

## THE CONCEPT OF LAND OWNERSHIP: ISLAMIC PERSPECTIVE

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### Abstract

"It is He who has made the earth manageable for you, so traverse through its tracts and enjoy of the sustenance which He furnishes but unto Him is the resurrection."

Surah Al-Mulk (67): 15

### 1.0 CONCEPTUAL BACKGROUND :

In Islam the concept of ownership is treated with utmost care. The properties that are capable to be owned are well defined and specified. Likewise, the rights of the owner over such property are stipulated in the Shari'ah law. The Shari'ah also affords its protection by laying down rules and regulations so that owners and other individuals would be guided and will not abuse the power and authority thereby accorded to them.

Why is it that whenever we talk about ownership we always equate it with ownership of Allah s.w.t ? We always attribute complete and absolute ownership to Allah s.w.t. Why is it so? It is the aim of this humble paper to investigate whether man's ownership over his property is recognised and to what extent it is permitted. Also whether individual or private ownership is recognized in Islam and to what extent such ownership is exercisable.<sup>1</sup> It also sought to identify how ownership is acquired and lost and how claims to a thing are to rank.

In Islam it is generally acknowledged that Allah (s.w.t.) is the Creator-Owner and Lord Sovereign of "all that is in the heavens and on the earth." Land like everything belongs to Him. Like water, air and sunshine, land is meant for the common use and benefit of the community.<sup>2</sup> Furthermore, He has delegated to man the power and authority to utilize and exploit the resources He has kindly bestowed upon them.

### 2.0. MEANING OF OWNERSHIP :

Ownership is not only confined to social and legal aspects but also gains political significance. The concept relates to a number of claims, liberties, powers, immunities in relation to the things or property a person owns. Thus, ownership pertains to or denotes a multitude of claims which refer more to the

<sup>1</sup> Who may own and what may be owned are widely differing questions.

<sup>2</sup> Afzal-ur-Rahman, Economic Doctrines of Islam, Vol.II, Islamic Publications Ltd., Lahore (1980), p.20; See also Ahmad Ibrahim, "Islamic Concepts and Land Law in Malaysia," The Centenary of the Torrens System in Malaysia, ed.by Ahmad Ibrahim & Judith Sihombing, Malayan Law Journal Pte. Ltd.(1989), p. 189.

content rather the ownership itself.<sup>3</sup>

Ownership signifies the rights to exploit and utilize the wealth and resources provided by Allah s.w.t. and such right is transferable only through legitimate methods. The owner deserves the right of ownership as long as he utilizes the gift endowed to him properly. In the event that he ceases to do so, and exploits and does not put the wealth into proper and productive utilization, he will be induced or even forced to give up that right of possession.<sup>4</sup>

Austin defines ownership as the right to the exclusive enjoyment of a thing. It denotes the relationship between a person and any right that is vested in him (Salmond). Ownership involves the right of free as well as exclusive enjoyment, including the right of using, altering, disposing of or destroying the thing owned. Absolute ownership is of determinate duration. Land is in strictness not subject to absolute ownership because it cannot be destroyed and because of the theory that "all land is ultimately held of the Crown..."<sup>5</sup>

Holland remarks that the essence of such rights lies not so much in the enjoyment of the thing, as in the legal power of excluding others from interfering with the enjoyment of it.<sup>6</sup> Ely similarly stated that "the right of property is an exclusive right." i.e. it excludes others."<sup>7</sup>

## 2.1. Land Ownership and the Right of Trusteeship :

The basic principle envisaged in Islam relating to land ownership is the concept that land vests solely in Allah s.w.t. That is, land, as a free and universal gift from Allah must be utilized to the fullest. It was also given to men for their common use as well as for the general welfare of the society. The following ayat from the Holy Qur'an clearly reflect the above contention. Allah s.w.t. has said that:

"All that is in the heavens and on the earth belong to Allah s.w.t."(S-An-Nisa (4):126 & 134)

"To him belongs whatever is in the heavens and on earth." (Surah An-Nahl (16): 52)

"His is the Kingdom of the heavens and the earth and all that lies between them." (Surah al-Zukhruf (43): 85; Surah Al-Maidah (5) : 120).<sup>8</sup>

And finally in Al-Mulk where Allah s.w.t. has stated categorically that :

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<sup>3</sup> For example, a man may part with his property but still retain ownership (such as lease: the lessee uses most of the content of ownership).

<sup>4</sup> D.S.M. Yusuf, Economic Justice in Islam, Lahore, (1977), p. 19.

<sup>5</sup> Ownership is always subject to the rule that a man must so use his own property as not to injure his neighbour.

See Osborn Concise Law Dictionary, 7<sup>th</sup> edition, Roger Bird, Sweet and Maxwell, (1983), pp. 242-243.

<sup>6</sup> T.E. Holland, The Elements of Jurisprudence, Clarendon Press, Oxford, (1900) in R.S. Bhalla, The institution of Property: Legally, Historically and Philosophically Regarded, Eastern Book Co., Lucknow. (1984),p.5.

<sup>7</sup> R.T. Ely, Property and Contract in Relation to the Distribution of Wealth, Vol. I, McMillan & Co., London (1941), p. 136 in Bhalla, p. 5.

<sup>8</sup> Surah Al-Maidah stated again that:

"For to Allah belongs the dominion of the heavens and the earth and what is between them.

He creates what He pleases." (surah Al-Maidah (5) : 18 and 40). In Surah Al-A'raf it is stated to the effect :

"The earth belongs to Allah, He gives to His servants as He pleases and the end is (best) for the righteous."

(Surah Al-A'raf (7): Part of ayat 128).

"It is He who has made the earth manageable for you so traverse you through its tracts and enjoy of the sustenance which he furnishes, but unto Him is the resurrection" (Surah al-Mulk (67): 15).

The Qur'anic ayat quoted above crystallizes that empires, kingdoms and other form of control by man over man and others are mainly trusts. Hence, no one should assume and act if he is the master because everything rests solely with Allah. Man is no more than a trustee answerable before Allah for the manner in which he discharges and executes the role reposed on him.<sup>9</sup>

From the above ayat land among other things is not the result or end product of anybody's labor but a precious gift from Allah s.w.t. in which every member of the community has equal rights of possession and use. Thus, if not put into proper use it is considered a loss to the community and that must not be tolerated. If any landowner neglects his duty, his land would revert or be repossessed by the State Authority. The State Authority reserves the right to take or repossess land or anybody's land for that matter and alienate it to another who would use it better and bring benefit to the community at large.

In short, the system of land ownership as viewed in Islam is founded in the concept of trust. Ajjola<sup>10</sup> stated that the hub and pivot of the system of ownership in Islam is the concept of trust. Accordingly, the rich serve as the trustees and they must show their trustworthiness by dealing with their wealth according to the decree prescribe by the Shari'ah law.

It is obvious, that man has been delegated with the authority and power to utilize the resources amply provided for him. He has to discharge that responsibility in his capacity as an agent or viceroy on earth. He must ensure that while exercising that power it would not result to the destruction to the segment of the society. He must remember that his rights are circumscribed by the limits Allah has prescribed and should be exercised towards these ends and must be sincerely fulfilled.<sup>11</sup> In Surah An-An'am it stated that :

"And He it is Who has made you vicegerents (to inherit the earth), and has raised some of you by degree above others, so that He might try you by means of what He has bestowed upon you. Verily your sustainer is swift in retribution ; Yet, behold He is indeed much forgiving, a dispenser of grace." (Surah An-An'am (6): 165. In Surah Yunus, the role of man as a representative of Allah s.w.t. on earth is stipulated. It states that :

"Then we made you vicegerents in the land after them to see how you would act."<sup>12</sup>

"And spend of that whereof He has made you His vicegerents." (Surah Al-Hadid (57) : 7).<sup>13</sup>

The ayat above categorically illustrate that absolute ownership of everything belongs to Allah s.w.t. alone and He has subjected it to men. He humbled it for men and men for that matter must strive to derive benefit from it. Man or the State Authority is not but a mere trustee and he must strive to fulfill the role reposed upon them in accordance to Allah's will. Delegation or trusteeship becomes the centre or focal point of ownership in Islam. Human beings have only the right of access to the property they own

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<sup>9</sup> Al haj Adeleke Dirisu Ajjola, **The Islamic Concept of Social Justice**, Islamic Publications Ltd., Lahore, (1977), p. 60.

<sup>10</sup> Ibid.

<sup>11</sup> Muhammad Nejatullah Siddiqi, "Islam's Approach to Right of Property," **Some Aspects of the Islamic Economy**, Islamic Publications Ltd., Lahore, (1978), p. 49.

<sup>12</sup> Surah Yunus (10) : 14.

<sup>13</sup> See also Surah Al-Hadid : 7 and Surah Al-Baqarah (2) : 284; 2:29.

and have the power only as much as they implement His law and will.<sup>14</sup> The foregoing view differs from the capitalist and the Marxist system. The capitalist holds the view that the real and ultimate ownership of property is vested on the individual alone while the Marxist holds that it is in the proletariat.<sup>15</sup>

The implication of ownership in Islam is that the right of man over things is limited and qualified. Everything is subservient to the God's law and will. Man is entrusted the role of being a vicegerent. Thus, he has to deliver and fulfill that trust with utmost care and in the manner outlined in the Shari'ah law.

In a society, ownership becomes necessary. It is a social institution. As such, the right of ownership comprises both benefits and burden. Among, the benefits are the enjoyment of the profits, freedom of user, the rights to lay legal claims to his property, and the right not to be interfered with. However, the benefits derived are burdened with duties, liabilities and disabilities. Ownership apart from its social function, contained claims, powers and immunities that may be vested in several person other than the owner.

To assume absolute rights have been the cause of harm and has ruined some groups of people. They arrogated themselves and likewise claimed absolute rights to discharge their property forgetting and transgressing, the limits set forth to them. They equate themselves to the position exclusively reserved to Allah s.w.t.<sup>16</sup> The Holy Qur'an spoke of this on many occasions. A clear example is the People of Prophet Shuaib who have gone astray as they incurred the wrath of Allah s.w.t.

“They said: O Shuayb! Does your way of prayer command thee that we should forsake that which our forefathers (used to) worship or that we (should leave off) doing what we will with our own property.” (Surah Hud (11) : 87)<sup>17</sup>

Thus claiming absolute authority and ownership as well as rights with one's property is akin to claiming equality of status with the Creator. And that is completely shunned in Islam.

Another aspect that is shunned in Islam is monopolization of the gift Allah has bestowed upon for everyone. It must not be concentrated in the hands of the few. Everyone has his rights over that gift. Islam neither tolerates nor approves of any property which breeds poverty because it would violate the very essence of the principle that Muslim are like brothers to one another and they constitute a harmoniously integrated jamaah.<sup>18</sup>

Therefore, unequal distribution of wealth as well as accumulation of it by the small segment of the Muslim ummah is entirely prohibited. Checks and balances are instituted to ensure the proper disposal of the power and rights vested unto man. The State being the guardian of Allah's defined laws as well as the individual's right is obliged to act and rectify any wrongs by diverting that wealth from where it stagnates to where it fructifies into social well-being.<sup>19</sup>

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<sup>14</sup> Aidit Ghazali & Syed Omar bin Syed Agil, Readings in the Concept & Methodology of Islamic Economics, Pelanduk Publications Sdn. Bhd., Petaling Jaya, (1989), p. 76.

<sup>15</sup> Ibid.

<sup>16</sup> Muhammad Nejatullah Siddiqi, supra, p.

<sup>17</sup> See also Surah Hud (11) : 57.

<sup>18</sup> Surah al-Hujarah (49) : 9.

<sup>19</sup> Al Haj Adeleke D. Ajjjola, supra n. 5, p. 161. It is to be noted that capitalism and socialism are alien and indeed very much condemned in Islam due to the fact that both are inimical to social wealth.

## 2.2. Right to Private Ownership Under The Shari'ah :

Every individual, man, and woman, Muslim and non-Muslim are entitled under the Shari'ah law to the ownership, possession, enjoyment and transfer of property, a right which must be respected and safeguarded by his fellowmen and the State.<sup>20</sup> In other words, ownership of property is a right recognized in Islam and ought to be enjoyed by every sector of the society irrespective of creed, colour and race. Indeed the law provides guidelines for its protection and proper utilization.

Islam along with the security of life guarantees security of ownership of property to every human being.<sup>21</sup> Such right is applicable only to property, which has been legally acquired. The above statement was emphasized on the occasion of the speech addressed to the Muslims by the Holy Prophet s.a.w. in his farewell haj when he said : **"Your lives and properties are forbidden to one another till you meet your Lord on the Day of Resurrection."**<sup>22</sup> This includes the right of enjoyment and compensation, investment in business, transfer and occupation of property.<sup>23</sup>

Therefore, it can be deduced that private ownership is regarded as social phenomenon as well as social necessity to which Islam has ordained its protection. The right of private ownership is not prohibited in Islam. Indeed, it is very much encouraged in Islam to own property. There is no provision in the Shari'ah law that prohibits an individual from owning a property. Individuals have defined rights and liabilities. A person has the right to benefit from the land provided he uses it properly. Islam does not condone pauperization and mendicancy. Being an ideal and rational religion, it acknowledges the sanctity of private ownership. Allah s.w.t. has affirmed in the following **ayats** and said :

"To men is allotted what they earn and to women what they earn. (Surah An-Nisaa (4): 32).

"Give to orphans their money and do not exchange the good for the evil."(S.An-Nisa(4):2).<sup>24</sup>

In Another ayat Allah said once again that :

"Your riches and your children may be but a trial." Surah At-Taghabun (64) :11)

These ayats mentioned clearly that man could take benefit from all the resources created and provided by Allah s.w.t for their sustenance and likewise he can own what can be owned privately to the exclusion of others.

Another principle illustrated in this system is that of inheritance and succession to be attached to private ownership.

Private ownership or individual ownership of land therefore, is encouraged and allowed in Islam provided, it does not injure, impede or jeopardize the interests of the greater segment of the community. However, even though such form of ownership is predicated in Islam, the State nevertheless reserves the right to take it from him should the need arise or if it is for the benefit of the society (Maslahah). Thus, property in Islam has a social function apart from fulfilling the needs of the owner proprietor.

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<sup>20</sup> Muhammad Hashim Kamali, "The Limits of Power in an Islamic State," Islamic Studies Quarterly Journal, Vol. 28, Islamic Research Institute, IIU-Pakistan, (1989), p. 344.

<sup>21</sup> Sheikh Showkat Hussain, "Human Rights in Islam: Principles and Precedents," Islamic Comparative Law Quarterly, Vol. III, No. 2 (1983), p. 104.

<sup>22</sup> Sahih Muslim, Kitab al-Haj, Vol. 2, p. 615.

<sup>23</sup> Salahuddin, Bunyadi Huquq, p.242 cited by Showkat Hussain, supra, p. 104.

<sup>24</sup> See Surah At-Tawbah (9) :111 which states that: "Allah has purchased of the believers their persons and their goods; For theirs (in return) is the garden (of Paradise):Then rejoice in the bargain which you have concluded."

The ratification of individual or private ownership includes the guarding of it to ensure equality between effort and recompense (i.e work and reward). This is in accordance with human nature and in agreement with the fundamental inclination of man's soul. It is this inclination that Islam reckons when it establishes its whole social system. On top of that, it is in accordance with the welfare of the society because it encourages and motivates the individual to give his utmost to the advancement of life.<sup>25</sup>

### 2.3. Protection of Ownership in Islam :

Islam has not only acknowledged and recognized private ownership but it also provides for its protection. This was affirmed in both the Qur'an and hadith of the Prophet s.a.w. with respect to private ownership. Accordingly, severe punishment is enjoined upon those who dare transgress the limits and directions decreed by Allah s.w.t. The Qur'an categorically stated that :

"As to thief, male or female, cut off his or her hands: A punishment by way of example, from Allah for their crime." (Surah Al-Maidah (5): 38).

The stern punishment In Islam for theft is an indication and sign of the sanctity of the right of individual ownership or property; also a way in which it is guarded and prevented from being infringed. To afford further protection and abuse from any quarter of the community the Qur'an again said in Surah an-Nisa to the effect :

"O you who believe! Eat not up your property among yourselves in vanities ; but let there be amongst you traffic and trade by mutual goodwill." (Surah An-Nisaa (4): 21).

"And withhold not the goods of the people, and do not cause mischief on earth." (Surah As-Shu'ara (26) : 183).

The above aayat supplemented and supported by another Surah which says that :

"And do not eat up your property among yourselves for vanities, nor use it as bait for the judges, with intent that you may eat up wrongfully and knowingly a little of (other) people's property." (Surah Al-Baqarah (2): 118).<sup>26</sup>

Another evidence that deals with the protection of private property or ownership is the hadith of the Prophet, which says that :

"No person's property is lawful to be taken except by his consent."<sup>27</sup>

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<sup>25</sup> Sayyid Qutb, Social Justice in Islam, (translated by John B. Hardie) Opera Press (M) Sdn. Bhd., Kuala Lumpur, (1983), p. 103.

<sup>26</sup> Ahmad Al-Maamiry, "Private Ownership and Its Limitations in Islam," Economics in Islam, Lancer Books, New Delhi, (1987), p. 52. See also Hadith narrated by Abu Shuraib which stated that "By God he is not a believer. The companions asked, Messenger of Allah s.w.t. who is that? The Prophet s.a.w. said:

"He whose neighbour is not safe from his handedness." (Sahih al-Bukhari, Kitab al-Adab, Vol. III, p. 28).

In another hadith it says:"He whose neighbour is not safe from his harm and dishonesty, will not enter paradise." (Narrated by Anas). See also Bukhari, Kitab al-Adab, Vol. III, p. 29 (Chapter 31). See also Al Haj Maulana Fazlul Karim, Al Hadis- An English Translation and Commentary of Miskat al-Masabih with Vowel- Pointer Arabic Text, The Book Home, Lahore, (n.d.) Chapter li, p. 249.

<sup>27</sup> Narrated by Muaz bn Jabal Al-Wahbah Al-Zuahaily, Fiqh Al-Islam Wa Adillahtuh, Vol V, (Damascus, Darul Fikr)(Arabic Text), (1989), p. 561.

“If anyone takes a span of land unjustly, its extent taken from seven earths will be tied around his neck on the Day of Resurrection. If He who took a span of land without his right he would be made to wear around his neck seven earths on the Day of Resurrection.”<sup>28</sup>

The above hadith warned men not to approach and take up somebody’s property through unlawful means. It also prohibits possession by all methods that lead to the destruction and loss to any individual or the society at large. Islam calls for the principle of lawful permission for ownership and keeps conditions and limitations ensuring ownership without oppression and exploitation to others.<sup>29</sup>

Whilst Islam recognizes the right to use one’s property it does not favour nor condone or grant the freedom to destroy, squander away or use one’s property for illegitimate purposes.<sup>30</sup> A person or proprietor is entitled in law to the right of private defence over his property.

The right of private ownership is protected but may be limited by legislation or the law. Neither the individual nor the State is entitled to interfere or expropriate one’s property on any grounds not recognized by the law.<sup>31</sup> The Qur’an clearly prohibits the believers to encroach upon another’s property unless it is through legal means, lawful trade and agreement by consent.<sup>32</sup> Relevant hadith on this point declare to the effect :

“What belongs to a Muslim is forbidden to others except by virtue of his consent.”<sup>33</sup>

“Surely no man’s property is lawful for you, save only with the goodwill of the owner.”<sup>34</sup>

In another Hadith it is says that :

“Everything which belongs to a Muslim is forbidden to his fellow Muslims, his property, his life and his honour.”<sup>35</sup>

Thus, protection of right of private ownership of land in Islam is prescribed to all and one of the five basic values, which have been recognized by the law. Another aspect, which is equally enjoined to all, is the lawful means of acquisition and transfer of ownership. A person is not free to own in any method he designs or chooses. He is not free to use his possession or deal with it or transfer it as he wishes or according to his fancy and whims. There are limits and conditions attached to ownership as well as methods on how to utilize and transfer it.

Islam recognized and guarantees security of ownership of property along with security of life as emphasized during the Holy Prophet’s Farewell speech provided such property has been acquired in a lawful means. It is worth noting that no Islamic State can just acquire the property of any person without his consent and without adequate payment of compensation.<sup>36</sup>

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<sup>28</sup> Hadith narrated by Said bn Zaid bn. Amr bn. Nufail; Sahih Muslim, Kitab al-Buyu, p. 847; See also Miskat Al-Masabih, (English translation by James Robson) Vol. I & II, p. 629.

<sup>29</sup> Ahmed Al-Maamiry, supra, p. 55.

<sup>30</sup> Muhammad Nejatullah Siddiqi, supra, p. 120.

<sup>31</sup> Muhammad Hashim Kamali, supra, p. 344. The Shari’ah law recognized certain grounds for valid transfer of property such as sale, gift (hibah), inheritance etc.

<sup>32</sup> Surah An-Nisaa (4): 29.

<sup>33</sup> See Abu Bakr Ahmad Al-Bayhaqi, Sunnah Al-Kubra, Vol. 10, (Beirut Dar Al Fikr) (n.d.) III, 10).

<sup>34</sup> Miskat Al-Masabih, Vol. I & II, p. 630 reported by Abu Hurrah Ar-Raqashi and Baihaqi transmitted it in Shu’ab Al-Imn & Daraqutni in Mujtaba.

<sup>35</sup> Muhammad Hashim Kamali, supra, p. 344; See also Ibn Majah, Sunnah Al Fitn, B. Hurmat Al Mu’min Wa’lma’l Hadith no. 3933, Vol II, p. 1297; See also the Holy Prophet’s farewell speech.

<sup>36</sup> See Showkat Hussain, supra, p. 105.

Historical precedent attests to the veracity of the statement just mentioned. The Holy Prophet s.a.w. had acquired the property of some of the people of Madinah for a construction of mosque with their consent and he paid compensation to the owners in accordance with the prevailing price although the owners did not demand any price.<sup>37</sup> Another incident was during the time of Caliph Umar where a Syrian cultivator complained that the army had trampled down his crops. Caliph Umar ordered that he be paid ten thousand dirhams as compensation. Muslim jurists ruled that the State could not acquire the property of its subjects unlawfully.

The amount of compensation envisaged in Islam covers not only the loss of ownership of property but also to indemnify the owner of his expenses incurred on the land and the loss of income arising from the loss of use of the land. The rightful owner must bear in mind that what he actually has is the right to use the land and what he owned is the benefit or usufruct from the land. The compensation is usually based on what he has actually been deprived of it.<sup>38</sup>

It has been mentioned above that nobody can just take another's property even the State for that matter. Thus, it must be acquired lawfully and likewise compensation must be adequately provided. This is based on the prevailing price of the property taken.

#### **2.4. Limitation to Ownership :**

Alongside with the protection accorded to ownership is the limit decreed by Allah s.w.t. so that man will be guided accordingly. Man's disposal over the worldly goods is in the capacity of an agent of Allah s.w.t. on earth. His rights are defined and circumscribed by the limits Allah has ordained and he must dispose of his obligations with utmost care and sincerity.<sup>39</sup>

The general guidelines relating to the sanctity of property are contained in the Qur'an and the sunnah of the Prophet (s.a.w.) and are described in the detailed rules of Fiqh which specify the proper use of the right of property and the limits within which, it must operate in order to meet the requirements and objectives of the Shari'ah.<sup>40</sup> Should anybody or the government exceed these limits and violate the rights of the owner, the owner may commence action and seek remedy in the courts. The transgressor is liable to return the property in question or redress any losses that might have been inflicted to the rightful owner. Once again lawful acquisition of ownership of private property is highly enjoined.<sup>41</sup>

#### **3.0. CONDITION FOR OWNERSHIP AND STATE INTERFERENCE :**

Islam forbids ownership by deception, cheating or fraud, by usurping or stealing or taking without compensation. It also prohibits possession, which leads to injury to the individual and the society. Allah says In the Qur'an that :

"O you who believe! Give of the good things which you have (honorably) earned, and of the fruits of the earth which We have produced for you, and do not even aim at getting anything which is bad, in order that out of it you may give away something, when you yourselves would not receive except with closed eyes." (Surah Al- Baqarah (2): 267).

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<sup>37</sup> Also in the Battle of Hunayn when the Holy Prophet acquired the helmets of Safwan bn. Ummaiah, he compensated him, Amin Ahsan Islahi, *Islami Riyasat*, Volume 4, p. 13 cited by Showkat Hussain supra, p. 105.

<sup>38</sup> Salleh Buang, "Law of Real Property in Malaysia," *IU-Law Journal*, Vol. I No.1 (1989), p. 92.

<sup>39</sup> The limitation is found in the manner the property must be expended and usually to serve social ends.

<sup>40</sup> M. Hashim Kamali, supra, p. 344.

<sup>41</sup> Ibid, p. 345. See also S. Mahmassani, *Philosophy of Jurisprudence*, p. 111.



Islam commands us to follow the lawful means of acquiring or possessing of all things and denounced possession of anything involving evil or wrong methods. It also does not approve of distribution of property and wealth that deprives a section of the society of their means of livelihood. Accordingly, the function of wealth is to sustain life and to enable its growth. Allah has enjoined it to be shared equitably by all so that it is universally instrumental in attaining a good life.<sup>42</sup> Man must remember that the property in his hand is in fact a test or trial upon him. He must therefore, observe what has been required of him by the law and must do what Allah wants him to do. This includes the conditions and limits prescribed relating to ownership of property. His rights as such are not absolute. They involve certain restrictions, obligations and are geared to certain ends. His right is not only limited and qualified but also inalienably tied to certain obligations towards others, such as his family and relatives; and he is obliged to share the responsibility of supporting the poor.<sup>43</sup>

Apart from the individual, the society and the State also can own property and exercise the right of ownership. The State being the guardian of individual rights is endowed with the power to intervene and in some cases take away the individual rights to property with a view of protecting the social and individual interests, which are of vital importance.<sup>44</sup> As for the degree and extent of State interference, public welfare or benefit determines this at large.<sup>45</sup> The State acting as representative of the people is empowered to implement the conditions imposed on private ownership even by force if the Muslims failed to subscribe to the conditions set thereto.

Finally, Islam has adopted measures to ensure the proper and equal distribution of wealth to its citizen. Property may be removed from private ownership if it is required for public needs or interests.

#### **4.0 CLASSIFICATION OF LAND OWNERSHIP UNDER THE ISLAMIC LAW :**

Under Islamic law, land ownership is classified into two main categories, firstly, according to the mode of acquisition or how land came into the possession and ownership of the individual and secondly according to the type of taxation.

#### **4.1 The categorization according to the Mode of Acquisition :**

##### **4.1.1. Land Belonging to the Muslims :**

These are lands of the territories whose people or inhabitants embraced Islam. This is automatically considered land owned by the Muslims and the Muslim jurists agree unanimously that it remains intact and nobody can take it away from them. It is left to its original owner and under the administration of the Islamic State. A hadith to support the above statement says that :

“A nation which embraces Islam secures its life and property.”<sup>46</sup>

Accordingly, if the inhabitants of any land embraced Islam, their lives become sacred, all the property which they possess at the time would remain with them and their land would be left in their possession and would be treated as Ushri<sup>47</sup> where 10% of the produce will be given out as Zakat.

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<sup>42</sup> Mohammed Nejatullah Siddiqi, supra, p. 52.

<sup>43</sup> Ibid, p. 122.

<sup>44</sup> Ibid, p. 120.

<sup>45</sup> Ahmed Al-Maamiry, supra, pp. 63-65 (incidents where State interference is needed).

<sup>46</sup> Afzal-ur-Rahman, supra, p. 149; See Imam Malik's Al-Muwatta (English translation) Book of Jihad, p. 205.

<sup>47</sup> Ibid; Also Imam Abu Yusuf's Book (Kitab al-Kharaj).

#### 4.1.2. Contractual Lands :

These are lands owned by those non-Muslims who entered into pacts or peace treaties or contract with the Islamic State and are governed by the rules and conditions stipulated in the treaty or contract, The Muslim State is required to protect and safeguard the property, trade, and industry of such non-Muslims and make life easier for them. The Muslim State must not burden them more than what is necessary as agreed in the contract. The State must not interfere in their affairs unless it is stated otherwise in the contract.

#### 4.1.3. Conquered Land :

These are lands acquired in war or conquered by force and they belonged to the subjugated people. During the pre-Islamic period, they belonged to the soldiers. Islam eventually abolished it and considered it as property belonging to Allah s.w.t. as mentioned in Surah Al-Anfal which says that :

“They ask thee about the spoils of war. Say; all spoils of war belong to Allah s.w.t. and the Messenger.” (Surah An-Anfal (8): 1).

It is clear from the quoted ayat that it is a public property and must be utilized and distributed as prescribed and directed in the Shari'ah law and sunnah of the Prophet s.a.w.<sup>48</sup> Those properties acquired during war belong to Allah and His Messenger. Those lands and other property should be distributed according to the needs of the society. The following are considered needy :

- (1) The fighters
- (2) Original owners
- (3) The poor people with no means of livelihood.

The rationale why the fighting men were favored was because they did not have fixed income or wages and since they were required to defend the Islamic State they were naturally given a share of the property acquired to give sustenance to their families. However, during the time of the Prophet (s.a.w.) he left most of the lands in the hands of the original owners, and some were distributed among the Muhajirin and among the poor Ansars who had no means of livelihood. In Surah An-Anfal, it says that :

“And know that whatever booty you acquire, one-fifth thereof is for Allah and the Messenger. and for the near of kin, and the orphans, and the needy and the wayfarer.”(S. Anfal (8): 41).

It is clear that spoils of war belong to Allah and His Messenger and the head of the Islamic State is tasked to administer it according to the best interest of the community at large. During the time of Caliph Umar, acquired lands or properties (Syria and Iraq) were not distributed despite the demands and pressures from the people. It was indeed in the light of Surah Al-Anfal (8) ayat : 41 that Caliph Umar based his decision for not distributing the conquered lands in Syria and Iraq.<sup>49</sup> He firmly believed that the general welfare of the community is of paramount importance. Hence, should those acquired land be distributed to the fighters, where will they get subsistence for other fighters, their children and the needy.

#### 4.1.4. State Land :

Lands which were neither occupied nor owned by any person and declared as State lands by the Islamic State.

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<sup>48</sup> Ibid, p. 133.

<sup>49</sup> Surah An-Anfal (8) : 41. First ayat mentioned spoils of war (ghamimah) and the second states Fai; See Abu Yusuf, Kitab al-Kharaj, p.167 (Arabic text- p. 34). Abu Ubaid, Kitab Al-Amwal, pp. 460-61, Also Umar does not wish that those land would concentrate to the hands of the few.

#### 4.1.5. Abandoned Lands :

These are lands, which were never acquired or requisitioned by anyone. The majority of the Muslim jurists regard this type of land as waqf land or treated it as war spoils, which fall into community ownership. Anybody who can rehabilitate this type of land or bring into direct utilization can claim ownership but he cannot override the requirements of the State for the general interests of the community.

#### 4.1.6. Mawat Lands or barren Lands :

Mawat Lands were uncultivated lands. It is given to whoever comes into possession of it by rehabilitating it or by irrigating it.

#### 4.1.7. Free Lands :

These are lands, which are not the result of anybody's labor and ability and must be equally shared by the inhabitants in the Islamic State. Free lands include grazing lands, forest and mines.

i) **Grazing lands :**

It is believed that grazing lands are considered as communal property and owned by the State. This type of property belongs to the category of Al-Hima and is not to be allocated to any individual alone. It is to be shared by everybody.

ii) **Forest :**

This too is not to be reserved for any particular person and is for the consumption or utilization of everybody in the community.

iii) **Mines :**

Lands containing minerals and other types of natural resources (such as salt, springs etc) fall under the administration of the Islamic head of State. No individual member of the community is allowed to own it privately. It is to be shared equally by every member of the community. In the event that it is alienated to any member of the community, the State has the right to repossess or take it back on the grounds that it is a common property.

#### 4.2 Land Ownership According to Type of Taxation :

Early Muslim jurists were concerned primarily with the fiscal consideration and therefore classified land on the basis of the revenues due from it to the State.<sup>50</sup> In other words, they classified cultivated lands based on the type of taxes levied upon them or the amount of revenue accruing to the State from such lands.<sup>51</sup> Thus, land belonging or under the possession of private individuals was classified either ushri or kharaj land depending on whether the land is charged with either of the two basic types of land taxes, i.e ushr or kharaj.<sup>52</sup>

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<sup>50</sup> Richard Abraham Debs, The Law of Property in Egypt: Islamic & Civil Code, Ph.D Thesis (Microfilm), Princeton University, (1963), p. 10.

<sup>51</sup> Ahmad Ibrahim, "Islamic Concepts and the Land Law in Malaysia," The Centenary of the Torrens System in Malaysia, ed. By Ahmad Ibrahim & Judith Sihombing, MLJ Pte. Ltd., KL, (1989), p. 191.

<sup>52</sup> Ibid; Also see Richard Abraham Debs, supra, p. 10. It is noted that there are categories of land explicitly recognized by the jurists as mentioned i.e uncultivated waste land or mawat land, waqf land and State owned lands with various conditions of tenure. (Ahmad Ibrahim, p. 190).

#### 4.2.1. Ushri Land :

The word ushr literally mean tithe. It is a religious tax incumbent upon the Muslim and applicable to land. It represents part of the Zakat or alms-giving<sup>53</sup> which is payable on cultivated land under the ownership of the Muslim holder. The classification of land as ushri is dependent on the status when it was first brought under the jurisdiction of the Islamic State. Such land belonged to the individual upon his conversion to Islam or it is land that had been vacated or left by the former owners who had fled in the face of the Muslim invasion which was later distributed to Muslim soldiers as their shares of the spoils of war.

It is noted that virtually all of the land within Arabia before was considered as ushri and under the possession of the Muslims. During that time, conversions to Islam among the Arab tribes were completed.<sup>54</sup>

It is apparent that the owner of the ushri land not only enjoys his property, but can alienate it in accordance with the recognized modes of alienation, deal with it such as sale, gift etc. and he could also constitute it as waqf whereby the property rights were held in perpetuity and the income derived thenceforth will be used for the objects of the -waqf. Whilst the kharaj land holder holds a sort of a leasehold or usufructuary interest, the land was administered for the benefit of the Muslim community and rent was payable by the owner to the State. Thus, both are distinguishable from each other as ushri land was charged with a tax, which was regarded as a religious obligation and incumbent to the Muslims in general. Kharaj lands however were lands left in the possession of the non-Muslims and conditions relative to their possession were imposed by the State.

#### 4.2.2. Kharaj Lands :

Accordingly, kharaj lands were divided into ;

- i). land brought under Muslim sovereignty peacefully by virtue of treaties or agreements with the inhabitants which allowed the occupants of the respective lands to retain possession.
- ii) those lands, which were acquired or conquered by force of arms and possession, but were left to the former inhabitants subject to the terms and conditions imposed by the State.<sup>55</sup>

There is a general consensus among the scholars in respect to the property rights vesting on the non-Muslim holder of kharaj lands of the first category stating that holders enjoys full rights of ownership (iqta' tamlik) as the land in their possession were considered to be mulk lands. However, disagreement arises with regard to the second category. The Hanafis hold the view that all kharaj lands (both first and second category) are deemed to be treated as mulk lands. As such, the owner was equipped with the rights of ownership, with full rights of disposition over the land and the power to constitute waqf. The Maliki and the Shafie School exclude the second category but regard it as land held in waqf for the welfare of the Muslim community.<sup>56</sup> There is not much difference in their views with respect to waqf land but differences lie in the property rights of individual holder of the second category of kharaj land. The Maliki and Shafie school maintain that the occupants or holders of the second category do not have full rights of ownership nor possess full power of disposition over their lands. Ownership is vested on the State in its capacity as trustee for the Muslim community. Consequently, the interest of the holder in this category is that of a leasehold or usufructuary.<sup>57</sup>

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<sup>53</sup> Nicolas Aghnides, Mohammedan Theories of Finance, New York, (1916), pp.283-294. It is important to note that it refer to 10% as Zakat taken from the fruits and other farm products.

<sup>54</sup> Outside Arabia, those left behind or who retained possession of their land were required to pay kharaj, levied and paid as land tax. It is viewed as rent payable by the owner to the State.

<sup>55</sup> Abu Yusuf, Kitab Al-Kharaj, See also Richard Abraham Debs, supra, p. 13.

<sup>56</sup> Richard Abraham Debs, supra, p. 14.

<sup>57</sup> Ibid.

Finally, the kharaj holding is not of a landlord/tenant relationship. It is a special form of land tenure whereby the land is owned by the State as guardian of the community and held by the individual holder pursuant to the rules stipulated in the Shari'ah and the conditions imposed by the State.<sup>58</sup>

### 5.0 ACQUISITION OF OWNERSHIP :

Islam, being a rational religion lays down the conditions of acquisition of property and thereby sets out the limitations of its disposal. The right of ownership is not an intrinsic quality of things but arises from the sanction of law.<sup>59</sup> The Muslim jurists maintain that the methods of acquisition of ownership to property which are recognized in Islam are as follows:

- i) Through Ihya al-Mawat - whereby an Individual can acquire ownership by way of irrigating or rehabilitating dead or mawat land.
- ii) Through al-Iqta' - a form of a grant by the State to deserving people.

### 5.1 Ownership through Ihya al-Mawat :

Ihya al-mawat literally means the revival of dead land or bringing of uncultivated and dead (Mawat) land to life.<sup>60</sup> "Bringing to Life" means putting a piece of land to use by an individual and acquiring proprietary rights over it.<sup>61</sup> Ihya at-mawat is a principle of Islamic law of property whereby a person can acquire ownership of land from the State by way of rehabilitating or bringing back to life dead (mawat) land.<sup>62</sup> This type of acquisition of land was practised and prevalent during the time of the Holy Prophet s.a.w. and continues to be so till the time of Caliph Umar who is known for his land reform programs.

Accordingly, the rehabilitation of mawat land has always been an indispensable issue in Islamic economic history. The Shari'ah indeed recognizes this type of landholding and provides rules governing its utilization and disposition.<sup>63</sup> Some of the relevant hadith reported relative to the practice of Ihya al-Mawat are the following:

"He who brings dead land back to life shall himself possess it and he who by force wants to make use of it has no right or title to it at all."<sup>64</sup>

Other hadith concerning mawat land are the following:

"Whoso quickens a dead land, it is his, there is no right of expropriation against him."<sup>65</sup>

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<sup>58</sup> Ibid.

<sup>59</sup> Sayyid Qutb, supra, p.111.

<sup>60</sup> Alienation or grant by the State to those people who would rehabilitate the land in order to bring benefit to the community.

<sup>61</sup> Zua ul-Haque, Landlord and Peasant in Early Islam: A Study of the Legal Doctrine of Muzaraa or Sharecropping, Islamic Research Institute Press, Islamabad, (1984), p. 248.

<sup>62</sup> Ibid; See also Y Linant de Bellefords, Encyclopedia of Islam, 2<sup>nd</sup> Ed., p. 1053.

<sup>63</sup> Richar Abraham Debs, The Law of Property in Egypt: Islamic Law and Civil Code, supra, p. 16.

<sup>64</sup> Ahmad Ibrahim, "Islamic Concepts and the Land Law in Malaysia," supra, p. 191; Sahih Al-Bukhari, (translated by Dr. M.M.Khan), Kitab Al-Muzaraat, Vol. 3 Chapter 15, p. 306; Imam Malik's Al-Muwatta, (trans. By Aisha Abdarahman at-Tarjumana and Ya'qub Johnson), Book of Judgment, p. 346. And in another hadith, Umar bin Al-Khattab was reported to have said: "He who should revive dead land shall possess it."

Also see hadith narrated by Aisha, Umar and Ibn Auf, Urwah; Sahih Al-Bukhari, Chapter 15, Vol. 3, p. 306;

Imam Malik's Al-Muwatta, Book of Judgment, p. 346.

<sup>65</sup> Related by Urwah bn. Zubayr; See also Sunan Abu Dawud, Kitab Al-Kharaj, (English trans. by Ahmad Hassan), Vol II, Ashraf Press, Lahore, (184) p. 874; Also narrated by Ahmad and Tirmidhi. "Whoso cultivates and inhabits a land which its owner is not able (to do) and has left to die, shall have it." Narrated by Samurah B. Jandub; See Mirza Abul-Fazi, Sayings of the Prophet Muhammad, Award Publishing House, New Delhi, (1980), p. 105.

“Whoso cultivates and inhabit a land which is nobody’s shall have the best right to it.”<sup>66</sup>

### 5.1.1. Mawat land and its Meaning :

What constitute ihya and what is mawat land? Is the State Authority’s consent necessary for the revival of mawat land and whether or not it is an old concept?

Mawat land actually refers to land that is left fallow, barren and uncultivated. It has been neglected and with lapse of time become dead or waste land. It becomes dry, and not fit for yielding any crops or vegetation in that state. It also refers to flooded areas.

In other words, it is an uncultivated waste lands that has no owners. Some maintain the view that ownership is vested in the State and acquisition by the individual is through rehabilitation either with the permission from the State or without, by cultivation, occupation or construction pursuant to the requirements laid down in the Shari’ah. If the said conditions are met relating to appropriation, the possessor acquired ownership without the need for a transfer of property rights from the State.<sup>67</sup>

The schools of law expressed different views on the definition of mawat lands, that is, Hanafi school, Shafii, Maliki, Hanbali. Among them, only the Hanafi give important emphasis on the location of mawat land and insist that it should be far away from any human settlements to be considered as mawat land.<sup>68</sup> Others do not impose that as a pre-requisite.

The Majelle<sup>69</sup> defined mawat lands as :

“Those lands which are not mulk property of anyone... the localities (of which)... are far from the distant parts of the village or town, that the sound of a person who has a loud voice cannot be heard from the houses which are in the extreme limit of the town or village.

It is clear that mawat land has no owner, is uncultivated and has been left barren, fallow and neglected and with the passage of time turned to become a waste land which is not suitable for cultivation in its present state.

### 5.1.2. Categories of Mawat Land :

The Muslim jurists notwithstanding the definition of mawat land advanced by the schools of thought, as being a territory belonging to nobody (terra nullius)<sup>70</sup> has categorized mawat into two distinct categories.

#### 5.1.2.1. Land Not Owned by Anybody :

The rule relating to mawat land is that any person who can revive mawat acquire ownership provided such land has never been tilled, worked upon and has never been owned by anybody.<sup>71</sup> With regard to the right of acquisition concerning mawat land, the Muslim jurists are in agreement. However, they disagreed as to whether ownership will vest ipso facto upon completion of rehabilitation or whether a further act of the State Authority in alienating the land is required. Judging from the views given, it is apparent that ownership of land through the principle of Ihya al-mawat needs and must be preceded by

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<sup>66</sup> Narrated by Aisha; Sahih Al-Bukhari, Kitab Al-Muzaraat, Vol. 3, p. 306; Imam Malik’s Al-Muwatta, Kitab ar-Rahn, supra, p. 321; Also Miskat al Masabih, Vol.1, p. 639; As Shafie’s Kitab Al-Umm, Vol.7, Supra, p. 336.

<sup>67</sup> Richard Abraham Debs, supra, p. 17.

<sup>68</sup> See Al-Hedaya, English translation by Hamilton, Premier Book House, Lahore, (1982), p.610. Isolated- means so far, remote from a village that if a person calls from thence, his voice cannot be heard. Abu Yusuf opined that mawat land should be isolated i.e. distant from a village.

<sup>69</sup> The Mejelle, Law Publishing Co., Lahore, (1967), Article 1270, p. 207.

<sup>70</sup> Literally mean a territory belonging to nobody. It is a principle derived from the Roman Law.

<sup>71</sup> Salleh Buang, Ihya al-Mawat, supra, p. 49.

the act of the State Authority to alienate land formally to the cultivator and this act of grant is known as "iqta."<sup>72</sup>

#### 5.1.2.2. Land Previously Owned and Abandoned :

The State in the case above could not alienate or allocate or grant by iqta' by virtue of the hadith narrated in the authority of Aishah which says that: "He who cultivates a land which is nobody's shall have the best right to it." However, if the land in question after abandonment, has never been rehabilitated by the owner and the prescribed period of three years has lapsed for the owner to revive and the land has turned to its mawat nature then the State Authority is at liberty to alienate to any subsequent tiller who could rehabilitate it. Likewise, the State is authorized to alienate land previously owned by a non-Muslim, which has been abandoned to any qualified cultivator.

#### 5.1.3 Consent of the State : Whether a Pre-requisite for Ownership :

The Shafie school and Abu Yusuf (in his Kitab al-Kharaj) hold the view that the consent of the State Authority is not necessary to revive a dead (mawat) land. However, the Hanafi and later jurists and scholars held the contrary<sup>73</sup> following the hadith of the Prophet s.a.w. which says that :

"Nothing is lawful to any person but what is permitted by the Imam"<sup>74</sup>

The rationale behind the latter view is to avoid any future disputes or conflicting claims among rival cultivators or between ihya tillers and iqta' owners.<sup>75</sup> The Maliki School qualifies the necessity of having the State consent saying that the consent of the State Authority is only required if the land is situated nearby any human settlement. If it is isolated and far away from the town or village, the State Authority's consent is no longer required.

The Hanbalis opined that if mawat land is previously alienated or owned by a Muslim or Dhimmi, consent is necessary otherwise no consent from the State is needed.

If the view put forward by some jurists on the consent of the State as a requisite in as much as ihya of dead land must be preceded by the formal act of the State granting an iqta' to the cultivator, it is necessary to note the effect of such a formal act of the State Authority should the cultivator fail to revive the land within the prescribed time.<sup>76</sup> The following are the views advanced by the different schools of thought.

The Shafie school maintain that iqta' by the state of mawat land confers only possession i.e. it confers a defeasible<sup>77</sup> or conditional ownership on the grantee. Full ownership will be obtained upon completion by the cultivator to revive the dead land within the period of three (3) years.<sup>78</sup> However, in Islam the

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<sup>72</sup> The root word is qata'a which means to slice or parcel out. Iqta' is the act of the State Authority in granting mawat land. Also refer to the title of document itself. See Also Al-Bukhari, supra, Vol. 3, p. 305. See Also Mahamoud A. Gulaid, Land Ownership in Islam (A Survey), Research Paper No. 14, Islamic Research & Training Institute, Islamic Development Bank, Jeddah, (1991), p. 45.

<sup>73</sup> See Al-Hedaya, supra, p. 610; See also Sunan Abu Dawud, Vol. 2 (fn 2534 p.873 on the subject of 'consent').

<sup>74</sup> Muaz bn Jabal, Al Wahbah Al-Zuhaili, Al-Fiqh Al-Islami Wa Adillahtuh, Vol V, (Damascus Darul Fikr), (1989), p. 561.

<sup>75</sup> Supra, n. 71, p.50.

<sup>76</sup> Ibid, p. 51

<sup>77</sup> Alienation of land by the State Authority in Islam confers at best a defeasible title. Unlike the Torrens system administered in Malaysia under the National Land Code, 1965 which recognized indefeasibility of title. Private ownership in Islam is always subject to the right of the State to acquire back (upon payment of Compensation) if the land is needed for the welfare of the community.

<sup>78</sup> Three (3) years is attributed to the Shafie school. See also M.A. Mannan, Islamic Economic: Theory and practice, A Commentary, Sh. M. Ashraf, Lahore, (1987). Refer also to the ruling made by Caliph Umar.

circumstances in which failure to bring back mawat land to life have to be examined and the reasonability of the case must be looked into. If non-completion is due to the negligence of the grantee, the land will certainly revert back to the State. If it is due to some valid grounds, extension of time may be granted.

The Maliki school viewed that iqta' confers unquestionable ownership. They support the doctrine of full ownership through iqta' irrespective of the extent of work being carried out on the land, such as, the failure of the ihya grantee to revive and cultivate the land completely within the stipulated period of three (3) years.<sup>79</sup> Furthermore, the owner can deal with the land by way of sale or gift at any time. This view is similar to the principle of land law prevailing in Malaysia under the Torrens system.

The Hanafi school favors full ownership too with the proviso that such right could diminish and be extinguished or lost should the grantee fail to cultivate the land within the time element stipulated therein. The grantee here has a qualified rights.

Should any conflict of interest arise between the iqta' grantee and ihya cultivator, this would be resolved in favor of the latter. The ihya cultivator has priority in his claim over the iqta' grantee whose interest has been forfeited due to his failure to rehabilitate the land in question.

Abu Yusuf viewed the matter on a different consideration. He opined that if ihya has been carried out for a period of less than three (3) years, the iqta' grantee has priority of claim. If it is for more that three (3) years the ihya tiller have a better claims, i.e. the right of iqta' grantee is lost to the ihya tiller.

The Malikis on the other hand take into consideration the intention of the ihya tiller. If it is carried out in good faith then the iqta' grantee can either :

- i) insist on his ownership of land by paying the tiller compensation for the efforts expended on the land; or
- ii) relinquish his right of ownership to the tiller by demanding the price for the land.

If the rehabilitation work has been carried out in the land despite the tiller's full knowledge that the land has been alienated (to somebody) no right whatsoever accrues to him. Indeed, he has usurped the grantee's interest and right to the property, an offence known in Islam as ghasab. The Prophet s.a.w. was reported to have said as narrated by Abu Salamah from Aisha that :

"He who usurps even a span of land would be made to wear around his neck seven earths."<sup>80</sup>

#### **5.1.4. Nature of Ihya Al-Mawat :**

The prescribed nature of rehabilitation to be carried out on certain mawat land is in accordance with the prevailing condition and nature of the land itself.

If the land falls under the category of building, the nature of work to be undertaken naturally relates to that purpose, i.e. the construction of building, dwelling house and others. If it falls under agricultural then agricultural work is to be carried out there such as clearing of the land, irrigation works etc.

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<sup>79</sup> Ibid.

<sup>80</sup> Sahih Muslim, Kitab Al-Buyu, Vol. III, p. 848. In another hadith narrated by Said bin Zaid stated that : "If anyone takes a span of land unjustly, its extent from seven earths will be tied round his neck on the Day of Resurrection." Sahih Muslim, p. 847; Sahih Al-Bukhari, Vol. 3(trans. by Mohd. Muhsin Khan), p. 379 Which says that the Holy Prophet (s.a.w.) said that: "Whoever usurps the land of somebody unjustly, his neck will be encircled with down the seven earths (on the Day of Resurrection).



The Shafie school pointed out that planting of fruit trees is not a condition of *ihya* unless it is classified as orchard land. The Maliki school on the other hand viewed that cultivation means carrying out irrigation works, planting of trees, digging of wells, building dwelling houses, ploughing the land and others. The *Mejelle* further stated that :

- a) The sowing of seed and the planting of young trees are the improving (*ihya*) of a place, and so is the ploughing of it twice for sowing or irrigation or the making of a water channel or conduit for irrigation;
- b) If a man makes a wall around *mawat* land<sup>81</sup> or raises and makes a dam around it, which will protect it from rain (flood) water, that place has been improved.

### 5.2 Ownership Through *Tahjir*.<sup>82</sup>

*Tahjir* denotes an act undertaken by the cultivator as preliminary measure towards reviving of dead (*mawat*) land such as making boundary stones or wooden stakes, the clearing or burning of grass enclosing the land, digging a trench and others.

The *Mejelle* elaborates further to include :<sup>83</sup>

- a) putting stones or thorns or the dead branches of trees to enclose four (4) sides of the land;
- b) clearing away the grass or burning the thorns ;
- c) sinking of wells on the land.

The Muslim jurists however were divided on the efficacy of ownership based on *tahjir*. The Shafie school believed that *tahjir* does not create any right of ownership. The right just begins and will only bloom to ownership if rehabilitation work has been completed within the specified period of three (3) years.

The Hanafi school believed that *tahjir* serves as a notice to parties. Therefore, it would serve as a point of reference for claiming priority if conflicting claims of ownership arise.

With regard to the effect of *tahjir*, the jurists are in agreement that ownership ceases or will be extinguished should the cultivator fail to rehabilitate the *mawat* land completely within the period of three (3) years.

### 5.3 Ownership Through *Al-Iqta'* :

*Al-Iqta'* is a type of grant issued to certain people for the common interest of the society at large. In most cases, State grants of land were given to deserving people who needed it and were of two distinct forms :

- i) the land is given for the rehabilitation to those who were cultivating it themselves ; and
- ii) the land is given to those who are doing some useful service to the community and therefore could not cultivate it themselves. They gave it for cultivation to another person and shared with him its income or its produce.

The institution of *Iqta'* is a process by which dead land is transformed into an important productive factor in the service of the community. In this respect, Imam Shafie said that "it is the duty of the Ruler to grant *iqta'* to a Muslim who requests for such a grant."

#### 5.3.1. Classification of *Iqta'*:

The grant of *Iqta'* are classified into three (3) distinct categories:

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<sup>81</sup> See *Miskat al-Masabih*, Vol. 1 p. 640; *Sunan Abu Dawud*, supra, p. 874; *The Mejelle*, Article 1276, p. 28.

<sup>82</sup> *Tahjir*- literally mean setting up of mark or marking.

<sup>83</sup> *The Mejelle*, Article 1277, p. 208.

- i) Iqta' Tamluk - This is a concession of ownership where the right to usufruct benefit as well as ownership or dealing in land such as sale, lease and others were specified. It is a type of a grant under which a person claimed a piece of land and it eventually became a private estate.

In addition to that, the Muslim jurists agree that in this type, full ownership is permitted for social ends, i.e, the land would be rehabilitated for the benefit of the community at large. During the time of the Prophet (s.a.w.) and the Rightly Guided Caliphs, the grant is limited to mawat land only. However, it was extended to other categories of land under the Umayyad period.

- ii) Iqta' Istiqlal - The right of exploitation or concession of usufruct alone is given. Only the right to the benefit from the land is given without the right of ownership or sale.

The grantee holds the usufruct of the land. He utilizes the land and derives benefits and profits. He is, however, required to pay dues in the form of land tax or rent to the State in consideration of the right to utilize the said land. Lands to be alienated under this category were kharaj lands, Imam Shafie maintained the view that ushri could not be the subject of this grant.

In short, the grantee under this category utilizes the land and he enjoys this right to the exclusion of others. It is inalienable as long as he holds possession of it. As soon as he abandons the land concerned, his right ceases.<sup>84</sup>

- iii.) Iqta' Irfaq - A grant of a temporary nature and for a specified purpose.<sup>85</sup> The grant refers to the State's act of alienation a portion of its developed area such as trading posts in the market place, along side roads, courtyards, bazaars to an individual<sup>86</sup> for the sole purpose of carrying out business in a recognized legal means and also with the condition that it would not cause harm and obstruction to others. The length and conditions of user are for the State to determine from time to time.

It is to be noted that State lands may be barren and uncultivated and to be rehabilitated. Thus, the object of the grants or alienation is to increase production from the lands for the general welfare of the public. Also the grant were awarded to those people who are responsible and could cultivate the said land to bring benefit not only to the individual but to the whole society. However, the lands are subject to be repossessed by the State should the need arise as illustrated in the case of Bilal bin Harith and the people of Bajeela.<sup>87</sup> The grant was revoked due to the interest and welfare of the society. Besides, Bilal was not able to work on the land fully. Thus, it should be granted to others who are capable to put the land into optimum use and proper utilization. The majority of the jurists opined that land to be allocated should not exceed the owner's ability and capability to rehabilitate the land so as not to deprive other section of the society.

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<sup>84</sup> Zia ul-Haque, supra, pp.262-63.

<sup>85</sup> Like the concept of temporary occupation licence under the NLC, 1965.

<sup>86</sup> Preference is given to those who are experienced in trading activities. Iqta' Irfaq is similar to Iqta' Istighlal in the sense that the grantee is only given the right to use or utilize the land. There is no right of full ownership involved nor the right to sell or dispose the land.

<sup>87</sup> Narrated by Harith ibnu Bilal As Sayyid, **Fiqh as Sunnah**, 7<sup>th</sup> Ed. (Dar-ul Kitab Al- Arabi), Beirut, (1985), Vol. III, p. 174, See also Ibn Qadamah, **Al Mughni**, pp. 17-42, Also Ridwan Awang, **Undang-Undang Tanah Islam Pendekatan Perbandingan**, Dewan Bahasa dan Pustaka, Kuala Lumpur, (1994), p. 211.

## 6.0. ALIENATION OF LAND IN ISLAM :

Alienation of land was made since the time of the Holy Prophet (s.a.w).<sup>88</sup> During the caliphate, land situated between Surf and Qanat was alienated by Abu Bakar to Zubair. Umar gave lands to some of the companions including Ali and Abu Musa Al-Ashani. Uthman allocated land to Abdullah bin Mas'ud, Ammar bin Yasir and others.

Alienation in Islam is determined by the principle of deserving grantees. Accordingly, it is incumbent upon the State to grant or alienate land to the Muslim who requested or applied for it<sup>89</sup> unless there is a strong reason to the contrary. This means that the State is obliged to alienate land particularly uncultivated land or waste lands to its subjects and the size is dependent on what the person could reasonably and be able to cultivate. Those considered deserving grantees were individuals who have rendered general welfare work and other forms of valuable service to the State, fighters or soldiers who were employed to defend the Islamic State (in a way deprived of the opportunity to earn their own living), new converts and landless farmers and peasants who actually work on the land and provide food and sustenance for the general public.<sup>90</sup>

However, that in Islam the State may not in any circumstances alienate public domains (al-hima)<sup>91</sup> to its subjects. It is in this respect of private domain, that the State is authorized to dispose or alienate land to individuals. Al hima or public domain for that matter, cannot and could not be disposed of to private individuals. Surface mineral resources like salt or sulphur, cannot be alienated to individuals because they constitute and form part of the State public domain and as such it is a communal property where everybody have an equal right over it.

With regard to underground mines and other mineral resources such as gold, silver, copper, iron, petrol etc., there is disagreement of opinion among the Muslim jurists. Some opined that these can be alienated or granted as concession for utilization and exploitation purposes only but it should not constitute the form of Iqta' Tamlik. Others viewed to the contrary stating that both surface and underground mines and mineral resources are subject to the same rule.<sup>92</sup>

As to alienation of mawat lands, Ibn Qadamah,<sup>93</sup> put forward the view (in his al Mughni) that such lands should be given only to those grantees who could actually cultivate and rehabilitate it. The Hanafi school following the practice during the time of Umar allowed three years to reactivate the area. If he does not, then his right of ownership or possession lapses and therefore the grant becomes null and void and shall be extinguished.<sup>94</sup> The purpose of reactivating waste land is to ensure through its full employment.<sup>95</sup>

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<sup>88</sup> Land situated at Bir Qais to Ali bn. Abu Talib, part of Nadhir's land to Zubair, land at Wadi Aqiq to Bilal bn. Harith and in Madinah to Abu Bakar and Umar bn. Khattab. See Afzal-ur-Rahman, supra, pp. 149-150.

<sup>89</sup> Zia-ul-Haque, supra, p. 263.

<sup>90</sup> See A. Maududi, Economic System of Islam, supra, p. 149; See Also Salleh Buang, "The Concept of Ownership in Islam," MCL notes, p. 14.

<sup>91</sup> Hadith which says that "Muslims are partner in three things: water, herbage and fire (Sahi Al-Bukhari). Abu Yusuf (Kitab al-Kharaj), English Trans. by Ben Shemesh, published as Taxation in Islam, Vol. III pp. 120-129; and in a subsequent hadith added salt. Miskat al Masabih, p. 314- which described the circumstances surrounding the grant of salt pits to abyaz bn Hammal of Ma'rib. The Prophet s.a.w. rescinded the grant.

<sup>92</sup> Nicolas Aghnides, supra, p.888; Those jurists who favored that mineral deposits (ma'din) could be alienated cited the case of Bilal where he was granted mineral deposits by the Prophet s.a.w. as narrated by Ibnu Abbas Shawkani, Muhd, Ibn. Ali, Nail al Awtar, Vol. V, (Daral Jil, Cairo, A.t.n.d.), pp. 309-310.

<sup>93</sup> Ibn Qudamah, Muwaffiquddin Abdullah Ibn Ahmad, Al Mughni, Vol.V, (Daral Kitab Al Arabi, Beirut, 1043/1983).

<sup>94</sup> A. Maududi, Economic Doctrine of Islam, supra, p. 148.

<sup>95</sup> Sayyed Qutb, Social Justice in Islam, supra, p. 111.

Three years were considered sufficient test of the ability of any person who put his hand to the task. If such ability has not been shown, then the land would thereby revert to the State and nobody can sequestrate it.<sup>96</sup> It is expressly stated that the land belongs to Allah and His Messenger and after that to you, if any man irrigates waste land, then it shall be his, and none shall have the right of sequestration after three years.<sup>97</sup>

The Shafie school and the Hanbali did not impose a time limit on rehabilitation. They held that the circumstances of the case must be looked into, whether the delay is reasonable or otherwise, Where the delay is unreasonable or due to negligence of the grantee, then the land should be taken back by the State. The Maliki school on the other hand considered the act of alienation by the State as sufficient and effective to vest full ownership.

#### **6.1. Size of Land :**

The size of land alienated by the State to any person is to be measured in terms of his ability to reactivate and develop the land concerned to its optimum level. The Jumhur Ulama supported this. They were of the view that the land to be allocated should not exceed the owner's capability to improve the said land. As-Shafie opined that the State Authority should not allocate land unless the person or alienee concerned is able to cultivate and manage the land properly.

The reason for allocating the size of land according to the person's ability to reactivate it is to avoid any part thereof being left untilled and eventually revert back to its mawat status. Also to avoid other deserving grantees being deprived of their rights to work, improve and utilize the said land should it be given to the wrong person. Thus, the State Authority must have some sort of control over those lands.

This was further elucidated when Abu Bakar intended to alienate a large tract of land to Talha for which the latter need to obtain the approval of other people. When he approach Umar, the latter refused by stating that :

“What ! Shall such a large tract of land be granted to you alone and others left deprived.”<sup>98</sup>

#### **7.0 CONCLUSION:**

Ownership of land is permitted in Islam. Private ownership is indeed encouraged. Islam calls for the principle of lawful ownership and keeps conditions and limitations ensuring ownership without oppression to others. The Shari'ah law along with the permission given provides ratification to protect both individual and communal ownership so that human being will be guided accordingly. Its very object is to promote righteousness and to bring benefit to the whole community.

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<sup>96</sup> Ibid.

<sup>97</sup> Ibid, See also As Shafie's Kitab al-Umm, Vol.III, supra, pp. 268-69.

<sup>98</sup> Abu Ubaid, Kitab Al-Amwal, pp. 275-276; See also Syed A. Maududi, supra, p. 156.