dealing with cases where a person erects buildings or plants trees on another person's land, the *ḥanafī* rules also start from the premise that that ownership of the land does not necessarily entail ownership of its trees or buildings. A landowner does not, therefore, automatically acquire possession of trees or buildings which another person has planted or built on his ground. He has, instead, two options. He may order their removal; or, if he fears that this may damage the soil, he may acquire ownership by compensating their owner with a sum equal to their value, this being the difference in the value of the land with and without the buildings or trees. The compensation is, in effect, a compulsory purchase[2].

The equivalent Ottoman law starts from the same premise as the *sharī'ah,* in that it distinguishes between possession of the soil and possession of the trees. This becomes clear in numerous *fetvās* and other legal records :

(1) *Question* : Zeyd plants a sapling in 'Amr's plot. 'Amr is unaware of this. Who, according to the *sharī'ah,* owns the sapling?
Answer : Zeyd.

[Kemāl Paşazāde]

In the next *fetvā,* the same rules apply :

(2) *Question* : New shoots sprout from the roots of saplings on Zeyd's land. They come up in the neighbouring plot belonging to 'Amr. According to the *sharī'ah,* who owns the shoots?

2 See al-Ḳudūrī, *Matn al-Ḳudūrī,* Cairo, 1957, 62.

Answer : Zeyd.

[Kemāl Paşazāde]

Since possession of the land does not determine possession of the tree, it follows that only the tree's owner has a right to its fruit[3] :

(3) *Question* : Branches from Zeyd's fruit-tree overhang the road. Passers-by pluck and eat the fruit from its branches. Is this legal?

Answer : No.

[Unattributed]

These answers conform to the *sharī'ah* insofar as they distinguish between possession of the ground and possession of the trees. It is, however, significant that in the first two answers Kemāl Paşazāde did not mention the landowner's canonical right to remove or buy the other man's trees. He did not do so, because it is at this point that the *sharī'ah* and Ottoman law part company, as another of Kemāl Paşazāde's *fetvās* demonstrates :

(4) *Question* : Bekr has trees on Zeyd's plot. Can he interfere with the land beneath those trees?

Answer : He can interfere with it (within a diameter determined by) the place where the sun casts a shadow at noon[4].

This answer seems to show that the possessor of the soil had no automatic right to remove or buy the trees, but that, in fact, the person who cultivated the trees had limited rights over the soil where they were growing, even where this belonged to another.

None of these questioners say whether the plots which the trees affected were freeholdings *(mülk)*, or whether they were leaseholdings on state *(mīrī)* or endowment *(vakf)* land. Since this lack of information did not prevent Kemāl Paşazāde from giving clear-cut answers, the implication is that the same rule affected both types

3 Excluding the portion due, usually as *'öşr-i meyva*, to the *sipāhī*, *vakf* or other recipient of taxes.

4 The midday shadow varies according to the season. The answer - if this translation is correct - is very imprecise.

of land: neither freeholder nor tenant could evict a person who had trees on his land. His replies, however, do not make it clear whether the trees themselves were freehold possessions of the cultivator, which his canonical heirs could inherit; or whether they were, in effect, leaseholdings which a fiefholder or *vakf*-adminstrator could later re-allocate by *tapu*. The complexity of the law on these questions was to cause problems.

There was, however, agreement on the principle that possession of cultivated fruit trees and possession of the soil were independent of one another :

(5) *Question* : There are fruit-trees on the *mīrī* land which is in Zeyd's possession, but nobody knows who grafted them. Is (possession) dependent upon (possession of) the land?
Answer : (The possession of) a grafted tree is independent of (the possession of) the land. If it has no owner it reverts to the Treasury.

[Ebū's-Su'ūd]

Furthermore, a person automatically acquired possession of any fruit-tree which they planted, or of any wild tree onto which they grafted new stock :

(6) *Question* : Zeyd grafts (new stock onto) trees growing wild on *mīrī* land. Do they belong to Zeyd or the fief-holder?
Answer : To Zeyd. He gives the fief-holder his due as (a tax called) *fidān bahāsı*.

[Ebū's-Su'ūd]

This ruling confirms a clause in the *ḳānūnnāme* of Süleymān I[5], which also ruled that a person who grafted new stock onto wild trees acquired freehold possession :

(7) If someone grafts the wild fruit-trees which are growing on the mountains and in the forests with the foreknowled-

5 I owe both the reference and the translation of this passage to T.C. Stanley.

ge of his *sipāhī,* (these trees) become the freehold *(mülk)* of the man who grafted them : that person is to gather their fruit and he is to pay the tithe.

However, undisputed freehold status belonged only to wild trees onto which a cultivator had grafted new stock. This contrasts with the *ḳānūnnāme*'s ruling on mature walnut trees growing on *mīrī* land, whose entire produce, it appears, went to the fief-holder, so long as it was not on a peasant's holding :

(8) There is no dispute about a mature walnut-tree which is not on a *raʿiyyet*'s holding : it belongs to the fief-holder.

On the retirement or removal of the fief-holder it would revert to the Treasury. Essentially the same rule applied to wild chestnut trees :

(9) Natural, self-propagating chestnut-trees in the mountains belong to the Treasury *(beglik)* : they are at the disposal of whoever holds the *timar.*

The status of trees planted to from an orchard was more complex. They did not become the freehold possession of the cultivator, but they did limit the *sipāhī*'s or the *vaḳf*'s rights over the land. He could not convert the orchard to arable, nor could he evict a tenant on the land who continued to pay rent, even if, by that time, no trees remained. Fruit trees which were not parts of a legally defined orchard conferred no such privileges :

(10) In a case where a *sipāhī* grants *vaḳf*-land or *mīrī* land by a *tapu*-contract along with (the right) to make it into an orchard and the person concerned makes it into an orchard if the trees have been sited (so close) to one another (that) the ground between them cannot be tilled, (the land) is classified as an orchard, (but) if a ploughing-team can enter the space between (the trees) and it can be tilled, (the cultivators) are to pay the tithe on the fruit.

If (the land) is classified as an orchard, it is not permissible for the *sipāhī* to say, «I am going to add (this

land) to the arable land. Cut down your trees», whether the period (since its planting as an orchard) has been long or short. He must either charge a (cash-)rent in lieu of tithe or he must levy the tithe on the fruit (from the orchard in kind) ... Thereafter, if, with the passage of time, no trees are left, the *sipāhī* cannot break (the *tapu*-contract) and add (the orchard) to the arable land again, unless its owner is unable to pay the rent and renounces his right to it. In that case the *sipāhī*, if he so wishes, may grant it again for cultivation as an orchard, (or), if he wishes, he may grant it for arable cultivation[6].

It seems, therefore, that wild trees belonged to the Treasury, as did fruit or nut-trees when nobody knew had planted or grafted them in the first place. These wild and mature trees were simple *mīrī* possessions, forming part of a *timar* and liable to redistribution by the state to new fief-hoders, or by fief-holders to their *reʿāyā*. A *fetvā* of Kemāl Paşazāde confirms this :

(11) *Question* : Zeyd leases by *tapu* a plot of land together with its fruit-trees. Can the next *sipāhī* (to hold the fief) take the trees?

Answer : Yes, he can. The *tapu* on trees is not in perpetuity. The *sipāhī* allocates them by *tapu* for (the duration of) his own time (as fief-holder).

However, if anyone grafted new stock onto a wild tree, it became his freehold possession. Trees classified as belonging to an orchard were not the freehold possession of the *raʿiyyet* who cultivated them; but the fief-holder could not order their removal, nor could he evict a tenant from an orchard or former orchard so long as he continued to pay rent.

Given the complexity of these regulations, it is not surprising that there were many disputes concerning fruit-trees. There was a popular, and quite understandable belief that any tree was the freehold possession of its cultivator. Furthermore, anyone who cul-

6 I owe both the reference and the translation of this passage to T.C. Stanley.

tivated a tree gained effective, if not legal, control of the ground beneath[7]. A logical conclusion from these premises is that, by planting fruit-trees, a person gained actual freehold possession of that piece of land. This was in fact a widespread belief. People thought, therefore, that by planting fruit-trees they could legally convert *mīrī* land to *mülk,* which would then pass out of the control of the fief-holder or *vakf* and descend to their canonical heirs. It is conceivable that aloose interpretation of the rule of the *sharī'ah* that any person who cultivated waste land «with the permission of the *imām*» thereby became owner of that land, reinforced the view that this was, in fact, the law. It was not :

(12) *Question* : Zeyd digs ditches and irrigation channels around a plot of *mīrī* land, in which he plants and cultivates fruit-trees. According to the *sharī'ah,* does the plot become Zeyd's freeholding and descend to his heirs?

Answer : The plot does not become freehold, but his heirs have the usufruct.

[Ebū's-Su'ūd]

Planting fruit-trees does not create a freeholding but, in Ebū's-su'ūd's view, a hereditary tenancy. His answer, however, leaves a problem. It is not clear whether the heirs *(verese)* are the canonical heirs of the *sharī'ah* - in which case, the hereditary tenancy would somewhat resemble a freeholding -, or whether they are the direct male heirs - in which case the hereditary tenancy would be no more than a normal *çift*-holding. In either case, however, the land would remain *mīrī* in law.

In 1547, the Imperial Dīvān issued a set of instructions to the *ḳāḍīs* of Edremid and Ayazmend which, assuming that the deceased *re'āyā* had themselves planted the disputed trees, are both more precise and more obviously restrictive than Ebū's-su'ūd's ruling :

(13) A command to the *ḳāḍīs* of Edremid and Ayazmend : The bearers of this command - the persons called Ca'fer

7 See no. (4) above.

and Ferhād - have come to my Exalted Court and presented the following petition :

> They are both *sipāhīs* holding *timars* in the aforementioned *ḳāḍīliks*. Some of their *reʿāyā* who are recorded in the Land Register have died leaving no sons or brothers. The lands which they held have consequently become due (for re-allocation) by *tapu* in accordance with the *ḳānūn*. However, the relatives of the deceased are preventing them from allocating (the land) by *tapu*, on the grounds that it has become their freehold property, simply because some fruit trees have been planted there.

Now I have commanded that as soon as (Caʿfer and Ferhād) arrive with my Noble Command, you should summon the contestans in the case, and make a thorough and truthful investigation, finding out (whether the case is as set out below) :

> Their aforementioned *reʿāyā* died, leaving no sons or brothers. Consequently the land which they had held became due (for re-allocation) by *tapu*, in accordance with the *ḳānūn*. They had, in fact, no established freehold rights recorded in the current Imperial Land Register. The lands were cultivated and guarded, and subject to the tithe. Nevertheless, (the relatives) are preventing their (re-allocation by) *tapu*, simply because a few fruit-trees have been planted there.

If this is so, you should forbid (it) and prevent (it), allowing nobody to act contrary to the *sharīʿah* or the *ḳānūn*. You should award such places to these (two *sipāhīs*), so that they can allot them by *tapu* to whomever they wish.

According to this ruling, neither the land nor the trees are freeholdings, nor can the canonical heirs inherit the tenancy. In the absence of direct male heirs, the *sipāhīs* are free to re-allocate the entire holding, both trees and soil. It is, in fact subject to the standard laws governing *çift*-holdings :

(14) (The holders) retain possession (of the *çifts,* cultivating them) as they wish, until they die. Then their sons inherit their positions ... If they have no sons, (the land) should, for an advance rent, be given by *tapu* to someone who is capable of cultivating it.

[Ebū's-Su'ūd]

The Dīvān's ruling, however, did not preclude the possibility of extending an existing tenancy or of acquiring a new one by planting or grafting trees on vacant, or even occupied land. Its effect is to prevent a person converting *mīrī* to freehold land by planting trees, and to prevent such lands descending to anyone except sons or brothers.

Nevertheless, arboriculturalists evidently continued to believe that their trees conferred freehold status on the land, since the same problem occurs in the 17th century. Some would-be heirs even claimed entitlement to land because trees were growing there wild:

(15) *Question* : Zeyd has possession of a field (belonging to) a *vaḳf,* where trees, which he did not himself plant, are growing wild. Zeyd dies without children. The *mütevallī* of the *vaḳf* wishes to re-allocate the trees and field by *tapu.* Zeyd's heirs claim that (the property) devolves on them, simply because there are trees growing in the field. Can they prevent (the *mütevellī*) from allocating (the property) by *tapu* and retain it for themselves?

Answer : No.

[Meḥmed Bahā'ī]

Another of Bahā'ī's *fetvās* discounts similar claims by canonical heirs :

(16) *Question* : Zeyd dies. The fields which he possessed and the trees growing wild in them become due for (allocation) by *tapu.* The fief-holder gives the fields and trees, by *tapu,* to Zeyd's

daughter, Hind. Can the other heirs intervene, claiming that they too have (a right) to a share of the said trees' produce?

Answer : No, so long as the trees are not freehold.

The deceased's daughter was, of course, a canonical heir, but she received the holding by virtue of a *tapu* from the fief-holder, not by virtue of her rights according to the *sharī'ah*. In his answer, Bahā'ī re-iterates the principle that the existence of trees on a *mīrī* or *vaḳf* holding in no way benefits the canonical heirs. His qualification, however, recognises the fact that possession of trees did not depend upon possession of land and that there was, therefore, a possibility that the deceased had held the tenancy of the land, which the fief-holder could then re-allocate, but the freehold of the trees, a share of which the canonical heirs could then claim.

In most cases, no doubt, both land and trees belonged to the same tenant or freeholder, However, since land and trees could belong to different persons and be subject to different types of ownership, it would have helped if all records of the transfer of tenancy or freehold showed the land and trees separately. This thought obviously prompted the following question to Şeyḫ ül-İslām Yaḥyā :

(17) *Question* : With the knowledge (and consent) of the *sipāhī*, Zeyd transfers the field which he holds to 'Amr. Does the transfer also include the fruit-trees which grow in that field, if they are not (specifically) mentioned?

Answer : Yes.

Yaḥyā's reply is legally correct, since if the same tenant held both the trees and the land, the transfer would automatically include both, in the absence of an agreement to the contrary. However, not to mention the trees separately could clearly lead to disputes, for example, between a new tenant and the former tenant's heirs. It is possible, in fact, that Yaḥyā did not base his answer on practical considerations, but on an analogy with the law of sale in the *sharī'ah* even though no sale is involved here. The manuals of *fiḳh* rule that the sale of land automatically comprises the trees and buildings on it, even without a specific mention.

Summary

It was a principle of Ottoman law that the owhership or tenancy of land and the trees on it were separate legal entities even if they were, in practice, in the possession of the same person. In cases of dispute trees had precedence over land: if a person planted trees on another person's land they remained in his possession and, furthermore, he gained the use, although not legal possession, of the land immediately beneath the tree. The law did not, it appears, require him to compensate the holder of the land. A person could also gain freehold possession of a wild tree by grafting onto it new stock. These rules gave rise to a mistaken, but quite understandable, popular belief that, by planting and cultivating trees, a person could gain freehold possession of the land. This caused local disputes over the ownership and tenancy of land and trees. It also caused a conflict between the state and individuals. People believed that by planting trees on *mīrī* or *vaḳf* land they thereby acquired the freehold. The state, on the other hand, refuted any such claim. It clashed with the fundamental principle of maintaining as large an area as possible of *mīrī* land. Any conversion of *mīrī* land to freehold meant the loss of revenue sources for distribution as *timars*. However, the popular belief that trees, and sometimes even wild trees, created freehold persisted and may, in some areas, have gained acceptance as law. However, the central government and the *fetvās* of successive Şeyḫ ül-İslāms continued to declare this to be illegal.

NOTES

Periods of office of Şeyḫ ül-İslāms mentioned:

Kemāl Paşazāde	1525-1534
Ebū's-su'ūd	1545-1574
Zekerriyāzāde Yaḥyā	1622-1623; 1625-1632; 1634-1644
Meḥmed Bahā'ī	1649-1651; 1652-1654.

Texts and references

Abbreviations used:

JRL 39: John Rylands Library, Manchester, Turkish MS no 39 (The *fetvās* of Kemāl Paşazāde and others; copied about 1600)

JRL 145: John Rylands Library, Manchester, Turkish MS no. 145 (A *ṣukūk-nāme*, compiled and copied after 1625. The section containing *fetvās* of Ottoman Şeyḫ ül-İslāms has no folio numbers)

Düzdağ : M. Ertuğrul Düzdağ, *Şeyhülislâm Ebussuûd efendi fetvaları,* İstanbul, 1972

MTM : *Millî tetebbüʿler mecmūʿası,* volume 1, İstanbul, 1331/1913

(1)

مساله زيد عمروك يرنه عمروك معرفتسز فدان دكسه شرعا اول فدان كمك اولور الجواب زيدك اولور

JRL 39, 364v

(2)

مساله زيد يرى اوزرنده اولان ميوه اغاجلرينك كوكندن جوارنده اولان عمروك يرى اوزرنده فدانلر چقسه شرعا اول فدانلر كمك اولور الجواب زيدك اولور

JRL 39, 364v

(3)

مساله زيدك ميوه اغاجلرينك بوداقلرى يوله جقوب يولدن كچن كنسه‌لر يوله چقن بوداقلردن ميوه سنى الوبله ا كل اتسه حلال اولورمى الجواب اولمز

1. Text : دفلرين

JRL 145

(4)

مساله زيدك يرى اوستنده بكروك اغاجلرى اولسه اول اغاجلرك دينه دخل ايده‌بلورمى الجواب كون اوزرنده زواله كونك كولكه‌سى دوشدوكى يره دخل ايده‌بلور

JRL 39, 364v; JRL 145

(5) Düzdağ no. 830

(6) Düzdağ no. 832

(7) Unpublished edition and translation of the *ḳānūnnāme* of c. 1540, by. T.C. Stanley. The passage occurs in the L manuscripts of Uriel Heyd's classification (see Uriel Heyd, ed. V.L. Ménage, *Studies in Old Ottoman Criminal Law,* Oxford, 1973, 36)

(8) *Ḳānūnnāme* of Bāyezid II, ed. M. ʿĀrif, *Tarīh-i ʿosmānī encümeni mecmūʿası,* supplement, 1326/1908, 14.

(9) op. cit., 15

(10) *Ḳānūnnāme,* ed. and trans., T.C. Stanley.

(11) MTM, 336

(12) Düzdağ 829

(13) Text in Mustafa Akdağ, *Türkiye'nin iktisadî ve içtimaî tarihi,* Ankara, 1971, 167n.

(14) Ebū's-suʿūd, *Üsküb ve Selānīk ḳānūnu,* text in O.L. Barkan, *Kanunlar,* İstanbul, 1943, 299

(15) MTM 336

(16) MTM 335

(17) MTM 336-337