Keeping Usufruct in the Family

Popular and Juridical Interpretations of Ottoman Land Tenure Law in
Damascus

*Conserver l'usufruit dans la famille. Interprétations populaires et juridiques du
droit ottoman sur la propriété foncière à Damas*

*في حفظ الانتفاع في العائلة: التأويل الشعبي والقانوني لفقه القانون
العثماني للملكية العقارية في دمشق*

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Popular and Juridical Interpretations of Ottoman Land Tenure Law in Damascus

Malissa TAYLOR

This article will investigate how—prior to the era of Ottoman Reform known as the *Ṭanzīmāt*—the cultivators in the countryside around the city of Damascus transmitted their cultivation right, or usufruct, from one generation to the next. From the 16th to the mid-18th centuries, the issue of who was eligible to claim the usufruct of a deceased cultivator was fairly inseparable from the issue of labor: indeed, a cultivator was considered eligible because he was considered capable of performing the labor of cultivation. In the middle of the 18th century, the criteria of eligibility changed fairly abruptly, for the Damascene muftis no longer spoke of how a candidate needed to be capable of working the land, but rather identified which of a number of surviving relatives, associates or fellow villagers of the deceased was “most deserving” (*aḥaqq*) of succeeding the cultivation right. In this new approach, all references to the ability to cultivate ceased. The question was no longer, who is best able to make the land productive, but rather, which person is most entitled to benefit from the wealth that the land provides? The article contends that this transformation was in large part due to the complaints of the cultivators themselves, whose petitions to the Ottoman government in Istanbul wrought a change in imperial policy that eventually made its way into the *fatwa*-s of the muftis of Damascus.

In their pioneering investigation into the concept of usufruct in Ottoman Greater Syria, Martha Mundy and Richard Saumarez Smith argue that the muftis’ understanding of the cultivation right underwent an evolution from the 16th to the 19th centuries.¹ In summary, the right was understood in the 18th century primarily as an appointment by the sultan, but in the 17th and 18th centuries it came to be understood as a right arising from labor invested in the land. The muftis of the 19th century, however, rejected the view that labor upon the land earned or perpetuated the right to cultivate. Rather, the eminent scholar and jurist Muḥammad Amīn Ibn ‘Ābidīn (1784-1836) held that usufruct was an immaterial right (*ḥaqq muğarrad*) over property. This article focuses on how usufruct is transmitted rather than the origin of the right *per se*. As a result, it traces a history of usufruct that is distinct from that documented by Mundy and Saumarez Smith, but related. As noted

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1. See MUNDY & SAUMAREZ SMITH 2007.

above, the article maintains that the ability to perform labor was a crucial element of a cultivator's eligibility for usufruct until the middle of the 18th century. As a result, whether the right was conceived as deriving from sultanic delegation or from labor expended, the ability to perform the physical toil of cultivation was the requisite qualification for claiming usufruct. It seems possible that the muftis' abandonment of this criteria in the latter part of the eighteenth century had something to do with Ibn 'Ābidīn's revised views about the origins of usufruct: if a woman who was incapable of cultivating had more right to the usufruct of her deceased father than her able-bodied uncle or cousin, such a right implied that there was no straightforward connection between labor and usufruct.

The Legal Configuration of Inheritance, Transmission of Usufruct, and Eligibility

As A.K. Rafeq has shown through information obtained in the court records of Damascus, the agricultural land surrounding the city was "mostly *mīrī* or *waqf*, and could not as such be owned by individuals as freehold."² While there has been some question as to whether the Damascene '*ulamā*' were uniformly convinced that the *ḥarāğ* lands of Syria had been converted to *mīrī*, even a cursory glance at the city's court records will confirm Rafeq's conclusions.³ Whatever academic debates about the status of the land were perpetuated by the '*ulamā*', the court records consistently show that agricultural land was treated as either *mīrī* or *waqf*, and that cultivators did not own it as *milk*, but rather possessed a right of cultivation, or usufruct, that the imperial muftis of Istanbul and sometimes, those of Damascus also, referred to *ḥaqq al-tasarruf*. More commonly, however, the Damascenes called this right *mašadd maska*, a term whose origin is obscure, and which may or may not have predated the Ottoman conquest of the Bilād al-Šām in 1516.⁴ *Mašadd maska* referred to the peasant's right to plant on land that was owned by the state treasury or a *waqf*. So long as the peasant cultivated continually the land upon which he had the *mašadd maska*, his right to plant in that place could not be taken away by the authorities or challenged by any other cultivator. However, if the peasant quit working the land for three years, the muftis ruled, he lost his *mašadd maska*, and it could be given to another. In these respects, the usufruct of Damascus was identical to that formulated by the jurists of Istanbul.

A further requirement that muftis in Damascus and Istanbul universally acknowledged to was that for a transfer of usufruct from one cultivator to another to be valid, the appropriate representative of the sultan or the *waqf* had to explicitly permit it.⁵ On *mīrī* land this person was either a holder of a *timar* or *zeamet*, or a representative of the Damascene

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2. RAFEQ 1992, p. 307.

3. for this debate see JOHANSEN 1988 and CUNO 1995.

4. see MUNDY & SAUMAREZ SMITH 2007, p. 248 note 66.

5. see IBN 'ĀBIDĪN, '*Uqūd*, II, p. 201, where Ḥāmid al-ʿImādī demonstrates the unanimity on this issue by invoking names of famous pre-Ottoman Hanafis like Ibn Bazzāz, famous Ottoman Hanafis like Ibn Nuğaym, and the famous Ottoman *Şayḫ al-Islām* Ebu Su'ud Efendi.

treasury. On *waqf* land, it was generally either the *mutawalli* or the *nāẓir* of the *waqf* who had the authority to grant or withhold permission. The Damascenes frequently referred to this authority, whether a *waqf* officer or a *timar* holder, as the *mutakallim* *‘alā-l-arḍ*. In theory, the *mutakallim*’s oversight of *mašadd maska* transfers meant that the interests of the *waqf* or the treasury were protected. For if an able bodied cultivator proposed transferring his *maska* to someone who was not fit to plow and would decrease the land’s productivity, the *mutakallim* could refuse to allow it. Whether or not the *mutakallim*-s took seriously this duty to maintain productivity, most of them were interested in the fees that they could charge the cultivators for permitting the transfer. The *qānūn* specifically authorized the *sipahi* or *waqf* administrator to take the fee called *tapu* in Turkish, a word which began to be seen in Damascene jurisprudence starting in the 18th century.

The situation was somewhat similar in the matter of what was to be done with the usufruct of a cultivator who died; the transmission (*intiqāl*) of the usufruct of the deceased to a successor had to take into account not only the interests of the cultivators, but also what was in the interest of the state or *waqf*. In a number of cases, the heirs of a deceased *maska* holder appeared before the mufti to ask if *mašadd maska* was subject to the same rules of inheritance that governed freehold property. What the muftis of Damascus and Istanbul both agreed upon was that the cultivation of the land was not part of the *irt̤*, or the possessions of a deceased individual that were subject to the law of inheritance. In both the imperial and the local traditions of jurisprudence, a son or sons that survived their father took the usufruct in its entirety, and the claims of all other family members were invalidated. The legal reasoning behind this procedure rested on the consensus among the muftis that *mašadd maska* was not *milk*, and hence could not be bought, sold or inherited.⁶ Rather, *mašadd maska* passed or was transmitted (*intaqala*) from one generation to the next, preferably from father to son.

In the 17th and early 18th centuries, other relatives of the deceased cultivator, particularly close female relatives, were oftentimes unaware of how this distinction between *milk* and *mašadd maska* affected their claim upon the latter. Daughters in particular knew that their fathers had possessed *mašadd maska*, and they presumed that it, like all other things of value, formed part of their father’s estate and subject to the Islamic laws of inheritance. For the cultivators, *mašadd maska* was a valuable resource; for many of them, it may have been among the most valuable of assets that they possessed. Despite the restrictions on its transfer, it could be alienated and did have an exchange value. A court record from October 8th, 1692, attests that a man named Muṣṭafā from the village of Duma had transferred his usufruct to a certain ṣayḥ Muḥammad for the sum of one hundred *qurūṣ*; if Muṣṭafā was a cultivator as his lack of title implied, this was a considerable sum of money.⁷ According to Rafeq, when rural estates of dwellings, animals, produce, and *mašadd maska* were sold, the *mašadd maska* accounted on average for 30 % of the value of the entire estate in 1700

6. See ‘Abd al-Raḥmān al-‘Imādī’s formulation in IBN ‘ĀBIDĪN, *‘Uqūd*, p. 198.

7. Damascus Šarī’a Court, v. 20, f. 62-3, case 209.

and 46 % in 1724.⁸ To have such a valuable item excluded from the laws governing the partition of a cultivator's estate may have made sense from a legal perspective wherein *mašadd maska* was not *milk*, but to family members who expected to share in the estate, it was objectionable.

The famous mystic and scholar 'Abd al-Ġanī al-Nābulusī (1641-1731) gave a *fatwa* recounting that after a male cultivator died, his wife and daughters told the *sipahi* that they inherited the *tasarruf* of the lands of the *timar*. The questioner continued, "but is it [the case] that the land of the *timari* cannot be inherited, but rather the right of *taşarruf* in it devolves (*intaqala*) to the sons of the deceased man, excluding the females? And if the deceased had no male children then the *timari* appoints it to whom he wishes just as the sultan has appointed it to him?"⁹ Nābulusī answered that the questioner was right, and quoted from a *fatwa* of the mufti Ismā'īl al-Ḥā'ik (d. 1701) that had become a definitive statement on the subject: "*mīrī* lands are the lands of the treasury, and they are not inherited, but rather it is for the one deputized by the sultan to direct them to those among men who are capable of cultivating them and women have no part in them."¹⁰ In other words, men are cultivators, women are not. Only cultivators are eligible to take the cultivation right; if the deceased cultivator was not survived by a son, no daughter or other female relative could claim the *mašadd maska*, for they could not cultivate the land.

It is Ismā'īl Efendi's last phrase, "those who are able to cultivate [the lands]" that should give us pause. The Arabic, "*al-qādirīn 'alā iṣlāḥ-ha*," might also be translated as "able to make [the lands] thrive or flourish." What is noteworthy is that Ismā'īl al-Ḥā'ik's understanding of who was eligible to claim the usufruct when no son survived is remarkably similar to that which the Ottoman Ṣayḥ al-Islām Ebu Su'ud Efendi expressed in the *Qānūnnāme* of Budin. This text, one of the very first to explain in detail Ebu Su'ud's vision of Ottoman land tenure, dates to roughly 1541. The text noted that when cultivators died "their sons will take their proper places" and cultivate as their fathers did.¹¹ If no sons remained then "persons from the outside capable of making [the lands] flourish (*ḥārij'den ta'mire qādir kemesneler*)" would be awarded the *taşarruf*. While Ebu Su'ud did not specify that these persons must be male, or state explicitly that daughters could not take their father's place like sons, the *Qānūnnāme-i Osmānī* of Sultan Sulaymān did specify that daughters were not eligible to obtain *tasarruf*: "If a cultivator dies without a son, but a daughter remains and claims 'this land was my father's, and therefore I have come [to claim it]," the *sipahi* is forbidden to give the land to the daughter."¹²

The views of Ḥā'ik and Nābulusī were not only similar to those expressed by Ottoman jurists and bureaucrats, but appear to have been in the mainstream of Hanafi thought. The Damascene rulings as well as those of Ebu Su'ud Efendi and the Ottoman *Qānūnnāme*

8. RAFEQ 1992, p. 310-311.

9. AL-NĀBULUSĪ, «Fatāwā», f. 176.

10. AL-ḤĀIK, "Bāb *mašadd maska*", f. 9b.

11. "Osmanlı kanunnameleri", *Milli Tettebbular Mecmuası*, 1903 (hereafter MTM), p. 50.

12. AKGÜNDÜZ 1990, p. 309. Ottoman as rendered by the editor: "Ve dahi bir ra'yyet fevt olub oğlu kalmasa kizi kalsa, dahi atam yeridir, hakkından gelürüm deyü taleb eylese, sipahi yeri kızına vermek memnû'dur."

were consistent with the predominant opinion among the Hanafi *‘ulamā’*. Let us consider the principles of succession as expressed in Ibn Nuğaym’s *al-Tuhfa al-Marḍiyya fi-l-Arāḍi al-Miṣriyya*. Ibn Nuğaym (1523–63), the great *‘ālim* of Egypt, wrote that if a cultivator died or became unable to plant on treasury land, the head of state was authorized to direct the land to “whoever is capable of cultivation.” Ibn Nuğaym notes that a number of other authoritative Hanafi sources also embrace this view.¹³ The reason that the sultan or his representative has such authority, he wrote, was that keeping the land under cultivation was a matter of critical importance for the entire community: “There is a general benefit for the Muslim community in *ḥarāğ* (the tax on agriculture), and if it’s attenuated, there is a general harm to the Muslim community. Hence it is permitted to deflect such harm by renting the land [to someone else] or giving it to sharecropping.”¹⁴ Keeping the land in the hands of those with the ability to cultivate and thereafter to remit the necessary taxes was not a specifically Ottoman priority, but a priority widely held among Hanafi scholars, who saw it as crucial to the maintenance of the political and social order.

Still, none of the *‘ulamā’* above explicitly linked the inability of women to obtain their father’s usufruct with the necessity of cultivation on *waqf* or *mīrī* land. It was for the great Damascene mufti Ḥāmid al-‘Imādī (1692–1758) to explicitly relate why the preservation of the land’s productivity precluded women. Ḥāmid al-‘Imādī was the scion of a prominent dynasty of Damascene scholars and muftis. He was widely revered in the city, and held the appointment as the Damascene Hanafi mufti from 1725 to 1758 with the exception of a ten month period.¹⁵ In a short treatise, he wrote that he was not exactly sure why women could not inherit (*tarīḥ*) *mašadd maska* as men do but that he had consulted the *fatwa*-s of his forefathers and they were in nearly unanimous agreement that women were excluded from usufruct. He noted that there was one important exception among his family members, namely his father ‘Alī Efendi al-‘Imādī (d. 1706). According to ‘Alī Efendi, a woman “inherits *maska* if there are plants in the earth. If [her father] left no loosened dirt, no manure and no plants but she has plowed, tended and made it able to support cultivation, then the right to remain known as *mašadd maska* is thereby proven.”¹⁶ In short, ‘Alī Efendi al-‘Imādī suggested that a woman could in fact be a cultivator, and if she was cultivating, she could ‘inherit’—as Ḥāmid al-‘Imādī put it—the *mašadd maska* like a man.

Ḥāmid al-‘Imādī noted that he, his paternal uncle and the rest of his ancestors did not make such rulings, and suggested that he categorically rejected that women could ‘inherit’ *mašadd maska* under any circumstances. However, it became clear as he developed his thoughts on that matter that his position was closer to his father ‘Alī Efendi’s than he first admitted. After noting that he did not hold with women inheriting usufruct, he went on to make an analogy that explained why women were ineligible. Inheriting usufruct, he maintained, was like inheriting governance over a slave (*walā’*). “Women do not inherit

13. IBN NUĞAYM, *Tuhfa*, p. 53.

14. *Ibid.*

15. MURĀDĪ, *Silk*, II, p. 13.

16. IBN ‘ĀBIDĪN, *Uqūd*, II, p. 205.

walā' because it is a mere right (*ḥaqq muğarrad*) and women are not among the people of *ḡihād*. Likewise, the *maska* is a mere right, and women are not among the people of cultivation (*ahl al-zira'a*). Hence, if a woman purchased a slave and manumitted him or, if she waged *ḡihād*, took a captive and then emancipated him and he died, then she would have *walā'* of him because she became qualified (*ta'ahhalat*) for this by her purchase or her *ḡihād*. It is thus if a man transfers his *mašadd maska* to her or she plows and claims a *maska* in a *šar'ī* way because she became qualified for it and became one of those who plow."¹⁷ In summary, women as a rule did not work the plough, which was the operative condition of being eligible for inheriting usufruct. Nevertheless, a woman could obtain *mašadd maska* in other ways, by transfer or by doing the cultivating. While Ḥāmid Efendi still differed from his father 'Alī Efendi on the matter of inheritance, he agreed with the latter that some women might in fact cultivate.

Despite the fact that custom and law both discouraged it, women did manage to attain *mašadd maska* in some circumstances. Even when they did so, however, their right could be and was challenged solely on the basis of their gender. The mufti 'Alī al-'Imādī gave a *fatwa* in a case where a woman was described as laying her hand on a piece of land belonging to a *waqf*.¹⁸ The *fatwa* noted that the woman had taken possession of the plot with the permission of the *waqf's mutawalli*, acting as the land's *mutakallim*. The *fatwa* did not specify whether she worked the land herself, but it noted that she had paid the taxes upon it for more than twenty years. At this point her brother protested that the plot was in her possession and demanded that she surrender (*taslīm*) it, suggesting that perhaps her father had worked the land before her and her brother was belatedly attempting to exercise his prerogative. The mufti, however, ruled that it was too late to question the woman's right to the land—she had had permission from the proper authority and had faithfully paid what was required for more than twenty years. Although 'Alī Efendi was exceptional in his approval of women claiming their father's *maska* so long as they engaged in cultivation, this *fatwa's* outcome rested on the lapse of time rather than the question of the woman's capability. The woman in the *fatwa* was a concrete example of the phenomenon that both 'Alī and Ḥāmid Efendi acknowledged as rare but possible: a woman who managed to keep the plot productive and pay the taxes upon it.

The Cultivators and Their Demands

If these were the views of the jurists, what then were the attitudes of the cultivators? As noted above, Martha Mundy and Richard Saumarez Smith have argued that the Damascene muftis of the 17th and 18th centuries favored the theory that *mašadd maska* was obtained through labor invested in land. Arguably, the cultivators were even more convinced than the muftis that their labor earned them *mašadd maska*. There were several cases wherein the cultivators made precisely this claim, although the mufti ruled against them. One *fatwa*

17. IBN 'ĀBIDĪN, *Uqūd*, II, p. 205–206.

18. AL-'IMĀDĪ, "Fatāwā banī-l-'Imādī", f. 143a.

from the early 17th century noted that a man had rented land from a *waqf* to cultivate, and then died before the termination of the rental agreement. His brother then took his place, but instead of relinquishing the plot or asking for another contract after the period of rental elapsed, he simply kept cultivating the land for five years thereafter. He too died, whereupon the *nāẓir* demanded that his heirs (*warāṭa*) surrender the plot, but they refused, asserting that they had *mašadd maska* over the land. The mufti ordered the heirs to surrender the plot, saying that their deceased relative “did not become the possessor of a *maska* by tending the land during the period of his brother’s rental.”¹⁹ For the relatives, the contract was immaterial, two family members had invested their labor in the land during the period of contract and moreover for another five years afterwards, and they had earned the right to continue cultivating.

This sense of right derived from labor expended was expressed more adamantly in a very similar *fatwa*, in which another cultivator on *waqf* land died before his contract expired. As in the previous scenario, the deceased cultivator’s brother took over the contract and continued cultivating after its expiration. When the *nāẓir* demanded that he surrender the land, the cultivator refused, countering that his dead brother had become “deserving of *mašadd maska*” (*mustahiqqan li-l-mašadd maska*) by his plowing and cultivating the land, and that now he too deserved (*yastahiqqu*) the *maska*.²⁰ This argument failed to prevail in this instance as in the one above, yet it clearly stated the relationship between labor and *mašadd maska* that was prevalent among the cultivators.

What is further notable in both of these *fatwa*-s is the sense of a shared family economy: in each case, the rental contract was completed by a brother of the deceased. Furthermore, the heirs in the first case maintained that they had inherited the *mašadd maska* after the death of the second brother, one of a number of *fatwa*-s in which it was clear that many Damascenes believed *mašadd maska* to be subject to the rules of inheritance. To understand why they would believe this, we need only turn to the discussion of labor above. In the view of the cultivators and their families, *mašadd maska* was earned by labor. In general, Muslims expected that their children and other heirs would benefit from the fruits of their labor according to the law of inheritance. Anything else earned as a result of labor, be it money, produce or other objects would be a legacy to their children. The *fatwa*-s indicate that many of them had difficulty understanding why *mašadd maska* should be an exception to this rule. Once a *maska* had been obtained, it should benefit the cultivator’s heirs rather than an outsider.

With the exception of ‘Alī al-‘Imādī, the muftis of Damascus agreed that if there were no son, the *mutakallim* should choose someone capable of working the land. However, it appears that if a male relative of the deceased such as a brother or nephew survived him and was capable of cultivation, these relatives were likely to request to take the *mašadd maska*, and were more likely to prevail than an outsider. According to Ibn ‘Ābidīn, Ismā‘īl al-Ḥā’ik had ruled that if a brother and two daughters survived a cultivator, it was appropriate for

19. AL-‘IMĀDĪ, “Fatāwā banī-l-‘Imādī”, f. 183.

20. AL-‘IMĀDĪ, “Fatāwā banī-l-‘Imādī”, mufti’s name is cut off, f. 103a.

the *mutakallim* to give the *mašadd maska* to the brother.²¹ An 18th century *fatwa* noted that a *mutakallim* gave the land's cultivation first to an outsider, then later, when the nephews of the deceased protested, it was awarded to the latter. The outsider for his part did not protest that he was deprived of the cultivation, and merely requested to keep what he had planted on the land.²² Such practices preserved the masculine prerogative over *mašadd maska* and the Hanafi preference for a 'capable' cultivator; at the same time, they suggested that the cultivators and muftis both agreed that *mašadd maska* was a valuable asset not only to the state or the *waqf* that held the land, but also to the cultivator and his extended family whose economic fortune was enmeshed with his own. Even when the family members acknowledged that *mašadd maska* was not subject to the law of inheritance, their behavior often suggested a belief that the *mašadd maska* should preferably remain with someone from the deceased's heirs and relatives even if there were no son.

While the muftis had doubts about whether or not women were fit to hold cultivation rights, female cultivators themselves made many documented efforts to retain the cultivation right of their fathers, husbands or to acquire it through transfer. Not only in Damascus, but in other parts of the Ottoman Empire, women protested that usufruct in the possession of their fathers should fall to them after his death, especially when they had no brothers. What is remarkable is that these protests produced results, and eventually ushered in a new policy at the imperial center that found its way to Damascus. We learn of a *fatwa* attributed to Ebu Su'ud Efendi, wherein the mufti is told of a deceased man who cleared and cultivated land on a *timar* that had not been previously cultivated. The questioner first asks what will happen to the deceased's usufruct if he is survived by both a son and a daughter, and secondly what will happen if he had only a daughter and no son. After dealing with the priority of the son, Ebu Su'ud responded to the latter situation by noting that "in the year 958 (1551 CE), in lands such as these that had been revitalized and put to cultivation through labor and expending of money (*tuḥay wa tuftaḥ bi-'amal wa kulfat dirāham*), it was decreed that usufruct was to be given to an outsider who would pay the *tapu* fee. But when it was necessary to dispossess the daughters from the wealth which their father had spent (*lamma kān yalzimu ḥarmānu-hum [sic] min al-māl alladī šarafa-hu abū-hum [sic]*) a sultanīc order awarding it to them (the daughters) was issued...and an unbiased group of persons accounted the value of the *tapu*, and the daughters paid it and took the land."²³

Many of the factors in this situation resembled those in Damascus. As females, the daughters had no right to obtain their father's usufruct. The money and labor that their father had expended on the land did not form part of their inheritance, but would benefit an outsider instead. The aggravating factor in the situation was that the land had not been cultivated previously, but rather had come under the plough due to the expenditures of

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21. IBN 'ĀBIDĪN, 'Uqūd, II, p. 206, see also p. 205 where a paternal nephew of the deceased (*ibn aḥi al-mayt*) asks for and is determined eligible for taking the *mašadd maska*, although the mufti (Ḥāmid al-'Imādī notes that the *mutakallim* can choose anyone who is capable, and need not choose the nephew.

22. AL-MURĀDĪ, "al-Fatāwā al-Murādīya", p. 327-328.

23. AL-ḤASKĀFĪ, *Durr*, I, p. 665.

their father. The increased value of the land derived from his investments: whereas it had previously not been a productive resource for either the state or a cultivator, it now benefited both. The *fatwa* suggested that the sultan recognized the amount of wealth and labor that the man had invested to create a productive land from wilderness. Implicit in the awarding of usufruct to the daughters was the conclusion that it would be unjust to part the daughters from the lands that had received so much of their father's wealth and labor. Ultimately, the logic behind the sultan's decision coincided with the prevailing beliefs of the Damascene cultivators noted above: surviving relatives and heirs had greater right to the assets won by the deceased's money and labor than outsiders. In the sultan's *firmān*, the previous priorities articulated in both the *qānūn* and the *fiqh* were reversed. Instead of awarding the land to the person who could arguably best exploit its productive capacity, it went to the people whose personal fortune was most dependent upon it. Sultan Suleyman and his *šayḥ al-islām* left aside what was best for the state's interest in the land, and instead, privileged the welfare of two peasant women.

In this situation, the exception to the rule that only sons could take their father's usufruct rested on the extra value created by bringing new land under cultivation. However, it was only a short step from the position that women were eligible to claim the fruit of their father's labor in specific circumstances to the position that women were eligible to claim the fruit of their father's labor, period. As the *fatwa*-s of Damascus demonstrated, neither male nor female family members were content to let a valuable resource escape their control because the deceased had no son. Although the females found that few muftis were willing to grant that they had priority over outsiders, male relatives of the deceased fared better in this regard. The request of the daughters in the sultan's order of 957/1551 is further proof that other cultivators in the Ottoman Empire saw usufruct through the same lens of labor and familial priority that prevailed among the Damascene peasantry. Furthermore, cultivators brought grievances such as these to the sultan's government and demanded justice, spearheading a transformation in the concept of usufruct and who should have access to it. This obscure order from 957/1551 proved to be the first step in a wholesale revision of the legal procedure for transmitting usufruct from the dead to the living.

In 975/1568, Ebu Su'ud wrote that according to sultanic proclamation, a cultivator's daughter was eligible to take the usufruct when he died, provided that he had no sons.²⁴ While Ebu Su'ud did not explain why the sultan's policy had reversed itself, it is likely that it had something to do with petitions from excluded daughters like those above, who protested the loss of what they saw as their father's estate. The exceptional position of the son was still intact, for the cultivator's son not only excluded all other claimants, but remained exempt from paying *tapu*. The daughter, like the "outsider" chosen by the *mutakallim*, could only claim the usufruct if no sons survived her father and if she could pay the *tapu* fee. From 975/1568 onwards, the writings of the imperial *šuyūḥ al-islām*, starting

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24. MTM, p. 66.

with Ebu Su'ud, completely eliminated all reference to the issue of whether a person was capable of cultivating.

This modification to the process of designating a new usufruct holder did not stop with the recognition of the daughter. On the contrary, it proved to be only the first step towards a veritable line of succession to usufruct, established not by one sultan, but by successive sultanic administrations over a period of roughly seventy-five years.²⁵ It is unclear when the deceased's brother was awarded the right to claim usufruct if neither a son nor a daughter survived the deceased. The recognition that the brother's right was preceded only by the deceased's children was not surprising if the attitudes about usufruct in other parts of the Ottoman Empire mirrored those of Damascus. There, as we have seen, the right of a brother or his children was most frequently recognized as valid in the absence of a son. It was in 1010/1602 that an imperial decree proclaimed that in the absence of a son, a daughter or a brother, then the priority passed to the deceased's sister. Just a few years later, in 1017/1609, came the ruling that if no offspring or siblings survived, then the deceased's father could take the usufruct, and if he was no longer living, it fell to the mother. These are the only family members included in the succession, and in 1031/1622 it was decreed that if none of them survived the peasant cultivator, then anyone who jointly shared in the usufruct on the land (for instance a partner in a *mušā'* holding) had priority over others. If the peasant had possessed the usufruct in its entirety and had not shared it with anyone, then the right of usufruct fell to any person with freehold property—such as trees or vines—on the land. If no parties met any of these definitions, declared a *firmān* of 1623, then anyone from the deceased's village could ask for the usufruct and was guaranteed priority above cultivators resident in a different village.

This scheme of succession reduced the category of “outsiders” to cultivators that lived outside the village, and delegated to every possible claimant within the deceased's village a proper place relative to the claims of others. Those recognized as having the most pressing claim were immediate family members, whose efforts to maintain control of the usufruct were finally legitimated. Those who shared property rights were recognized as having a legitimate, though secondary, priority. As taxation was largely determined by village, it was also in the interest of villagers to see that land resources were not transferred from a peasant of one village to a peasant in another. In the case of each new legally recognized claimant, the benefit to the claimant is more apparent than any benefit that accrued to the state. Perhaps the Ottoman government intended to increase the possibility of a quick and orderly turnover of the usufruct, and to reduce incidents of protest or conflict by recognizing everyone who had some kind of interest in the land and arranging them according to priority. Whether or not the empire's administrators were driven by such concerns, there can be no doubt that these new edicts were a recognition that the granting of usufruct should not only protect the interest of the state, but the needs and interests of the cultivators themselves. The new laws continued the trend that began in the *firmān* of 1551, assigning priority to claimants not on the basis of their skills as cultivators but the

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25. To examine this evolution and that described in the rest of the paragraph, see MTM, p. 59–80.

degree to which their material interests were already enmeshed with the productivity of the land in question.

Even after the inclusion of daughters, sisters and mothers to the succession order, there was noticeable privileging of the male to male line. The son was the only successor who paid no *tapu*, unlike the daughter. In each set of family successors, first children, second siblings, and thirdly parents, the right of the male preceded that of the female. Daughters could not claim usufruct if a son survived, sisters could not claim it if a brother survived, and so on. An unusual condition attached to the succession of the sister that applied to no other family member was that the sister must be living on the 'yurt' in order to succeed, as the text puts it. Whether this meant the family plot itself or simply in the same village is ambiguous, leaving its interpretation largely to the mufti's discretion. One mufti, taking a generous interpretation, wrote that the sister was eligible for the usufruct so long as "her residence is less than three days distance from the land under consideration."²⁶ A further indication that sisters had difficulty asserting their right is evidenced by the fact that the right of sisters to succeed was originally proclaimed in 1010/1602 and then actually re-proclaimed two years later.²⁷

A more telling indication of the limitations upon women is that the line of succession automatically presumed that the deceased cultivator was male. It was not until 1609 that a sultanic order proclaimed that if a female *mutaşarrif* (holder of usufruct) died that the only recognized successor was her son, and unlike the free succession that marked the passing of usufruct from father to son, a son could only take his mother's usufruct by paying *tapu*.²⁸ No daughter or other family member could claim the usufruct, so if no son survived, the *sipahi* was free to choose the succeeding cultivator of his choice. Despite such limitations, the fact that women constituted a recognized part of the succession by the 1560's was fairly extraordinary, considering that the *Qānūnnāme* of Sultan Suleyman had instructed timariots not to give the usufruct to women.

Damascene Muftis and the New Understanding of Usufruct Transmission

Although the sultan's decrees about the status of these various family members were issued by the first quarter of the seventeenth century, the muftis of Damascus were either unaware of these orders or did not believe them to be relevant to the situation in the Damascene countryside until the second half of the 18th century.²⁹ The first *fatwa* from a Damascene mufti that made reference to the line of successors established by the sultan

26. *Qānūn-i ğadīd-i Uṭmānī*, f. 22.

27. MTM, p. 71.

28. MTM, p. 72-73.

29. The famous Damascene jurist 'Alā' al-Dīn al-Ḥaṣkāfī (d. 1087/1677) clearly knew about the imperial rules of transmission, and discussed them in *Durr*, I, p. 665. However, it is unclear if he followed them when he gave his own *fatwa*-s in Damascus because few have survived from his tenure in the office of Hanafi mufti and none that deal with transmission have come to light. Ismā'īl Ḥā'ik, 'Abd al-Ganī al-Nābulusī and Ḥāmid al-'Imādī were categorical in ruling that transmission to women was not allowed, while 'Alī al-'Imādī, as discussed, was less categorical. 'Alī

was given by ‘Alī Efendi al-Murādī, Hanafi mufti of Damascus from 1171/1758 to 1184/1771. Why it was ‘Alī al-Murādī who initiated the shift towards compliance with the imperial rules of usufruct must remain a subject of conjecture. All that is clear is that prior to his term in the mufti’s office, Damascene muftis continued to rule that if no son survived a cultivator, then the *mutakallim* must choose a capable cultivator to take his place. There was of course the exceptional ruling of ‘Alī Efendi al-‘Imādī, but even his idiosyncratic understanding of the issue was based on the ability to cultivate, a factor which had ceased to have any bearing on Ottoman imperial *fatwa*-s from the middle of the 16th century. Ironically, it appeared that the muftis of Damascus demonstrated greater zeal for guarding the state’s interest in the land’s productivity than that evinced by the sultan’s policies and *ṣayḥ al-islāms*. Such adherence to the previous norms of the Hanafi school is less ironic when we consider that the Damascene ‘*ulamā*’ were protecting not only the financial interest of the state on *mīrī* land, but also the financial interest of the *waqfs* on endowed land. Preserving the health of the *waqf*-s, as Astrid Meier has shown, was not only a matter of piety but of self-interest for the Damascene ‘*ulamā*’.³⁰

Another irony was that female family members started to present themselves as being capable of cultivation at just the time when the muftis of Damascus began to abandon the logic of ‘capability’ and follow imperial guidelines. Ḥāmid al-‘Imādī was told that a man had died leaving a wife, a son and paternal cousin (*ibn ‘amm*). The deceased had been a cultivator on *waqf* land, and shortly after his death, his only son also died. The *nāẓir* of the *waqf* awarded cultivation of ten of the twenty-four carats of land to the wife, and fourteen of twenty-four to the cousin. The *fatwa* then noted that both the wife and the cousin were capable of cultivation (*qādirān ‘alā-l-zira‘a*) and that this arrangement was good for the interest of the *waqf* (*ḥaẓẓ wa maṣlaḥa li-l-waqf*).³¹ When asked if the arrangement was *ṣar‘ī*, the mufti replied that in this case it was. While Ḥāmid Efendi had repudiated female inheritance in his writings quoted above, he did not see fit to abrogate the *nāẓir*’s decision because he cared principally about whether a candidate was capable of cultivation. By noting that she was capable of doing the work, the woman was able to retain some of her husband’s *maṣadd maska*.

Another example shows even more clearly that women had come to understand that if they wanted the *maṣadd maska*, they needed to prove that the land would not lie unproductive while it was in their care. A *fatwa* shows that a man with *maṣadd maska* on the plough land of a *waqf* died with no issue except a daughter. The daughter had a son that was capable of using the land (*qādir ‘alā mutaṣarrif [sic] al-arāḍi*) and paying the taxes (or rent) assessed upon it. The mufti was asked if the woman had the right to take the *maṣadd maska* under these circumstances. The questioner clearly anticipated that the ability to keep the land under cultivation would be a crucial factor in the mufti’s decision. Given the precedent

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al-Murādī, on the other hand, seems to have inaugurated a shift towards referring to the work of the Ottoman *Ṣuyūḥ al-islām* on this issue.

30. see MEIER 2005.

31. AL-‘IMADĪ, “al-Fatāwā al-ḥāmidīya”, f. 457.

of the previous century, it was understandable that women went before the mufti armed with an explanation of how the *waqf*'s or the state's interest in the land's productivity would not be compromised if they took possession of the *mašadd maska*. As it turned out, the questioner above was appearing before the mufti 'Alī Efendi al-Murādī, who, like the imperial muftis, had abandoned the requirement of masculine capability. The mufti replied that "it is bestowed upon the daughter by way of her being the most deserving (*bi-ṭarīq al-aḥaqqiya*). Ebu Su'ud Efendi ruled thus, that if there is a daughter it is bestowed upon her and if there is no daughter, then it goes to a sister."³² Hence we find a cultivator presenting her situation in a particular way in order to address what she presumed to be the mufti's concerns, when the mufti no longer considered these concerns to be relevant.

As in the work of the Ottoman *šuyūḥ al-islām*, 'Alī al-Murādī made no reference to the ability to cultivate, and his example seems to have influenced those who followed him. By the time Ibn 'Ābidīn (1784-1836) penned his famous commentary on Ḥāmid al-'Imādī's *fatwa*-s, he showed a thorough knowledge of the imperial order of succession and saw no connection between the ability to cultivate and the question of who was eligible to claim usufruct. After recording Ḥāmid al-'Imādī's *fatwa*-s on succession issues, he noted that in the *Ma'ruzat* (a compilation of Ebu Su'ud's petitions to Sultan Suleyman) the most deserving claimant is the son, then the daughter, the brother, the sister, the father and the mother.³³ In addition, he states that "it is now generally accepted in all the sultanic and *waqf* lands that the *mutakallim* gives them to the son for free because he has the greatest right and if there's a daughter then it's given with a fee that the *mutakallim* takes which is called *tapu*... the daughter has the right to take (the usufruct) but only with *tapu*, in contradistinction to the nephew, who has no right. Rather, the *mutakallim* has the choice between him or an outsider."³⁴ For Ibn 'Ābidīn, what made a person eligible for receiving usufruct from a deceased kinsman or associate was not labor, but the law established by the sultan. He noted that "the management of sultanic lands (*al-taṣarruf fi-l-arādī al-sulṭāniya*) belongs his majesty the sultan, God make great his victory, and it is for him to permit their appointment in a special way (*fa-lahu ya'dan tawḡīḥa-ha 'alā ṭarīq ḥāṣṣ*). Contradiction [of the sultan's commands] is not permitted without contradicting the noble *šarī'a*."³⁵

The adoption of the imperial succession rules in the province of Damascus had a number of consequences for the cultivators. While the imperial succession validated the longstanding contention of the peasantry that family members were more deserving to claim usufruct than any outsiders, the order of priority established among the relatives upset the prevailing norms that had privileged male relatives in earlier times. Ibn 'Ābidīn specifically mentioned that the nephew, whose position of unofficial favor was shown

32. AL-MURĀDĪ, "al-Fatāwā al-murādīya", f. 327 Arabic: "tawāḡḡa-ha bi-ṭarīq al-aḥaqqiya li-l-bint kamā ifṭā bi-dālīka Abu Su'ud Afandi anna-hu idā wujadat al-bint tawāḡḡa-ha li-ha wa ann lam takun al-bint fa-lil-uḥt."

33. IBN 'ĀBIDĪN, 'Uqūd, I, p. 205. Ibn 'Ābidīn is mistaken in attributing the succession line to Ebu Su'ud, but many nineteenth century texts—including the 1858 Land Code—made the same mistake and credited him with organizing the claimants, when most of it was legislated after his death.

34. IBN 'ĀBIDĪN, 'Uqūd, II, p. 206.

35. IBN 'ĀBIDĪN, 'Uqūd, II, p. 207.

above, had no place in the imperial line. A *fatwa* from the mid-19th century affirmed that the deceased's sister—who was noted to be resident in the village—had more right to her brother's usufruct than the deceased's cousin (*ibn 'amm*), another relative who had frequently made a successful claim in the past.³⁶ This new form of exclusion, based not on gender but on propinquity to the deceased, likely caused a new set of tensions among family members.

By the beginning of the 19th century, the issue of who was most deserving to claim usufruct had become an issue of adhering to the succession rules laid out by the sultan and the muftis of Istanbul. The muftis of Damascus were not necessarily aware of how the sultan's *qānūn* had taken shape, and hence may also have been unaware that it was a process largely driven by the cultivators' demand that the law of transmission take into account their interests and priorities. This shift in usufruct transmission was important for several reasons, all of which would have import for the future. First of all, it affected the allocation of resources in the countryside and the relations between members of families and village communities. It added to the security of cultivator tenure, greatly limiting the circumstances in which a *mutakallim* would be free to choose a successor at random. Secondly, it was a testament to changes in the legal culture of the empire. The fact that the sultan's laws of usufruct transmission came to be the acknowledged basis of the muftis' rulings suggests that even prior to the era of Ottoman reform, Damascene jurists were becoming more integrated into a specifically Ottoman practice of *fiqh* wherein the legislation of the sultan played a decisive role. In the final analysis however, the reworking of usufruct transmission demonstrates that it was not only the muftis' understanding of the laws that had important consequences for the practice of law in the Ottoman Empire, but also those of the cultivators.

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36. AL-MURĀDĪ, "al-Fatāwā al-murādīya", f. 332.

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