ACQUISITION BY USE IN ISLAMIC LAW: *IḤYĀʾ AL-MAWĀT* IN THREE LEGAL OPINIONS FROM LATE OTTOMAN EGYPT

Adam Mestyan

Duke University

Abstract:
This article presents three legal opinions by the Ḥanafī mufti Muḥammad al-ʿAbbāsī al-Mahdī in late Ottoman Egypt (the so-called "khedivate") to explore the legal problem of what Muslim jurists call "reclaiming unused land," literally bringing "dead" land back to life (*iḥyāʾ al-mawāt*). At the core of this legal problem is a norm which we can call "acquisition by use." This norm prescribes that the use of unused land gives ownership rights to the user with certain conditions. The logic behind this principle is that the community's interest in increasing the agricultural productivity of a given plot of land outweighs the government's interest in maximizing the land-tax (rent) that can be yielded by the plot in question. The paper concludes that the norm of *iḥyāʾ al-mawāt* in its Ḥanafī interpretation served as a battleground for land ownership between the khedivial government and individuals.

Keywords: Islamic law, land tenure, unused land, environment, Egypt

1 Introduction

There is a growing ecological awareness among contemporary Muslim leaders. In Indonesia, for instance, religious scholars issue judicial opinions (sing. *fatwa*, pl. *fatāwā*) about waste handling and climate change awareness (*The Economist* 2022). When producing such opinions, Muslim leaders around the world are able to draw upon a rich storehouse of legal opinions and decisions issued and compiled by Muslim jurists in the past, pertaining to how humans interact with nature.

One of these topics is what Muslim jurists call "reclaiming unused land," a subject that relates to the various legal issues attendant on bringing "dead" land back to life (*iḥyāʾ al-mawāt*). For the purposes of this paper, I call the legal norm at the core of this topic "acquisition by use." Experts of Islamic law usually translate the term *iḥyāʾ* into English as "revival" and/or "reclaiming" (Johansen 1988:12, 19; Mālik, *Muwaṭṭaʾ* [Fadel and Monette] 620). But I hope to show that when using the term *iḥyāʾ* (or in earlier times *ʿimāra*) in this context Muslim jurists in fact understand

https://doi.org/10.58513/ARABIST.2024.47.8

it to mean "use" – which is to say any type of human work and material investment needed to make a piece of land productive. The plural Arabic term *mawāt* (as in the sense *arāḍin mawāt*, a pluralization of *arḍ mayyita*) has been usually translated as "uncultivated," "waste," "deserted," "abandoned," "waterless," or "barren" lands, but Fadel and Monett in their recent translation of Mālik's *Muwaṭṭa'* employ the term "unused" (Mālik, *Muwaṭṭa'* 620). I find this a more apposite translation because jurists understand the term *mawāt* in a sense of inactive potential, waiting to be activated. Importantly, in this context *mawāt* is a legal *terminus technicus* indicating a special status of a piece of land. Hence, I suggest denoting the legal norm underlying the problems associated with *iḥyā' al-mawāt* as "acquisition by use."

Most Muslim jurists, except the Ḥanafīs and the Šīʿīs, consider that use confers the right of private ownership (*milk* or *milkiyya*) over the piece of land in question, with some conditions. This Muslim norm of acquisition by use, in fact, contains the same idea that French (colonial) agriculturalists called *mise en valeur* ("making productive"). Making land productive was a popular justification – within an agenda of *mission civilisatrice* – for French control and settlement in the nineteenth- and early twentieth-century colonies and protectorates. We can find the same idea in the Zionist settler movement in mandate Palestine. And we find a similar idea, though without the civilizational-racist discourse, in everyday use in the early and later Muslim empires, including the Ottoman Empire. For instance, this idea seems to have constituted the premise behind the claim that the collective work of a tribe needed for reclaiming land gave each member title to a share in collectively owned land, a claim to which Iraqi tribes often referred to during the nineteenth-century land reforms (Jwaideh 1984). On a similar note, in early nineteenth-century Syrian *šarīʿa* court records there are cases in which the ownership of land ensues simply from the fact of "working it" (Reilly 1987:157).

Although such legal views were widespread in Muslim empires, they were not universal. One notable dissenting view is to be found in Šīʿī legal thought; another, which is the focus of the present paper, is to be found in the Ḥanafī legal tradition, where many jurists maintain that land acquisition by use is not automatic. They argue that the most important condition for acquisition by use is prior permission from the imam (the head of the Muslim community). Thus, the Ḥanafis, typically, side with the government as opposed to all other Sunni jurists who give primacy to cultivators and landowners in this matter (Linant De Bellefonds 1986:1053–1054; Delcambre 1991:869–870).

In this essay, I argue that the norm of *iḥyā' al-mawāt* in its Ḥanafī interpretation served as a battleground for landownership claims between the government and individuals in nineteenth-century Egypt. My examples are three legal opinions issued by the office of the Ḥanafī chief mufti Muḥammad al-ʿAbbāsī al-Mahdī (1827–1897) (Peters 1994). In his time, the governors of Egypt used land that they claimed to be unused or barren as a resource with which to establish political alliances, to finance their military adventures, and in general to increase the income

of the treasury and their own purse for financing industrialization (Barakāt 1977; Cuno 1992; Mestyan 2020). The three *fatāwā* show us more than just Ḥanafī support for the government: they also offer us a glimpse into the legal ecology of villages, an attempt to deploy the norm of acquisition-by-use retrospectively (and into the mufti's opposition to this attempt), and the way in which the mufti interpreted this Muslim norm to stop foreigners' land speculations.

2 The Emergence of the Concept of *Iḥyāʾ al-Mawāt*

Let us start with a brief history of this legal problem. It is a story about how jurists translated into the language of legal theory the cultivators and landowners' interest in establishing property claims against the government's interest in increasing the area of government land to achieve higher treasury income from their rent. For jurists, the core theoretical problem was whether the legal status of *mawāt* is an exception among the other ownerless assets falling under the Muslim fisc (*bayt al-māl*), whose assignment depends on the imam's decision.

In the earliest periods of Islam, this conflict played out in the interpretation of Prophetic sayings. Mālik b. Anas, the eighth-century maker of Muslim legal norms in Medina, implicitly articulated the view that *mawāt* is an exceptional case and while the imam can distribute such lands, individuals by their own work can also claim ownership rights. His *Muwaṭṭaʾ* quotes a saying of the Prophet and another one by the caliph ʿUmar about this issue. The Prophet says that "anyone who puts unused land to productive use shall become its owner" (*man aḥyā arḍan mayyitatan fa-hiya la-hu*) and adds that "but no right will grow out of an unjust root" (*wa-laysa li-ʿirqin ẓālimin ḥaqqun*). The text continues with Mālik's explanation of the term "unjust root": as he notes it "refers to anything that was dug, taken, or planted without right." The term without right, presumably, means the lack of permission from the imam. But Mālik implicitly argues for the exception of *mawāt* land among the other ownerless assets falling under the Muslim fisc because the text subsequently quotes the caliph ʿUmar who utters only the first half of the Prophet's sentence "anyone who puts unused land to productive use shall become its owner" (*man aḥyā arḍan mayyitatan fa-hiya la-hu*). And based on this short version, Mālik now gives his ruling: "The rule among us is in accordance with that." Clearly, *Muwaṭṭaʾ* portrays Mālik b. Anas as a jurist who acknowledged the acquisition of ownership right by the use of individuals and is silent about any further conditions (I used the translation of Fadel and Monett in Mālik, *Muwaṭṭaʾ* [Fadel and Monette] 620; and I compared it with the original in Mālik, *Muwaṭṭaʾ* III, 567–570).

The problems associated with *iḥyāʾ al-mawāt* and the norm of acquisition by use was an important topic in Mālik's time, during the consolidation of the Abbasid empire. Another legendary jurist in the very same century, Abū Yūsuf (or the later compilers of a *Kitāb al-ḫarāǧ* under his name), devotes even more space to this problem. The *Kitāb al-ḫarāǧ* reports the opinion of Abū Ḥanīfa in Iraq that unused

land becomes property by use *only* if the imam had previously given permission. Although Abū Ḥanīfa makes no explicit reference here to Mālik b. Anas, he is in clear disagreement with the latter. And in this instance, the text portrays Abū Yūsuf as agreeing with Mālik against his own teacher Abū Ḥanīfa. Abū Yūsuf's argument against Abū Ḥanīfa is that, if no one's interest is hurt, the Prophet's permission is valid until the Day of Resurrection (*wa-ammā anā fa-arā iḏā lam yakun fī-hi ḍarar ʿalā aḥad […] inna iḏn Rasūl Allāh […] ǧā'iz ilā yawm al-qiyāma*). Furthermore, if there is a disadvantage for someone, then the only question is what are those cases in which there is an "unjust root," so to speak. Thus, he quotes even more sayings in which the Prophet offers further specifications. For instance, we learn that someone who demarcates a parcel of land with stones but then fails to cultivate the plot for three years loses the right to ownership. Abū Yūsuf also explains that in addition to being uncultivated, *mawāt* is also ownerless land, including those lands whose original owners fled or died and no one can claim them (a typical case after conquest). If someone cultivates such a piece of land and pays the correct type of land tax "the imam has no right to take away anything from anyone unless with a solid and known legal cause" (*laysa li-l-imām an yuḫriǧa šay'an min yad aḥad illā bi-ḥaqq ṯābit maʿrūf*). That is, the imam cannot "nationalize" the Muslim settlers' cultivated lands (acquired by use after conquest) into government ownership and impose a higher tax. The imam can, however, assign available *mawāt* to soldiers as their private property (assessable for *ʿušr* tax) or leave such land with the conquered unbelievers through a treaty which also guarantees the preservation of its status as personal property (but subject to the higher *kharāǧ* tax). (Abū Yūsuf, *Kitāb al-ḫarāǧ* 275–286, esp. 278).

We find a subtle supporting argument for Abū Ḥanīfa's point in the ninth century in the writings of the *ḥadīṯ* collector Muḥammad al-Buḫārī. Unlike Mālik b. Anas, al-Buḫārī attributes the saying "anyone who puts unused land to productive use shall become its owner" (*man aḥyā arḍan mayyitatan fa-hiya la-hu*) to ʿUmar, and not to the Prophet. The Prophet in his version only adds that "but no right will grow out of an unjust root." Next, al-Buḫārī provides a variant of the saying from the Prophet: "The one who cultivates ownerless land has the most right [to own it]" (*man aʿmara arḍan laysat li-aḥadin fa-huwa aḥaqqun*) (al-Buḫārī, *Ṣaḥīh* 562). This means that al-Buḫārī's material has the perhaps unintended consequence of supporting Abū Ḥanīfa's point: As there is no evidence that the Prophet gave permission, the imam's permission should be supreme.

By the thirteenth century, the jurists' treatment of the topic becomes quite elaborate. In this century, the Ḥanbalī jurist Ibn Qudāma dedicates a whole sub-book (*kitāb*) to the problem of *iḥyā' al-mawāt* in his great summarizing work *al-Muġnī*. His discussion covers many situations, considering, for instance, whether it is possible to reclaim roads as *mawāt* (the answer is no), as well as the numerous rules concerning mines in reclaimed land. Ibn Qudāma explains the exceptional nature of this source of ownership in legal theory. He admits that *mawāt* are always originally

ownerless lands, and that therefore these belong to the Muslim fisc (*māl bayt al-māl*). Since the things belonging to the Muslim fisc, in Ibn Qudāma's wording, are "the property of all Muslims," the decision about their use belongs to the imam. This, however, is not the case with *mawāt*, Ibn Qudāma carefully adds, because of the Prophet Muḥammad's original permission (it appears that he either follows Abū Yūsuf or independently reaches the same argument) (Ibn Qudāma, *Muġnī* VI, 147–184).

Only the Ḥanafī jurists among the Sunnis maintained that the permission of the imam is compulsory for reclaiming land as a source of property right. Indeed, one might say that it was their insistence on this point, among others, that made them distinctively Ḥanafī. The eleventh-century Ḥanafī author as-Saraḫsī provides the argument for many similar later jurists. He highlights the clear disagreement between Abū Ḥanīfa and others. While acknowledging the Prophet's permission, as-Saraḫsī cleverly makes a logical distinction between cause (*sabab*) and condition (*šarṭ*). He admits that the *cause* of ownership is the act of *ihyāʾ* because the Prophet permitted it. However, the *condition* of ownership is the imam's permission (*šarṭ al-milk wa-huwa iḏn al-imām*) and this is so because otherwise there would be lots of controversy (*munāzaʿa*) among the people, which might even lead to *fitna* (as-Saraḫsī, *Mabsūṭ* III, 16–17).

But what is *mawāt* exactly? The definition of this legal category shows, first, the impact of rural custom on legal terminology and, secondly, the development of property law. Ibn Qudāma still defines *mawāt* land in practical terms as "the obliterated (*dārisa*) land which is in the state of desolation (*ḫarāb*)." (Ibn Qudāma, *Muġnī* VI, 147). The Ottoman Ḥanafis are more eloquent. For instance, the seventeenth-century jurist al-Ḥaṣkafī defines *mawāt* in the following poetical way: "Life [can be defined by] two features: sensation (*ḥāssa*) and growth (*nāmiya*), and in this case growth is what should guide us. [A piece of land] is called 'dead' because of the nullity of gaining benefit from it and because it is worthless [i.e. nothing grows on it]." (al-Ḥaṣkafī, *Durr* 671). The early nineteenth-century Syrian Ḥanafī jurist Ibn ʿĀbidīn emphasizes that: "*Mawāt* is like the clouds or the dust, which have no soul." (Ibn ʿĀbidīn, *Radd* V, 277). (The eighteenth-century Egyptian Mālikī jurist Dardīr had already used this last metaphor, a point that needs further study.)

By the time of al-Ḥaṣkafī, jurists also reached some agreements on this legal problem. For instance, all agree that the imam's permission is needed if the user (the would-be owner) of the land is a *ḏimmī*. Also, a further condition for land qualifying as *mawāt* is that the piece of land in question should be at more than "shouting distance" from the last house of the village (meaning that if one shouts next to the last house no one can hear the shouting in the *mawāt*). And importantly, al-Ḥaṣkafī emphasizes and Ibn ʿĀbidīn follows him that a piece of land also gains the status of *mawāt* if "it has no owner." That is, in this Ottoman Ḥanafī interpretation any ownerless land – even if not actually barren or neglected – is legally "dead" and

therefore its acquisition by cultivation is dependent on the imam's permission (Ibn ʿĀbidīn, *Radd* V, 277–281).

As to *iḥyāʾ*, the central concept in defining what counts as "reviving/reclaiming" and "use" is the idea of benefit (*nafʿ*) and similar concepts such as exploitation and gain (*intifāʿ*). *Iḥyāʾ* in this case is an act which creates the conditions of "activating" the land in question for creating gain. The inverse ideas of benefit and gain figure in many definitions of *mawāt*. For instance, al-Ḥaṣkafī is clear: "*mawāt* is called as such because of the nullity of gaining benefit from it" (*buṭlān al-intifāʿ bi-hi*). Ibn ʿĀbidīn comments on this remark that "it is like the animals: if they die, they cannot provide gain anymore", and notes among the ways of returning the *mawāt* to being beneficial the acts of building, cultivation, irrigation, digging a well and so on (Ibn ʿĀbidīn, *Radd* V, 277).

In the nineteenth century both Ottoman metropolitan and provincial thinkers used the idea of benefit extensively as a Muslim ideology of reform. Let us just mention the imperial Ministry of Public Works in Istanbul, which was first called *Nezaret-i Umur-i Ticaret ve Nafiʿa*, the Department of Commercial and Beneficial Issues. The idea of *nafʿ* was central in justifying Ottoman imperial industrial developmentalism, for instance, during the introduction of steamships and the reviving of land in nineteenth-century Basra province (Cole 2021). This use of the term *nafʿ* for justifying modernization was not a novelty, however, but a logical consequence of the previous interpretation of land use as a source of benefit for the whole community.

3 The Problem of *Iḥyāʾ al-Mawāt* in the Ottoman Khedivate of Egypt

In the khedivate of Egypt in the nineteenth century, the problems associated with *iḥyāʾ al-mawāt* were of utmost importance as landownership was the currency paid for political loyalty and for investing in agro-industrialization. In 1858 in reaction to the preparations for an Egyptian land code, Ḥasan al-ʿIdwī al-Ḥamzāwī, an Egyptian scholar, summarized that "there are three types of land in Egypt, and in similar regions that had been conquered without treaty (*ʿanwatan*): 1) fully taxed land (*ḫarāǧī*) […] which is in private ownership; 2) *mawāt* land […] which can be allocated to the one who reclaims it either in private ownership or in usufruct; 3) land which belongs to the *bayt al-māl*" (al-ʿIdwī, *Tabṣirat al-quḍāt* 84).

Al-ʿIdwī defined, somewhat confusingly, the legal category of *mawāt* as being under the authority of the imam but not belonging to the *bayt al-māl*. Perhaps this was because in the mid-century the khedives of Egypt assigned immense amounts of land to family members and loyalist followers as property, with the text of the orders usually referring to "reform" or "revival" (*iṣlāḥ*, the administrative synonym of *iḥyāʾ*) for the common benefit (*intifāʿ*) as the reason of donation. The *iḥyāʾ al-mawāt* norm was a major justification in acquiring ownership of land among the khedivial elite. With the passing of the 1858 land laws in Egypt and the Ottoman Empire at

large, the mid-nineteenth century was furthermore a time when foreigners' (non-Ottoman subjects) access to land ownership became a momentous legal question. (Mestyan 2020, Ghalwash 2023).

The office of the government-backed Ḥanafī mufti of Egypt was the main constitutional authority over land tenure until 1858, and possibly even later. The long-time postholder in the nineteenth century, Muḥammad al-ʿAbbāsī al-Mahdī, included a long section on land tenure and a short section on issues related to *iḥyāʾ al-mawāt* in his published legal opinions in the 1880s (Peters 1994). The fact that he listed only twelve legal opinions about acquisition by use should not mislead us as he selected only cases which corresponded to a norm.

How did the old norm of land acquisition by use figure in Egypt in a moment of large transformation in ownership practices? Let us examine three of al-ʿAbbāsī al-Mahdī's legal opinions.

1) The first item is a legal opinion dated 19 Ǧumādā l-Ūlā 1268 (11 March 1852):

> (A question was posed] concerning two men who exchanged land for cultivation. One of the exchanged properties is in the vicinity of fallow [*būr*] land which is *ḥarīm al-balad*. The one who took it reclaimed some part of this mentioned [*ḥarīm*] land by making it a threshing floor for the harvested products. [The question is] if the exchange was legally invalid and all returned to its original state [is it possible that] what resulted from reclaiming the mentioned [*ḥarīm*] land during the exchange should not be admitted [as private property] and its neighbour has no right to it because it belongs to the community?
>
> (He answered:) the right to exploitation in *ḥarīm al-balad* is for its [i.e. the village's] people. No one among them can prohibit another one from exploiting it without a legal reason. God Almighty knows best. (al-ʿAbbāsī al-Mahdī, *Fatāwā* V, 310)

This *fatwa* provides us a glimpse into the interaction of law, village community, and nature. In this case, the question was about the conflict of two norms. One of these is the norm that we have been discussing, namely acquisition by use. The second norm, deriving from village practice, was that *ḥarīm* land is for the benefit of the local community. We can find this type of legal status (variously categorized as *ḥarīm al-balad*, *ḥarīm al-biʾr*, *ḥarīm al-ʿimāra*) often in connection with *iḥyāʾ al-mawāt* cases. In this context, *ḥarīm* derives from a very ancient meaning of the discarded waste (*nabīṯa*) which remains on the sides of a well or a river, or the resting place of animals (*ʿaṭn*) next to a drinking well (al-Ḫalīl, *ʿAyn* III, 222). By extension, *ḥarīm* is a type of addition to a place. *Ḥarīm* is also often the piece of land which surrounds and "defends" a well in a way that no one can erect another well nearby which would take away its water. At-Timurtāšī, the sixteenth-century scholar in Gaza, who wrote the source text of both al-Ḥaṣkafī and Ibn ʿĀbidīn, has an extended

discussion on the *ḥarīm* of various water-sources (at-Timurtāšī, *Matn Tanwīr* 216). In our case, in short, the question was whether reclaiming *ḥarīm* land – in this case by using it as a threshing floor – gave ownership right. In this case, al-ʿAbbāsī al-Mahdī decided that the *ḥarīm* norm is stronger than the acquisition-by-use norm; that is, the village community's interest is stronger than the individual's interest.

2) The second case relates to a question of land tenure in which we can see the khedivial *šarīʿa* administration at work. This legal opinion is dated 11 Ḏū l-Hiğğa 1273 (2 August 1857).

> (A question was posed) concerning a man who took possession of a piece of Egyptian *mawāt* without permission from the executive authority. He reclaimed a part of this land and he had to pay the *ḫarāǧ* tax accordingly. Next, it appeared that apart from what was taxed there was another part cultivated and another part still unused. The executive authority wanted to deprive the mentioned man of the mentioned land so as to tax it and to reclaim the remaining unused part. However, the man argued that he owned the land, and [had inherited it] from his father, by means of a certificate of a pious endowment, and that his father got it from the Awlād ʿAlī Bedouins, who in turn received it by an order of the executive authority in 1225 [1810–11] with the condition that they should reclaim and cultivate it. But they did not perform any act of reclaiming or cultivation because the borders mentioned in the copy of the certificate are only [known] by dictation (*imlāʾ*) and not by the fact of the order, nor by the fact of taking possession. The Ruznāma [bureau] – which is the place to preserve and register the orders concerning land allocations – searched but did not find [mention of] the allocation of the mentioned land to anyone. And the claimant also searched for the order but did not find it. What is the legal verdict in such a case? Is it possible for the executive authority to deprive the man of the mentioned land and tax it or not? If this person created a pious foundation from either the government's *ḫarāǧiyya* lands or from unused lands, is that a permissible act of pious foundation and would it be valid [in court] or not?
>
> His Eminence, the present mufti of Alexandria answered this question: We should know whether the proof of private property rights of the Awlād ʿAlī in this mentioned land is conditioned by the authority's act of donating it to them specifying their names or [whether] it was assigned as property to unknown persons by specifying the borders and by making the land's reclaiming and cultivation a condition. If this is the case, and there was one condition from among these [which was not fulfilled] it did not become their private property. And if it was not their private property the founder could not make a pious foundation of it. If there was no acquisition of private property rights the creation of a pious foundation was not valid. The executive authority can take it and its appropriation is correct. [This is our opinion] concerning the donated

land. And as regards the creation of a pious foundation of *ḫarāğiyya* or unused lands, we say: if a person created a pious foundation of *ḫarāğiyya* land, which is not unused, and without the land having been allocated by the imam, it is not valid. Even such an allocation [by the imam] is valid only if the land was unused or it was the private property of the sultan. His Excellency Qāsim b. Qutlūb Aġa said: "The person for whom the sultan allocated a piece of land from *bayt al-māl* lands owns its usufruct and even can rent it out but [the person's relation to the piece of land] ceases when he dies or by [the sultan's] allocation of the same plot to another person because it is the sultan's right to take it from him." And so on. This concerns the *ḫarāğiyya* land good for cultivation. As to the unused land, the creation of a pious endowment of it is valid only after it has been reclaimed by the permission of the imam. Even its reclaiming without permission does not make it private property, and the one who does not own the land cannot designate it as a pious foundation. God knows best. This was written by Muḥammad b. Ṣāliḥ al-Bannāʾ al-Ḥanafī, the mufti of Alexandria.

(He answered:) Our scholars explained that a Muslim or a *ḏimmī* owns a piece of unused land if he reclaims it by making it suitable for cultivation, provided that the imam permitted this. This is the opinion of the greatest imam [i.e. Abū Ḥanīfa] and he is the favoured one, and it is the agreement of the authors of the fundamental [Ḥanafī] works. The two [jurists – presumably Mālik and Abū Yūsuf who both disagree with Abū Ḥanīfa or the two students of Abū Ḥanīfa: Abū Yūsuf and Šaybānī], however, say that such land can be owned by the simple fact of reclaiming without the permission of the imam if the person is a Muslim. But all agree that a *ḏimmī* needs permission. If the one who took possession admitted that the piece of land in question was unused land and that the executive authority had given it to the Bedouins on the condition that they reclaim it but no such thing happened until it was transferred to his father, the founder, then the creation of a pious endowment [with the apport] of this land was not valid. Its transfer by sale was not valid given the conditions of the executive authority's permission about the known and specified piece of land for the Bedouins. It did not become private property if its transformation into private property was conditioned by reclaiming and not by the mere order. The reclaiming of some of this land by the one to whom it was transferred occurred without permission from the executive authority. Thus, it did not become the property of the one who reclaimed it. This is the opinion of the favoured imam [Abū Ḥanīfa]. And thus, it cannot become a pious foundation. The case is as stated: a pious foundation is conditioned by the existence of private property, and it does not exist in this case. And if neither the status of private property nor the status of pious foundation is valid the piece of land belongs to the *bayt al-māl*; and the executive authority has the right to use it

> for what is the most beneficial for the Muslim community. God Almighty knows best." (al-ʿAbbāsī al-Mahdī, *Fatāwā* V, 310–311)

In this case, we find the two Ḥanafī conditions of private ownership concerning unused land playing in favour of the government, namely a) the permission of the imam or his representative, and b) the act of reclaiming. While both are necessary conditions the imam's permission must precede the act of reclaiming and then the reclaiming must occur. The Bedouins had a permission from the imam but did not acquire ownership rights because they did not cultivate the land, and the man a generation later did not acquire ownership rights either because neither was his land in private ownership nor had he permission from the imam. A subtle legal question that al-ʿAbbāsī al-Mahdī answers in the negative in this case is whether the original permission of the imam can be somehow transferred together with the land, thus whether a new person who properly cultivates the land can be imagined as stepping in the shoes of the original grantee. A further point that the mufti of Alexandria also emphasizes, again indirectly, is that *ḫarāǧī* land is government land and the imam or his representative ("the executive authority," *walī al-amr*) cannot assign it as private property. (Possibly he was opposing the actual ongoing land alienations by the khedives who did exactly this). That is, the muftis argued for retaining this land for the Muslim community. The unarticulated consequence is that the cultivated parts of the land in question could be taxed higher (with the *ḫarāǧ* value) because the whole became *bayt al-māl* land again.

3) A third case pertains to ecological issues, with implications even for our contemporary world. This legal opinion is dated 13 Šaʿbān 1285 (29 November 1868), which is interesting as it is a decade after the enactment of the 1858 Land Law which presumably transferred property questions from the *qāḍī* courts to administrative councils (*maǧālis*):

> (A question was posed) by the Foreign Affairs Department about what is in this copy. [The question is the following:] is it possible that if a person or persons own lands next to the seashore in the Egyptian Domain they do not have right to possess the mentioned seashore? And [is it possible] that they do not have right of ownership to the shores of the salty lake which borders their lands, [either]? And [is it possible] that the owners of the mentioned lands have no right to ownership of a piece of land from which the sea's water has disappeared? Because such shores should belong to all Muslims if needed for the common good by the government or if needed for a road or for the making of some boats or for landing small boats on them and for similar issues. So, would the legal authority over them belong to the executive authority? And what is the size of the shores needed [for such purposes]? Do we measure it by the need of the public? And if [such lands are] allocated and these are *mawāt* lands but not needed for public benefit [is it possible that] no one has the right to take possession or reclaim them by cultivation or by construction

except with the permission of the executive authority? And if allocated with the permission of the executive authority but three years pass without reclaiming them [is it possible that] the one who received the permission has no right of ownership over such lands? [Is it possible that the right of ownership] is for another person who does reclaim them with the permission of the executive authority while there is no new permission for the first person?

(He answered): Yes, the mentioned persons have no right to claim ownership over the mentioned shore of the sea. They have no right to claim ownership over the shores of the salty lake around their lands. Neither can they have any claim in case of the disappearance of the seawater from these lands, if these are, as mentioned, needed for the general interest, or needed for the mentioned necessary issues. And the legal authority over them and the legal ability to use them lies with the executive authority like in all cases involving the community's rights. The size of such shores is [ascertained] by the measure of the need of the public. And if these lands are *mawāt* lands and are outside of the town, and do not belong to it, and are not needed for the general interest, and are not the property of anyone, and there is no special right to them, no one can claim the right of private ownership. They can be only reclaimed with the permission of the executive authority. This is the favoured opinion, and this is the guiding norm if the person who revives the land is Muslim. And even if he is a *ḏimmī*, the permission is a [necessary] condition for private ownership. If the person in question is under a limited protection treaty he cannot possess [land] anyway. If the executive authority allocated the lands with the condition that the land be reclaimed, and three years go by and the land remains unused, the executive authority has the right to issue a permission to another person even if a demarcation by stones had already happened. [This new permission can be issued] because of the absence of private ownership for the first person permitted. [As to] the three years, it is narrated about ʿUmar b. al-Ḫaṭṭāb – may God bless him – that he said: 'there is no right following from demarcation by stones after three years [without the land being reclaimed].' 'Demarcation by stones' can happen by erecting a stone sign or by a harvest of the herbs and weed growing on it and by clearing its grass and leaving it to grow around it or by burning the weed and other things on it. But all of these do not help in acquiring private ownership because [demarcation] is just the first step towards this right. The right [to reclaim] cannot, however, be taken from the person [who received permission] for three years and no one should reclaim these lands until the passing of three years. This is the religious practice (*diyāna*). But in the legal rule (*ammā fī-l-ḥukm*), if someone else revives it before the passing [of three years] conforming to the condition [by the executive authority] he will own it. (al-ʿAbbāsī al-Mahdī, *Fatāwā* V, 314–315)

In this case, a change in nature and the available land surface evidently created a competition among individuals and the government. It is possible that the individuals were either local Christians or foreign subjects; this would explain why the enquiry was made by the Foreign Ministry, as well as al-ʿAbbāsī al-Mahdī's reference to *ḏimmī* persons. The rights to available new land after the withdrawal of the sea was a thorny question which could be solved in favour of the government only by the introduction of the idea of general interest which overrides all other claims. The rejection of "demarcation by stones" (or by weeding, etc.) (*taḥǧīr*) as a source of ownership shows that muftis did acknowledge that *iḥyāʾ* of unused land can be a gradual process, in which the first step may be demarcation but which in itself is insufficient to establish private ownership. Al-ʿAbbāsī al-Mahdī however insists that the three-year period should be respected before the government can do anything.

Yet the ending of the fatwa is curious: the mufti contrasts the term *diyāna* with the term *ḥukm* (*wa-hāḏā min tarīq ad-diyāna ammā fī-l-ḥukm fa-iḏā*… 'and this is the religious practice. But in the legal rule, if…'). This is a confusing contrast since in 1868 there were two types of legal forums in Egypt: the *qāḍī* courts and the administrative councils, both of which applied *šarīʿa* norms and the government's administrative orders, and both of which used the term *ḥukm*. Presumably, the mufti meant by the term *ḥukm* a government regulation or decision. He explains that what is in the *ḥukm* allows an individual, other than the holder of the permission, to claim ownership by use within the three years period. Importantly, this last sentence also implies that – as opposed to the previous case – the mufti acknowledges that the administrative regulation allows that a new individual may execute the permission of the imam instead of the original grantee even within the three years prescribed by the previous muftis. He subordinated the government's interest in higher tax to the norm of acquisition by use.

Conclusion

When writing new histories of the world that consider humanity's interaction with nature, we can learn a great deal from Muslim legal sources. Muslim societies were predominantly agricultural until the 1950s, and indeed in many regions have remained so up to the present day. The issues related to reclaiming unused land include people's relationship to nature, the value of agricultural work to society, ideas about the future welfare of the community, the uses of law in everyday village life, and a detailed attention to what produces benefit (*nafʿ*) – in the sense of the joining and exploitation of the creative forces of nature and the human being.

We can see that Ḥanafī jurists provided a normative ideology for the expansion of central authority in matters of land tenure, but that this ideology was not entirely bound to the government. The first case analysed shows the village community's supremacy, the second case is a clear decision upholding the interests of the government, and in the last opinion it is unclear which party emerges as the winner

– the only certain issue in the *fatwa* is that the mufti prohibits foreigners' acquisition of newly available shore-lands without the government's permission. But we must also recognize that the mufti's insistence that *mawāt* and *ḫarāğiyya* lands belong to the *bayt al-māl* cannot be entirely taken as a pro-government position. The things in the *bayt al-māl* are – in most interpretations – the property of all Muslims (Mestyan and Nuri 2022), and thus the mufti regards this issue as being of crucial importance (retaining property for future generations). The government is only important as much as it represents the imam. The "general interest" of the Muslim community is another type of justification, in addition to the *bayt al-māl*. This "general interest" is more easily translated into the nineteenth-century European idea of "public interest." The *mawāt* cases of al-ʿAbbāsī al-Mahdī testify that the merging between the idea of the Muslim community as proprietor and the idea of the public had started before the British rule in Egypt in terms of land tenure.

REFERENCES

A. Primary sources

al-ʿAbbāsī al-Mahdī, *Fatāwā* = Muḥammad al-ʿAbbāsī al-Mahdī, *al-Fatāwā al-Mahdiyya fī l-Waqāʾiʿ al-Miṣriyya*. 6 vols. [Cairo]: al-Maṭbaʿa al-Azhariyya al-Miṣriyya, 1301 [1883–84].

Abū Yūsuf *Kitāb al-ḫarāğ* = Abū Yūsuf Yaʿqūb b. Ibrāhīm al-Anṣārī, *Kitāb al-ḫarāğ*. Edited by Muḥammad al-Manāṣīr. [Oman]: Dār al-Kunūz, 2009.

al-Buḫārī, *Ṣaḥīḥ* = Muḥammad b. Ismāʿīl al-Buḫārī, *Ṣaḥīḥ*. Damascus: Dār Ibn Kaṯīr, 2002.

The Economist = *The Economist*. (4 November 2022) "Indonesia's Imams Are Doing Their Bit for The Environment." Available at: https://www.economist.com/asia/2022/11/03/indonesias-imams-are-doing-their-bit-for-the-environment (Accessed: 6 November 2023).

al-Ḫalīl, *ʿAyn* = Abū ʿAbd ar-Raḥmān al-Ḫalīl b. Aḥmad al-Farāhīdī. *Kitāb al-ʿAyn*. Edited by Mahdī al-Maḫzūmī and Ibrāhīm as-Sāmarrāʾī. 8 vols. Baghdad: Dār ar-Rašīd li-n-Našr, 1980.

al-Ḥaṣkafī, *Durr* = Muḥammad ibn ʿAlī al-Ḥaṣkafī. *ad-Durr al-muḫtār fī Šarḥ Tanwīr al-abṣār wa-ğāmiʿ al-biḥār*. Edited by ʿAbd al-Munʿim Ḫalīl Ibrāhīm. Beirut: Dār al-Kutub al-ʿIlmiyya, 2002.

Ibn ʿĀbidīn, *Radd* = Muḥammad Amīn b. ʿUmar Ibn ʿĀbidīn, Muḥammad b. ʿAlī al-Ḥaṣkafī, and Muḥammad ibn ʿAbd Allāh al-Ḫaṭīb at-Timurtāšī. *Radd al-muḥtār ʿalā d-Durr al-muḫtār ʿalā matn Tanwīr al-abṣār*. 5 vols. Būlāq: al-Maṭbaʿa al-Kubrā, 1272 [1855–56].

Ibn Qudāma, *Muġnī* = Ibn Qudāma al-Maqdisī, *al-Muġnī wa-yalīhi aš-Šarḥ al-Kabīr*. Edited by Rašīd Riḍā. 10 vols. Miṣr: Maṭbaʿat al-Manār, 1347 [1928].

al-ʿIdwī, *Tabṣirat al-quḍāt* = Ḥasan al-ʿIdwī, *Hāḏihi Tabṣirat al-quḍāt wa-l-iḫwān fī waḍʿ al-yad wa-mā yušhadu lahu min al-burhān*. Miṣr: al-Maṭbaʿa al-Wahbiyya, 1272 [1855].

Mālik, *Muwaṭṭaʾ* (Fadel and Monette) = Mālik b. Anas, *Al-Muwaṭṭaʾ: [the Recension of Yaḥyā B. Yaḥyā Al-Laythī (d. 234/848)]*. Translated by Mohammad H. Fadel and Connell Monette. Cambridge, Massachusetts: Program in Islamic Law, Harvard Law School, Harvard University Press, 2019.

Mālik, *Muwaṭṭaʾ* = Mālik b. Anas, *al-Muwaṭṭaʾ*. 5 vols. Dubai: al-Furqān, 2003.

as-Saraḫsī, *Mabsūṭ* = Muḥammad b. Aḥmad as-Saraḫsī, *Kitāb al-Mabsūṭ*. Edited by Muḥammad Rāḍī. 30 vols. Miṣr: Maṭbaʿat as-Saʿāda, 1324–1331 [1906–1913].

at-Timurtāšī, *Matn Tanwīr* = Muḥammad b. ʿAbd Allāh al-Ḫaṭīb at-Timurtāšī. *Matn Tanwīr al-abṣār fī ǧāmiʿ al-biḥār*. Edited by Šayḫ Kamāl ad-Dīn Muǧāhid al-Azharī. Cairo: Maṭbaʿat at-Taraqqī, 1332 [1914].

B. Secondary sources

Barakāt, ʿAlī. 1977. *Taṭawwur al-milkiyya az-zirāʿiyya fī Miṣr wa-aṯaruhu ʿalā l-ḥaraka as-siyāsiyya (1813–1914)*. Cairo: Dār aṯ-Ṯaqāfa al-Ǧadīda.

Cole, C[amille]. L[yans]. 2021. "Nafia for the Tigris: The Privy Purse and the infrastructure of development in late Ottoman Iraq, 1882–1914." *History of Science* (n.a.).1–23.

Cuno, Kenneth M. 1992. *The Pasha's Peasants: Land, Society, and Economy in Lower Egypt, 1740–1858*. Cambridge: Cambridge University Press.

Delcambre, A[nne]-M[arie]. 1991. "Mawāt". *The Encyclopaedia of Islam, Second Edition* ed. by P. Bearman *et al*., VI, 869–870. Leiden: Brill.

Ghalwash, Maha Ahmad. 2023. *State, Peasants, and Land in Mid-Nineteenth-Century Egypt*. Cairo: American University in Cairo Press.

Johansen, Baber. 1988. *The Islamic Law on Land Tax and Rent: The Peasants' Loss of Property Rights as Interpreted in the Hanafite Legal Literature of the Mamluk and Ottoman Periods*. London: Croom Helm.

Jwaideh, Albertine. 1984. "Aspects of Land Tenure and Social Change in Lower Iraq During the Late Ottoman Times." *Land Tenure and Social Transformation in the Middle East* edited by Tarif Khalidi, 333–56. Beirut: American University of Beirut.

Linant de Bellefonds, Y. 1986. "Iḥyāʾ". *The Encyclopaedia of Islam, Second Edition* edited by P. Bearman *et al*., III, 1053–1054. Leiden: Brill, 1986.

Mestyan, Adam. 2020. "Seeing Like a Khedivate: Taxing Endowed Agricultural Land, Proofs of Ownership, and the Land Administration in Egypt, 1869". *Journal of the Economic and Social History of the Orient* 63/5–6.743–787.

Mestyan, Adam and Rezk Nuri. 2022. "The Probate Regime – Enchanted Bureaucracy, Islamic Law, and The Capital of Orphans in Nineteenth-Century Egypt". *Law and History Review* 40/4.597–624.

Peters, Rudolph. 1994. "Muḥammad al-ʿAbbāsī al-Mahdī (d. 1897), Grand Muftī of Egypt, and his *al-Fatāwā al-Mahdiyya*". *Islamic Law and Society* 1/1.66–82.
Reilly, James A. 1987. "Sharīʿa Court Registers and Land Tenure around Nineteenth-Century Damascus". *Middle East Studies Association Bulletin* 21/2.155–169.