Abstract

Ottoman state practice in the field of state succession in the nineteenth century displays strict adherence to European notions of international law. This is evident from the ratification of cession treaties, attention to reciprocity, the use of mediation, reliance on existing laws of war principles, including the legal effects of occupation, conquest and the rights and duties of belligerents. The article focuses on state succession treaties with Greece as this represents the paradigm for all future treaties, examining the Islamic origin of Ottoman land regulation. The Ottomans succeed in attaching a further condition to their cession arrangements with the new Greek state, namely the latter's obligation to respect the property rights of Muslim citizens. This brings into play the application of Ottoman land law, which Greece is under no obligation to succeed to. This body of law, particularly the set of property rights bestowed under it, becomes a focal point in the ensuing state succession negotiations. It is the actual basis of Muslim property rights – a precursor to contemporary property rights – and a sine qua non element of Ottoman practice in the law of state succession. In this light, Ottoman land law and institutions should correctly be considered as general principles of law – with origins from the Qur'an and the early caliphates – as well as regional custom, at least in the territories liberated from Ottoman rule and which continued to apply and enforce it not only to Muslims but also in the property relations of the indigenous ethnic communities.

Introduction

In most cases legal history provides an opportunity to analyse past developments and practices but is only seldom relevant to contemporary legal processes. The subject matter of this article is therefore somewhat exceptional because it demonstrates, among others, in what manner nineteenth century Ottoman land law, which was in place throughout the territories conquered by the Ottoman Empire, is relevant to land claims in contemporary Greece. An illustration of contemporary relevance is apt. Early nineteenth century Ottoman law[1] generally distinguished between public and private lands – as well as land held by charities (*vakif*).[2] The new nation of Greece became the successor to Ottoman territories initially in 1830, later extending its sovereignty to other territories occupied by the Ottoman Empire. Whereas upon succession – and during the preceding armed rebellion also some private land which was confiscated and sold - all public land came into the ownership of the Greek state by reason of capture/conquest, the same was not true in respect of privately-owned land. Much of this land in the Aegean islands was not considered valuable and although claims

[1] That is, the body of law applicable in all territories under the control of the Ottoman Empire prior to its codification of 1858.

[2] Athens First Instance Court judgment 10231/1929. For other sub-categories and variations thereof see the discussion below. I have avoided references to Greek journals where judgments are published as these are meaningless to non-Greek speakers. Greek judgments seldom, if ever, provide numbered paragraphs and hence I have no citations to page numbers or paragraphs. I have equally avoided references to Greek academic articles on issues relevant to this paper – published in the early 1900s – because they are inaccessible to a largely international audience.

premised on Ottoman law had been lodged throughout the nineteenth and early twentieth century, the recently-acquired real estate value of land on the islands has brought about a revamped army of suitors who once again rely on the same body of law. The claimants intimated that with very few exceptions, if any, the Ottomans had not designated any land in the Aegean islands as public and hence upon succession all land therein was subject to private ownership.[3] Therefore, it was claimed, the Greek state possessed no right of ownership and all that was needed by the claimants was a valid chain of titles dating from Ottoman rule to the present day.[4] The Greek government has vehemently contested these claims and with arguments largely drawn from Ottoman land law has retorted that it would have been out of sorts for the Ottomans not to carve out any public entitlements in the Aegean. This seems to be the position of Greece's Supreme Court of Cassation, the *Areios Pagos*.[5]

The international law dimension of nineteenth century Ottoman land law is not immediately evident. For one thing, Ottoman land law, much of which was inspired from the Islamic legal tradition, was uniform throughout the Empire and was therefore an international land law – albeit with regional effect - for all conquered territories. One should not take this too far, my intent being to make an analogy with the concept of *jus gentium* under Roman law, which although called international was effectively domestic Roman law applicable in the relations between Roman territories. Secondly, although beyond the purview of this article, the links between Ottoman and traditional Islamic land law, particularly the underlying financial considerations, rendered the former part of the wider, ecumenical, land law of Muslim nations. Indeed, given that a significant element of Muslim conquest since the time of Mohamed encompassed territorial claims against the vanquished, the regulation of land ownership was a significant part of Islamic international practice up until the demise of the Ottoman Empire. Thirdly, land claims are an integral part of several international law disciplines, namely in the law of State succession, international humanitarian law, particularly occupation and the rights of aliens, human rights, especially the right of private ownership and finally treaty arrangements, most notably the fate of property rights following peace treaties and population exchanges.

The intersection between general international law and Ottoman land law is interesting because it clearly shows that by the early part of the nineteenth century Ottoman leaders, which pretty much represented the Muslim world, accommodated their claims in the international sphere on the basis of sovereignty and reciprocity. This is by no means a novel

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[3] In 1934, *Areios Pagos* ruled in judgment 200/1934 that all land on the island of Ikaria, as indeed in all the islands of the Aegean, was subject to private ownership (*mulk*) under the Ottoman regime, the transfer of which did not require any particular formalities. The Cassation Court (*Areios Pagos*) went as far as to claim that this state of affairs (i.e. the private ownership of land throughout the Aegean islands) was "beyond doubt", against which no contest could be made. This judgment, the ramifications of which were not evident to the judges in 1934, was set aside by the same Court in its judgment 1/2013. Alas, the 1934 decision was not the only one. The Aegean Court of Appeal in judgment 18/1925 held that by way of exception all lands on the islands of Chios and Lesbos are private lands subject to full ownership on the basis of prior Ottoman regulation; equally with respect to Lesbos, see Aegean Appeals Court judgment 50/1923 and Syros First Instance Court judgment 264/1927; the same result was recently reached as regards the island of Euboea by the Athens Appeals Court (sitting exceptionally in Euboea) judgment 166/2011.

[4] The principal legal justification as to the wholly private character of the lands on the Aegean islands stems supposedly from their legal mode of acquisition. It is argued that under ancient Ottoman practice, as codified much later in Arts 1 and 2 of the 1858 Ottoman Land Code, only land acquired by the Sultan through war was considered public land. The Aegean islands were sold to the Sultan by the Venetians and the Genoans and as a result their tenure was considered private from the outset. This justification which is not accepted by *Areios Pagos*, has been offered by several lower courts, such as recently the Naxos First Instance Court judgment 62/2004.

[5] *Areios Pagos* judgment 1/2013.

suggestion, particularly since it has long been demonstrated that by the thirteenth century Muslims abandoned the dichotomy between *dar-al-Islam/dar-al-harb* (territory of Islam and territory of war respectively) in their relations with non-Muslims, opening the way to a third category, the *dar-al-sulh*, which means the territory of peace.[6] The *dar-al-sulh* in the particular circumstance of Greek succession to Ottoman territories between 1825 and 1832 exemplifies a willingness to resolve land claims by complex international legal means and not simply on the basis of the ancient custom of capture. This merging of ecumenical Ottoman/Islamic land law with largely Western notions of international law was important for yet another reason; it provided legal certainty (in land matters) to Muslims and Christians by guaranteeing its force in respect of all land transactions prior to Greek succession. Interestingly, and as a result of the subsequent operation of Ottoman land law, in the course of the last two-hundred years Greek courts have created a significant body of jurisprudence, with many litigants, now exclusively Greek, relying on Ottoman legislation. This construction by the Greek courts of ancient Ottoman legislation is based on its historic context and as a result may be completely alien to similar developments in Turkey or other nations still relying to a larger or lesser degree on Ottoman land law.

The International Character of Ottoman Land Law and its Gradual Departure from Classical Islamic Ownership Law

The Ottoman conquest, as indeed all other conquests by Empires, was based on the subjugation of occupied peoples and territories. Given that oppression can only achieve limited results – and fuels endless conflict – in addition to being expensive to maintain, it was only natural that the conquerors sought to consolidate their control and pacify the local populations by providing financial incentives, at least from the seventeenth century onwards. There is no better incentive than assured land tenure because it has the potential of turning a part of the occupied population into a formidable ally of the occupier. There was also the issue of generating income from annexed territories, because if they did not they would constitute a financial and military burden upon the new conqueror. Consequently, the regulation of land by Ottoman legislators encompassed of tax on property as well as a tax on produce[7]. Hence, Ottoman land law is to a large degree a reflection of the Empire's practice of belligerent occupation with the twofold objective of maintaining order and generating income, although such notions matured around the seventeenth century. Land regulation was therefore a central characteristic – if one takes annexation for granted – in the treatment of

[6] M Khadouri, *War and Peace in the Law of Islam* (LawBook Exchange,1955), at 202-22.

[7] There are several stages in the evolution of Ottoman land regulation. The first is associated with a fief (*timar*) system whereby conquered land was granted to cavalrymen in exchange for their continuous participation (along with raising small local armies) in military campaigns. The idea was that the land would be cultivated by peasants who would then pay tax on produce to the state, a part of which would return to the fief. The state could repossess the land if the cavalryman failed to provide military service or produce crops for three years. This system provided hereditary rights in practice following a halt to Ottoman expansion. By the fifteenth century, but especially since 1550 the fief system was abandoned because the Empire's poor economic situation (compounded by the huge inflow of gold and silver from European colonies forcing the Ottomans to debase their currency) gave rise to large urban migrations, while at the same time European nations had formed professional armies. The Ottomans thus turned to a system of tax-farming (*iltizam*). The right to collect taxes was auctioned to private individuals in exchange for a lump sum, but the pressure on the peasants to increase production created unrest which led to minor reforms in their favour with the introduction of the *melikane* system in 1695. The reform era (*tanzimat devri*) officially took shape officially in the mid-nineteenth century. However, there are many similarities with the system inherited by Greece upon independence in 1830. See H Inalcik, State-Owned Lands (Miri), in H Inalcik, D Quataert, *An Economic and Social History of the Ottoman Empire, 1300-1914* (Cambridge University Press, 1994).

occupation by the Ottomans. No doubt, there was a far more complex interplay between agrarian reform, military capacity, tax collection, regional control and food security than what is described here in a few lines.[8] As will become evident, this ecumenical Ottoman land law was very much the product of classical Islamic legal thinking. The international character of this body of law is also manifested in its unity throughout the vast expanses of the Empire and the relative uniformity in its application. Indeed, where Ottomans purchased sovereign rights over foreign territories, it was assumed by the parties that Ottoman land law would subsequently be applicable even in respect of non-Muslim residents.[9] Although until the middle of the nineteenth century there were no developed notions of private international law, from the latter part of that century to the present day all land rights and relevant transactions based on Ottoman land law have been respected in the courts of third nations as the proper *lex situs*.[10] A general rule could perhaps be articulated to the effect that certain parts of imperial law, including land law, may gain an international character, particularly where they satisfy legal certainty and hence are unopposed as is largely the case with the situation under consideration. Therefore, the international character of Ottoman land law is not an idiosyncratic feature of this body of law.

So what were the principles of Ottoman land law as well as those of classical Islamic law before it? It should be stressed that classical Islamic law was unconcerned with delineating the legal niceties of land ownership as such, albeit it was by no means antithetical to private ownership or profit-making. In accordance with the Qur'an, since man's earthly existence is temporal, all things on earth belong to Allah and are bestowed by Him upon individuals on the basis of a sacred trust.[11] As a result, ownership rights find their justification in stewardship (*khilafa*) and the legitimacy of the means by which said ownership is acquired, namely through the restoration of socio-economic justice (*al-adl*) and the promotion of mutual benevolence (*al-ihsan*).[12] The morality of ownership is central to the Qur'an whereby the legitimacy of private ownership is acceptable where it is the result of physical and mental work, the product of landed property (i.e. cultivation and farming of otherwise deserted land), extraction of minerals, inheritance and bequest and finally trade and commerce.[13] These principles apply *mutatis mutandis* to both objects and land (*al-mal*, which corresponds to anything that can be owned and which has value). Public ownership under the principle of *khilafa* was also recognised with a view to fulfilling the aims of a just Muslim society, such as the defeat of poverty, gross inequality and protection from aggressors. The Islamic state exacted a number of taxes from Muslims and non-Muslims in order to meet the needs of its people and as a result public ownership of lands was not *haram* (unacceptable) in classical Islam or in the practice of its subsequent caliphates; quite the contrary.[14]

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[8] See generally V Moutafchieva, *Agrarian Relations in the Ottoman Empire in the Fifteenth and Sixteenth Centuries* (Columbia University Press, 1988).

[9] Several Aegean islands had been sold to the Ottomans in the sixteenth century by way of agreement by their prior sovereigns/occupiers, namely the Genoans and the Venetians. The historical sources relating to these purchases are discussed in judgment 51/2007 of the Aegean Appeals Court. It is exactly on the basis of this public purchase of the islands by the Ottomans which justifies the argument by the Greek government that at no point did said lands cease to be public property. See also note 3, above, with a discussion of the same issue by another court.

[10] This is particularly so in Greece. For example, the Aegean Court of Appeals in judgments 23/1929 and 90/1930 determined that all lands deemed public under Ottoman law and which were ceded under an Ottoman title did not give rise to full ownership but rather to usufruct.

[11] Qur'an 2:30 and 36:54.

[12] AM Bashir, Property Rights in Islam, in *Proceedings of the Harvard University Forum on Islamic Finance: Local Challenges, Global Opportunities* (Harvard, 1999), 71, at 72.

[13] Id, at 73-74.

[14] See S Sait, H Lim, *Land, Law and Islam: Property and Human Rights in the Muslim World* (Zed Books, 2006), at 12.

Ottoman law, as will become evident, inherited the basic architecture of land rights (including tenure) developed by subsequent Muslim scholarship and the practice of the caliphates. Thus, classical Islam distinguishes between full private ownership (*mulk*), state ownership (*miri*), endowments, or land entrusted to charitable institutions (*waqf*) and common land (*metruke*). Although these are the basic forms of land tenure, other lesser ones were also known in practice, such as communal land (*musha*).[15]

One should not, however, assess the existence of land tenure in Islamic state practices, as indeed in Ottoman law and state practices, in isolation of the political and military realities existing in the relevant time. The military – in addition of course to the peaceful – expansion of the caliphates and the Ottomans in the Arabian peninsula, North Africa and Europe brought into play the Islamic notion of war booty.[16] Although part of this was used for the purposes of *khilafa*, the Ottomans distributed large tracts of occupied land to those who took part in military campaigns as a form of reward. In time, however, and with the establishment of a permanent administration in the annexed territories, it made sense to provide land tenure to prominent personalities among the subjugated populations – or subsequent converts to Islam - in exchange for their loyalty. The allocation of land tenure to non-Muslims encompassed not only political but also financial objectives as hefty taxes were levied with a view to maintaining the ever-growing administrative apparatus. Hence, much like in classical Islamic legal practice, Muslims, under the Ottomans, were entitled to land with full ownership rights (*mulk*), at least from the late seventeenth century onwards. M*ulk* tenure was later also afforded to particular classes of non-Muslims. Thus, whereas Muslims with *mulk* properties were taxed one-tenth over the value of their properties (*arazi-i osriye*), non-Muslims who wilfully subdued to the Sultan were afforded *mulk* ownership rights but subject to a higher tax than that which was ordinarily applicable to Muslims, known as the *araz-i haraciye* (or *harac* as is commonly known).

Greek courts, according to the judgments studied analysed here, have unanimously recognised that under long-standing Ottoman law, going back well before the nineteenth century, there were virtually no impediments to the transfer and cession of *mulk* land.[17] In fact, no written agreement or other formalities were required[18] (including registration of title with the land registry)[19] and the new owner could prove the transfer by any means, including solely by witnesses.[20] Besides *mulk*, Ottoman law recognised public lands (*arazi-i emiriye*), endowments (*vakif*) and abandoned land (*metruke*).[21] The concept of public lands evolved from that of state lands (*arazi-i memleket*) whose original purpose approximated the aims of *khilafa*, namely their common use by all people, which pretty much explains why they were considered protected lands (*arazi-i mahmiyye*) not subject to private ownership. The

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[15] Id.

[16] Qu'an 8 (*al anfal*):1, whereby "spoils [of war] are at the disposal of Allah and the Messenger"; Qur'an 8:41, according to which: "And know that out of all the booty that ye may acquire (in war), a fifth share is assigned to Allah- and to the Messenger, and to near relatives, orphans, the needy, and the wayfarer"; Qur'an 33 (*al azhab*):27, whereby: "And He made you heirs of their lands, their houses, and their goods, and of a land which ye had not frequented (before)."

[17] *Areios Pagos* judgment 9/1927.

[18] Aegean Appeals Court judgments 8/1921, 40/1921, 44/1921 and 55/1921; Athens First Instance Court judgment 10231/1929.

[19] Thrace Appeals Court judgment 24/1929; Aegean Appeals Court judgment 116/1930. See *contra* Mytilene First Instance Court judgment 403/1931. The 1858 Ottoman Land Code introduced formal titling and registration, principally with a view to increasing revenues through the collection of appropriate taxes.

[20] Aegean Appeals Court judgments 18/1925 and 143/1929; Thrace Appeals Court judgment 24/1929.

[21] Athens First Instance Court judgment 10231/1929. The observant reader will have noticed the terminological confusion in the term *metruke* by the Athens court and its use in classical Islamic legal thinking. The Ottomans had purposely altered its meaning to denote abandoned land, contrary to its classical meaning of communal or protected land (*arazi-i mahmiyye*).

similarities between Ottoman and classical Islamic land law are striking (even in terminology), albeit the fundamental element of *khilafa*, central to classical Islam, was not especially strong in Ottoman practice as it was in the early caliphates.

With this observation in mind it was not a far leap for the Ottomans to gradually erode the *mulk* regime, initially by restricting it to land in cities and villages containing buildings, thus excluding fields, prairies and farmlands,[22] save by means of an exceptional decree by the Sultan (*temlik name*). This concentration of public lands in the Ottoman government created several anomalies, particularly the inability of the state mechanism to utilise land productivity to its maximum potential, not to mention the loss of taxable revenues which would otherwise accrue to the treasury if the lands had been in private hands. This led to the creation of the concept of *tassaruf*, whereby the Sultan's ownership over public lands persisted (*rekabe*), albeit the use and possession of the land in question was transferred by formal title (*tapi*) to a private third party.[23]

This section hopefully demonstrated in brief terms the evolution of the Ottoman land tenure system with its origins in classical Islamic law, albeit with a significant departure due to the gradual abandonment of *khilafa* for whatever socio-political reasons. This Islamic/Ottoman state practice found further application in the occupation (which was typically the first step towards annexation) and conquest of non-Muslim territories by the various caliphates, including the Ottoman caliphate. The land tenure system described in this section is a direct expression of this particular state practice, whether as war booty or administration of conquered (essentially annexed) territories and is consistent with the respective practice of European powers up until the early nineteenth century. By this time the Ottoman Empire had fully accepted the prevailing, yet largely rudimentary, law of nations and the next section will attempt to discuss how this was achieved in practice with an emphasis on the land regime in Greece to which the newly-emergent Greek state was succeeding to.

The Protection of Ottoman Land Tenure in Treaty Law and the Law of State Succession

Following a successful military campaign which lasted almost a decade, Greece entered the family of nations officially in 1830. There were several parameters and limitations to Greek independence, all of which stemmed from the reluctance of the then European powers to destabilise the Ottoman Empire, which they too had recently defeated in their defence of Greece, by breaking it up into small and fragmented nations which would have provided little security and stability in the region. By 1928 Greek forces were effectively in control of the Peloponnese, the district known as Sterea Ellas (which includes Athens), the island of Euboea and most of the Aegean islands. Nonetheless, the independence of Greece was by no means a foregone conclusion, at least in unilateral terms. It was inconceivable even to the Greeks themselves that sovereignty could be achieved by means of an effective occupation, the existence of a largely homogenous ethnic population and a unilateral declaration of independence. It was quite clear that statehood and sovereignty was something that could only be conferred by European powers under their own terms and conditions.

Within the context of this political framework the Great Powers, namely Great Britain, France and Russia mediated between the Ottomans and the Greeks with a view to agreeing the final terms of independence. As regards the fate of existing land tenure, two

[22] See Kozani First Instance Court judgment 438/1915.

[23] See *Areios Pagos* judgments 175/1933. Use and possession by means of a *tassaruf* cession entailed a right to further cession, subject to formal consent by the Sultan. *Areios Pagos* judgment 9/1927.

legal regimes came into play, namely the laws of war and the law of state succession as supplemented by relevant treaties. In the ongoing cases before *Areios Pagos*, legal counsel representing the Ministry of Finance have consistently taken the view, with the Cassation Court agreeing,[24] that Greek rebel forces had by 1830 (the date of formal independence) assumed full ownership of all public property (including public lands) formerly in the hands of the Ottomans by reason of a "right of war", presumably referring to a right of booty. This conclusion is, however, only partially true because prior to formal independence the Greek forces were at best[25] in occupation of the territory and not the rightful successors to the Ottoman Empire. Article 55 of the Regulations annexed to the 1907 Hague Convention IV on Respecting the Laws and Customs of War on Land reflects long-standing practice, as does the entirety of section III thereto which refers to the rights and obligations of the occupying power. This provision clearly states that the occupying power is regarded only as administrator and usufructuary of public buildings, real estate, forests and agricultural estates belonging to the hostile state in the occupied territory. The right to booty exists only in relation to the enemy's movable property and it is of no legal importance if such property is captured in combat or following an occupation.[26] Moreover, in accordance with Article 46(2) of the 1907 Hague Regulations the occupying power does not possess a right to confiscate private property rights.

It is not entirely clear whether these norms were considered as being of a customary nature in the early 1800s,[27] despite the fact that several judgments by Greek courts in the early 1900s claimed that the existence of war affected only public, as opposed to private, entitlements and obligations of the belligerent nations' citizens.[28] Despite initially finding their way into the London Protocol of February 1830 (essentially the peace treaty between the Ottomans and Greece which granted nationhood to the latter), discussed below, a subsequent Protocol of 19 June/1 July 1830[29] between the same parties came to modify or distinguish somewhat the legal situation regarding private immovable property. Whereas the earlier Protocol (Article 5) clearly stipulated that all Muslim rights over private property in the territory comprising the new state were guaranteed and not subject to confiscation, Article 2(1) of the latter Protocol emphasised that the Greek obligation in Article 5 of the earlier Protocol "referred to the future and not the past". This provision expressly stated that the aforementioned guarantees applied only with respect to existing property rights and did not encompass an obligation on the Greek government to compensate private ownership

[24] *Areios Pagos* judgment 1/2013.

[25] There was no other precedent of a non-state entity being entitled to rights and duties from the law of occupation at the time, so the treatment of the Greek forces as an occupying power must be seen as exceptional.

[26] See ICRC, Commentary on the Additional Protocols of 1977, Additional to the 1949 Geneva Conventions (Martinus Nijhoff, 1987), at 803.

[27] See H Lauterpacht, *Oppenheim's International Law: Vol II, Disputes, War and Neutrality* (Longman's, 7th edition, 195), at 397, who states that under a former rule of international law, even during the nineteenth century, belligerents could appropriate all public and private enemy property which they found on enemy territory, but this was not possible prior to annexation. In any event, Lauterpacht does not specify when this norm was definitively modified and later suggests that the occupant was never allowed to confiscate private immovable property, at 403ff. Again, it is not clear whether this blanket prohibition existed during the early nineteenth century.

[28] Larisa First Instance Court judgment 41/1913 and Herakleion First Instance Court judgment 183/1929. In any event, the two judgments noted that "war" was not a lawful cause under international law for the cessation or abrogation of treaty rights and obligations, but solely a legitimate cause for the suspension of said rights and obligations to the degree that they are in conflict with the belligerent situation.

[29] The author has made use of a Greek version found in D Kokkinos, *The Greek Revolution*: volume 12 (Melissa, 1959), at 231ff

confiscated during the course of the liberation war (i.e. prior to 1830).[30] The clarity by which this distinction is made naturally leads one to conclude that by the early 1800s, although there was no settled customary rule on the treatment of private immovable property in occupied territory, the confiscation of such property for the purposes of the war effort by the occupier was not considered a violation of international law. Conversely, the wholesale confiscation of all private immovable property without any connection to the war effort must have been subject to revocation, remedial action and/or reparation by the occupier. In the present case, this conclusion is drawn from the fact that the rebel Greek army had only confiscated some Ottoman properties, most possibly a minor fraction. It is not unlikely that this practice constituted emerging or standing custom, to which in any event the Ottomans consented and acquiesced. These developments are also interesting because they demonstrate the Ottomans' adherence to the formation and use of customary international law, which is generally thought to be the product of exclusively European, Christian, nations. The practice of the Ottomans, successors to the early Islamic caliphates, dispels to some degree such criticisms, at least as regards the formation of customary rules in the early nineteenth century.

By 1829 the negotiations between the various parties as to the terms of Greek independence had given rise to numerous exchanges and alas a draft treaty. This so-called London Protocol of 10/22 March 1829 [draft Protocol][31] was not eventually adopted but constitutes a true and unanimous reflection of the legal position of the parties as regards the fate of property rights in circumstances of state succession. For one thing, the Ottomans were urged to accept (but essentially to demand) the annual payment of a hefty tax from Greece, a condition ultimately abandoned because the new entity would have quickly succumbed to indebtedness.[32] However, coupled with the condition that the Great Powers were to elect the nation's imposed monarch it was evident that Greece's sovereignty was circumscribed and by no means absolute.[33] The fact that a long section on the maintenance and guarantee of Muslim property rights was incorporated in the draft Protocol without an equivalent for public property – coupled with the aforementioned proposal for an annual tax – may go some way to suggest that the Great Powers were reluctant to recognise a succession by right of conquest, but rather a succession by peaceful means effected through a (peace) treaty.[34] In any event, it was implicit that the Greek state lawfully succeeded to the property rights of the Ottomans in territories ceded to newly-independent Greece.

The 1829 draft Protocol envisages two broad categories of Muslim land owners, namely those who wish to remain in the new state and those who wish to exit it. In respect of the former, both Greece and the Ottoman Empire were reciprocally obliged to guarantee existing property rights of Greeks and Muslims respectively. Land owners who wished to leave were granted the right to sell their properties within the course of a year, failing which an independent committee would assess their value which the Greek government was obliged

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[30] An 1837 Law entitled "Distinction between Public Lands" specifically encompasses private lands confiscated during the Greek rebellion as public lands. This result was also confirmed by Athens Appeals Court judgment 8339/2000.

[31] Greek version as found in Kokkinos, above note 29, at 104ff.

[32] It should be noted that the revolutionary entity had already received a significant loan by English financiers, which had naturally been guaranteed by Great Britain. It was thus in the financial interests of the latter to see the loan repaid with interest, something which would have proven impossible had Greece not ultimately become independent, or had it been liable to pay, in addition, the proposed annual tax to the Ottomans.

[33] In fact, the first-appointed monarch, Prince Leopold of Sax-Coburg quickly resigned his throne and in an angry letter to the representatives of the Great Powers, written in London on 9 May 1830, stressed that he was frustrated with being simply a representative of the allies, merely appointed by them to keep Greece subjugated by the strength of their arms (my translation). The text is found in Kokkinos, above note 29, at 227.

[34] In light of the 1830 peace treaties by which territory was ceded by the Ottomans to Greece, one is forced to refute Crawford's suggestion that the component territories of the Empire achieved their independence without any express recognition or declaration by the Porte. See Crawford, below note 41, at 373.

to offer to the departing owner.[35] Although the relevant provision in the draft Protocol makes reference to usufructuary rights, these are specifically associated with charitable foundations (*vakif*). *Prima facie*, therefore, it seems that *tassaruf* rights over former public lands ceded by the Sultan to private individuals are outside the ambit of the protection offered. This distinction is of paramount importance, for if *tassaruf* rights are excluded then said lands were to be considered public and hence subject to legitimate booty without an obligation to compensate. Article 5 of the subsequent (final) London Protocol of 22 January/3 February 1830[36] is even vaguer than its 1829 predecessor by providing that both nations guarantee to Christians and Muslims within their territory full protection of existing property rights, without any further distinctions between full and lesser forms of ownership. Subsequent judgments of Greek courts have provided ample recognition to *tassaruf* rights,[37] irrespective if one claims that the Ottoman government may have abused this concept slightly prior to its military defeat in order to declassify public lands and hence avoid subjecting them to Greece's booty entitlement. The existence of *tassaruf* rights, in fact, produce no legal effects on the law of booty because under Ottoman land law ownership of *tassaruf* lands remains governmental and hence subject to capture. Private usufructuary rights do not affect the public character of the land, albeit said rights are not subject to confiscation as booty because they are private in character.[38] The Greek Parliament adopted a law on farming in 1920, Article 49 of which converted all *tassaruf* rights to rights of full ownership.[39]

Interestingly, on the basis of a subsequent London Protocol, which entered into force and was dated 4/16 June 1830[40] it was agreed that land possessed by Ottoman charitable foundations (*vakif*) and which was located on territory under the control of Greece was deemed legitimate booty. Private usufructuary rights over *vakif* lands were covered uner the same legal status.

In closing, one cannot but comment on the fact that Greece's succession obligations as regards private land ownership was to respect tenure rights thereof, not to retain Ottoman land law. Hence, Greece could have just as well abolished Ottoman land law altogether and substituted Muslim private ownership with its equivalent in the country's civil code. This did not happen for practical reasons and in order to retain a high degree of legal certainty, particularly since many Greeks owned land under the previous regime. There is of course another consideration which is not altogether evident. The obligation to guarantee existing land rights refers to rights *in rem*, which are perpetual, in the sense that the owner may legitimately cede or bequeath and this can go on in endless chain without the right itself suffering any loss in its substance. As a result, in strictly legal terms, it is unclear what is encompassed in the particular case of state succession under the obligation to respect existing land rights of Muslim subjects; the obvious conclusion points to the rights of the persons at the time and no one else. However, in practice, given the substance of rights *in rem*, such a restriction would have produced unknown consequences on Greece's fledgling land tenure, so the decision was made to retain Ottoman land law for several generations.

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[35] This was later implemented with respect to properties situated in other parts of Greece, which during 1830 were occupied by the Ottomans. See Arts VII and VIII of the 1832 Constantinople Treaty for the Definitive Settlement of the Continental Limits of Greece.

[36] The Greek version of the Protocol is from Kokkinos, above note 29, at 160ff.

[37] *Areios Pagos* judgment 175/1933.

[38] Unlike the transfer of *mulk* property, which as already explained required no formalities, the cession of tassaruf rights required the issuance of legal title and registration with the Ottoman land registry. Aegean Appeals Court 131/1930.

[39] Law No 2052/1920. See also Supreme Court of Cassation judgment 183/1931.

[40] Greek version in Kokkinos, above note 29, at 228.

State Succession in respect of non-Occupied Pockets of Annexed Ottoman Territory: the Case of Mani

The southern-most mountainous region of the Peloponnese, now falling administratively within the prefectures of Lakonia and Messinia, known as Mani, enjoyed a very particular circumstance during the Ottoman occupation of Greece. Blessed with a treacherously impassable terrain and inhabitants that were determined never to succumb to the Ottomans, the Maniots never subjugated to the Empire and the army of the latter at no point effectively occupied the region of Mani, despite several unsuccessful attempts from 1460 onwards. At the face of such resistance the Ottomans gave up military means and in the seventeenth and eighteenth century appointed prominent Maniots as representatives of the Sultan (*bey*) in an attempt to foster some self-rule under the authority of the High Porte, in addition to an annual tax. The people of Mani never considered said representatives as their leaders, or the Sultan as their ultimate authority and in fact many of these representatives took military action against the Ottoman army and its allies. Moreover, the annual tax was never paid, or if it was, this would have been an exceptionally rare event.

The people of Mani have as a result of their exceptional circumstances claimed that since 1830, the date of Greece's independence, there were no public lands in the region because it had never been occupied by the Ottomans. The argument is certainly valid from the perspective of private law, particularly since Ottoman land law had never been applied to any land in Mani, whose people effectively sold and bought land by oral and written agreement, and by 1830 there were no notarised titles or deeds as was the case with all land previously administered in occupied Greece by the Ottoman land registry.[41] However, it is certainly unusual for a territory to have been annexed for a period of four centuries within which a pocket has never been effectively occupied, albeit having never sought distinct legal personality or recognition as such by other state entities.[42] The 1830 London Protocol did not make any special reference to Mani, making clear that the entire Peloponnese was ceded to Greece; with which of course the Maniots, as Greeks, were overwhelmed.[43]

From the point of view of state succession – and the legal repercussions this would have entailed – it is fair to say that the principle *nemo dat quod non habet* (no one gives what he does not have) is directly applicable. The Ottomans failed to occupy Mani and it is absurd to claim that territory may otherwise be annexed by the issuance of a mere administrative decree to that effect. As a result, the region of Mani united with Greece in 1830 by "sovereign" consent and not through an Ottoman cession. Its last sovereign was the kingdom of Venice in the fifteenth century but since that entity's subsequent demise the people of Mani must be deemed as possessing some degree of international legal personality. While

[41] As a result, it is fair to say that the distinction made by Crawford between protection and devolved status – the latter involving a separation for practical purposes while remaining formally part of the metropolitan state – does not apply to the relations between the Ottomans and the Maniots. See J Crawford, *The Creation of States in International Law* (Oxford University Press, 2nd edition, 2006), at 287.

[42] Perhaps not so, considering that in subsequent successions the lack of adequate cartography was largely responsible for the non-inclusion in maps of islets and islands in territory otherwise ceded by mutual agreement. Confusion over the status of territory is also reported in an 1817 treaty of cession by which the British sold the mainland city of Parga (Epirus region) to the Ottomans. Recent research conclusively demonstrates that Parga was a dependence of the Ionian Islands, then a sovereign nation albeit a British protectorate, whose parliamentary consent, which was never provided, was required in order to validate the cession. See E Roucounas, How the Organs of the State Read Article I of the Treaty of London of 1864 as to the Territorial Questions [in Greek], in *Proceedings of the Union of Greece with the Ionian Islands, 1864-2004* (Academy of Athens, 2005).

[43] In the early 1800s there were three serious attempts by the Ottomans to subjugate Mani, namely in 1803, 1807 and 1815, all of which failed. See E Dee Kord (ed.), *The Ottoman Invasion of Mani: Maniots, Mani Peninsula, Ottoman Empire* (Betascript Publishing, 2011).

this may not have amounted to nationhood in 1830 – at least in the strict sense of the Vienna Congress of 1815 - their recognition of self-rule by the Ottomans was such that sufficed to grant Mani several entitlements usually afforded to states under international law, particularly, as in the present case, the right to unite with another nation of their choice. Any other result would create an absurdity that would have assimilated Mani to *terra nullius*, but it should also be emphasised that a peace/succession treaty excluding Mani would have been politically awkward for all the parties – including the mediators – and would have caused far more legal problems than the ones designed to solve.[44]

In 2012, after almost 180 years of protest, the Greek government tacitly recognised the historical claim of the people of Mani that they were never occupied or in any other way conquered by the Ottomans and hence that no part of their lands was ever Ottoman public land. This was achieved through an amendment to Article 62 of Law No 998/1979 which reversed the general burden of proof which requires the production of evidence by the disputant that particular land is not public. The amendment excluded all land in Mani from the general burden of proof, thus tacitly acknowledging that all land there has always been private because it was never in Ottoman hands.

The Reception of Ottoman Land Law by Successor Greek Courts and its Place as Regional Custom

The extensive use of judgments by Greek courts was undertaken with a twofold aim: firstly, to illustrate the continuity of Ottoman land law not only as a strict matter of state succession but in order to meet practical needs, and; secondly in order to gain useful insights into its historical past, given that the Greek courts construed Ottoman land tenure as it existed upon independence, making no attempts to provide contemporary or progressive interpretations. The same courts have discussed at length the obligations of successor states under international in relation to the legislation of the former sovereign. It has thus been ruled that the laws of the former sovereign are not only in force upon succession in relation to contractual and other legal relationships, but must moreover be considered domestic rather than foreign law.[45] As a result, Greek courts were found to enjoy jurisdiction to entertain appeals and cassation claims against judgments dealing with Ottoman law rendered prior to the succession of Greece.[46] The Supreme Court of Cassation has gone as far as rule that the

[44] Legal and historic confusion, usually intertwined, is rife to the present day. The Athens Appeals Court in its judgment 166/2011 held that the Ottoman government possessed no public lands on the island of Euboea prior to Greek independence and as a result these could not have been confiscated by "right of war". Moreover, it ruled that the island was ceded to Greece and unlike other territories it was not incorporated by Greece by means of a military victory. The confusion in the reasoning is clear. For one thing, the succession of Greece to former Ottoman territories was never deemed as having been achieved by conquest but on the basis of mediated cession; this is irrespective of the Greek rebels' effective occupation of said territories. Secondly, the third (latest) London Protocol of 1830 expressly stated that private property confiscated (and sold) by the rebels in the course of the rebellion was not subject to reparation or restitution. There is also a peculiar interpretation of the provision (Art 2) that discusses the territories ceded to Greece. Art 2 conveniently describes the outermost northern border of Greece and then provides the names of the islands incorporated in the new state. It is implicit therefore that the southern-most borders are in the south Peloponnese, thus covering the entire peninsula. The court erroneously suggests that the Peloponnese peninsula was excluded from the peace/cession treaty of 1830 because it was not referred to by name!

[45] *Areios Pagos* judgments 181/1890, 309/1892, 544/1904 and 314/1914; equally, Athens Appeals Court judgment 733/1914.

[46] *Areios Pagos* judgments 81/1921, 79/1922 and 279/1927.

very act of succession does not automatically bring into force all the laws of the successor state; rather, this is dependent on relevant administrative law and procedures.[47]

The fact that the Greek legislator chose to retain Ottoman land tenure for several generations without trying to shape it along the lines of the Greek Civil Code is evidence enough of a corpus of law that is compatible with Western notions of land rights.[48] At the same time its continuous usage from classical Islamic law until the nineteenth century – if not to the present day even in non-Muslim nations such as Greece – demonstrates its place as regional custom and a body of general principles up until the early nineteenth century.[49] Regional custom has been recognised on several occasions by the ICJ in respect of institutions and inter-state exchanges spanning back several centuries.[50] It is instructive that the cession of the region of Thessaly to Greece by the Ottomans in 1881 was conditional, among others, on the retention of existing Ottoman land tenure to which its inhabitants were accustomed to for centuries.[51]

The reception of Ottoman land law and its adaptation to the exigencies of the new state was meant to foster legal certainty and fulfil relevant international obligations. It was by no way implicit that this tenure system was effective or that it provided investment incentives. In fact, its early transformation in Greece was nothing more than a continuation of Ottoman fief for which it was originally intended, which eventually consolidated the bulk of Greek farming lands in the hands of a few wealthy individuals to the detriment of the many which lived in abject poverty and became serfs. This led to demands for agrarian and land reform, culminating in the 1910 events at Kileler, Thessaly, which constituted the watershed for subsequent radical changes to land tenure and agrarian reform more generally.

Conclusion

The Ottoman land law of the early to mid-nineteenth century may clearly be viewed as a reflection of regional custom, in addition to constituting general principles of land law. Its customary character is confirmed by the uniform practice and positive regulatory acts throughout the expanse of the Empire and the subsequent recognition and application of this body of law – for a while at least – by succeeding states. Of course, one cannot speak of customary law, even at the regional level, when this is the creation of a single nation, irrespective if this is a large empire comprising numerous territories. Hence, our reference to customary law concerns the period immediately following the relinquishment through cession or conquest of territories under Ottoman rule. In the circumstances of Greece, at least, the acceptance of the pre-existing Ottoman land regime was the result of a peace treaty, but consent did exist and in any event it is difficult to imagine that the new Greek state would have chosen to ignore existing land relations and introduce a wholly new system without even a transitional period; had it chosen a radical reform it would have destroyed legal certainty in one of the few tax-producing sectors of the economy, particularly since the local

[47] *Areios Pagos* judgment 396/1893.

[48] We have already alluded to the fact that gradually legislation was adopted which subsumed Ottoman land tenure within the Civil Code and narrowed its scope of application.

[49] It was on this strength that the British much later imposed Ottoman land principles in the mandate of Palestine, without much success, as is usually the case with foreign, contextually alien, legal transplants. See M Bunton, Inventing the Status Quo: Ottoman Land Law during the Palestine Mandate, 1917-1936, (1999) 21 *The International History Review* 28.

[50] In the *Right of Passage* case, ICJ Rep (1960), 6, at 37, 91-91 the Court distinguished between local and general customs as between Portugal and the Maratha Emperors.

[51] See generally, V Prontzas, *Economy and Land Ownership in Thessaly, 1881-1912* (National Bank Cultural Foundation, 1992).

population was accustomed to Ottoman land law and saw no real need for reform. The same is more or less true of all new states formed from the ashes of the Ottoman Empire.[52]

This regional custom developed along two legal routes; a domestic and an international one. At the domestic level, Ottoman land principles and institutions continued for a long time to govern private relations as well as those between individuals and the state. At the international level, Ottoman customary land law has received little attention, principally because this dimension was never made use of by litigants or by the succeeding states themselves.[53] As the extensive Greek case law clearly illustrates, litigants, while relying on the relevant treaties of succession, have relied solely on the incorporation of Ottoman law in the Greek legal system. The forgotten international dimension is multifaceted. At one level, Ottoman land institutions, as incorporated in a treaty of succession, give rise to private entitlements that must be guaranteed by the Greek state. Therefore, they reflect a justiciable entitlement under international law before the Greek courts or an appropriate international body. The fact that no right-holder invoked his or her international legal personality in this matter is immaterial. The private justiciable entitlement encompassed under the peace/cession treaty is subject to an interpretation that is consistent with the principles and institutions of Ottoman law. The entitlement itself is a sui generis property right which corresponds to what would be viewed today as an internationally recognised right to property. An applicant, Greek or otherwise, holding a land title that purportedly traces its origin to Ottoman regulation may bring a claim before the European Court of Human Rights claiming a violation of property rights, the examination of which would involve analysis of nineteenth century Ottoman land law. International law has never refused recognition to inter-temporal entitlements, that is, rights existing in the form they did when assumed even if by today's standards the mode of acquisition would be illegal or illegitimate.[54]

The Ottomans placed great emphasis on the protection of existing land tenure, particularly as regarded the rights of Muslims, when negotiating their treaty of cession with Greece. Of the ten provisions in the 1830 London Protocol the key issues are: the specification of ceded territory, the new entity's form of government, the reciprocal granting of personal amnesties and respect of existing land tenure. Needless to say this was considered a most crucial issue which led to the ratification of three further international agreements clarifying the application of land issues. Land regulation in the nineteenth century law of cession must therefore be viewed as central to the practice of states and the contribution of Ottoman land law has constituted an important paradigm in the development of the law of cession in the subsequent explosion of nationhood throughout Europe from the mid-nineteenth century onwards. The relevant agreements between Greece and the Ottomans demonstrated that ancient Islamic institutions, dressed as Ottoman law, were not necessarily out of place or in stark conflict to laws and institutions embraced by Europeans at the dawn of the Enlightenment.

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[52] See, for example, J Middleton, Sketch of the Ottoman Land Code for Cyprus (1900) 2 *Journal of the Society of Comparative Legislation* 141, who cites several examples; KM Cuno, The Origins of Private Ownership of Land in Egypt: A Reappraisal, (1980) 12 *International Journal of Middle East Studies* 245.

[53] In the *Lighthouses in Crete and Samos* cases, PCIJ Rep ser A/B no 71, at 109, although the principal question was whether the relevant concessions made by the Ottoman Empire on the two islands subsequently gave rise to an obligation on the succeeding Greek state – with the Greek argument being that at the relevant time the Ottomans had lost all control of Crete and Samos, both military and political - the PCIJ determined the validity of the concessions, additionally, on the basis of their treatment under Ottoman law (including implicitly land law) at the relevant time.

[54] See T O Elias, The Doctrine of Inter-temporal Law, (1980) 74 *American Journal of International Law* 285.