

# THEORETICAL CONSIDERATIONS OF OWNERSHIP THEORY WITHIN MUAMALAT FRAMEWORK

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## Abstract

*This article discusses the definition, types and categories of ownership within muamalat framework according to the different perspectives of Muslim jurists as found in the literature. This will enable Muslims to make better-informed decisions while undertaking current muamalat transactions. The applications of ownership theory in relation to current muamalat practices will also be addressed. This article concludes that the ownership theory within muamalat framework has solid ground. However, due to the changing global landscape, fresh ijtihads and innovative approaches in dealing with contemporary muamalat practices are needed.*

## INTRODUCTION

In today's world, it appears that various muamalat issues have emerged, and these issues need immediate attention and solution from the Islamic scholars. These solutions can only be determined if in depth understanding of theories, such as *aqd* (contract) and ownership, are acquired. The term muamalat refers to an *aqd* or the exchange of ownerships or trading or the exchange of goods against money for the mutual benefits of the parties involved based on voluntary participations and preferences. Adequate understanding of the muamalat theories pertaining to rights, assets, ownerships and *aqd* will enable a person to better understand current economic issues; therefore able to make better informed decisions.

This article will examine the ownership theory within contemporary muamalat practices and will be organized as follows. The next section covers the definition of ownership and discusses the different aspects of ownership categories as found in the literature. Section three will discuss the application of ownership theory within current muamalat practices. Finally, section four will conclude the discussions and offer some recommendations.

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## DEFINITION OF OWNERSHIP

### The Linguistic Definition of Ownership

The term ownership originates from an Arabic word *al-milk* meaning full authority upon something that enables a person to personally act upon it.<sup>4</sup>

### The Legal Definition of Ownership

The *fuqaha'* give various definitions of ownership according to its terminology. However, most of the definitions are similar and closely related to each other. Badran Abu al-<sup>c</sup>Aynayn defined ownership as follows<sup>5</sup>:

*"Pure authority upon any goods/thing/article that prevents others from interfering and allows the owner to act upon it unless forbidden by Shariah."*

Al-Zuhayli considered the definition put forth by Badran Abu al-<sup>c</sup>Aynayn as the best and most accurate.<sup>6</sup> He added that there are cases where individuals who own property are forbidden from exercising their individual rights based on Shariah rulings. These individuals are those who are insane, morons and the minors. Their property should be managed by their guardians (*wali*) or the appointed trustees. The rights given to the trustees or the guardians are not absolute rights, but partial rights. Other than guardianship, the partial rights could also be granted via wills or legal representation. However, when the above-mentioned individuals recovered from their illnesses, they have the rights to manage their own property.

Meanwhile, Dr. <sup>c</sup>Abd al-Karim Zaydan defined ownership similar to the above definition. However, he did not explain clearly the concept of absolute rights and the prohibition of others from interfering with the owners' absolute rights.<sup>7</sup>

Based on the above discussion, the study concludes that the definition of ownership as put forth by Badran Abu Al-<sup>c</sup>Aynayn is most accurate in to operationalizing the concept of ownership. Therefore, his definition would be adopted throughout the article.

## PROPERTY OWNERSHIP

Property (*mal*) is something of value that should be reimbursed when damaged or broken. Al-Suyuti is one of the scholars who wrote about

- 4 Jubran Mas<sup>c</sup>ud. 1986. *Al-Raid Mu'jam Lughawi 'Asri*. 5<sup>th</sup> ed. Beirut: Dar al-<sup>c</sup>Ilm li al-Malayin. 2<sup>nd</sup> Vol. p. 1431.
- 5 Badran Abu al-<sup>c</sup>Aynayn Badran. n.d. *al-Shari'ah al-Islamiyyah Tarikhuha wa Nazariyyat al-Milkiyyah wa al-'Uqud*. Al- Iskandariyyah: Muassasat Shabab al-Jami'ah li al-Tiba'ah wa al-Nashr wa al-Tawzi', p. 309.
- 6 Al-Zuhayli, Dr. Wahbah. 1989. *al-Fiqh al-Islamiyy wa Adillatuh*. Damascus: Dar al-fikr. 3<sup>rd</sup> ed. Vol.4. p. 57.
- 7 Zaydan, Dr, <sup>c</sup>Abd al-Karim. 1995. *al-Madkhal li Dirasat al-Shari'ah al-Islamiyyah*. 12<sup>th</sup> ed. Beirut: Muassasat al-Risalah li al-Tiba'ah wa al-Nashr wa al-Tawzi', p. 189.

property ownership by making extensive references to the work of al-Imam al-Shafi'i. According to al-Imam al-Shafi'i, *mal* is non-existence unless it is of value, can be sold and if damaged, the owner should be reimbursed in due proportion.<sup>8</sup> In his work, al-Suyuti mentioned three types of *mal* ownership being public good ownership, conditional ownership and unconditional ownership.

The following section briefly explains the differences among them followed by the discussion on the different categories of ownership within muamalat framework.<sup>9</sup>

### 1. Public Good Ownership

Public amenities such as road, bridges, sea and public parks do not belong to any entity, in so far as it is used for and by the public. Once these properties cease to serve the public interests, these properties can be privately owned<sup>10</sup>.

### 2. Conditional Ownership

Conditional ownership refers to *waqf* and *bayt al-mal* properties. *Waqf* property cannot be sold or given to anyone unless it is damaged or its operating expenditure exceeds its revenue. Should this occur, the court can allow the transfer of ownership. The same rule applies to *Bayt al-mal* properties; unless there is dire financial requirements for *maslahah* or the monetary valuation of the property increases manifold<sup>11</sup>.

### 3. Unconditional Ownership

Unconditional ownership is accorded to all other properties that do not fall under the categories of the afore mentioned public property, *waqf* property or *bayt al-mal* property<sup>12</sup>.

## OWNERSHIP CATEGORIES

There are two categories of ownership, namely *mutamayyiz* ownership and *ghayr mutamayyiz* ownership<sup>13</sup>. *Mutamayyiz* ownership refers to ownership of a specific, private property such as owning a car. On the other hand, *ghayr mutamayyiz* ownership, which is also known as *al-milk al-shai'*, is collective ownership.

*Mutamayyiz* ownership is divided into perfect ownership and imperfect ownership. There are three types of perfect ownership, first, *milk*

8 Al-Suyuti, Jalal al-Din 'Abd al-Rahman. 1990. *al-Ashbah wa al-Nazair fi Qawa'id wa Furu' Fiqh al-Shafi'iyah*. Beirut: Dar al- Kutub al-'Ilmiyyah, p.327.

9 Al-Zuhayli, Dr. Wahbah. *al-Fiqh al-Islami wa Adillatuh*. Vol. 4. pp. 57-58.

10 *Ibid.*, p. 57

11 Al-Zuhayli, Dr. Wahbah. *al-Fiqh al-Islami wa Adillatuh*. Vol. 4. pp. 57-58.

12 *Ibid.*, p. 57

13 Madkur, Muhammad Salam. 1963. *al-Madkhal li al-Fiqh al-Islami Tarikhu wa Masadiruh wa Nazariyyatuh al-'Ammah*. 2<sup>nd</sup> ed. Cairo : Dar al-Nahdah al-'Arabiyyah, p. 482.

*al-‘ayn*, second; *milk al-manfa‘ah al-shakhsi* and third; *milk al-manfa‘ah al-‘ayniyy*. Meanwhile, *ghayr mutamayyiz* ownership is further divided into two subcategories described as follows:

- i. Shared property that can be divided such as a few acreages of inherited land.
- ii. Shared property that cannot be divided such as ownership of a house, which is collectively owned by a few people. Before the shared property is divided, no one among the existing owners holds any special rights or claims towards the property.

The following section will further elaborate the *mutamayyiz* ownership categories based upon the subcategories mentioned above. The discussion of perfect ownership will be done first, followed by the explanation of imperfect ownership.

## PERFECT OWNERSHIP

An individual is said to have a perfect ownership when he owns the *zat* (essence) of the property, can utilise its usufruct (*manfa‘ah*) and can perform any activities permissible under Shariah, such as selling or renting the property. It is a permanent ownership, irrespective of the time frame, as long as the property exists. The owner’s decision to withdraw or to let go of his rights will not affect his legal ownership status upon the property. However, the property ownership is transferable via sale, inheritance or will. The sources of perfect ownership, as discussed by the *fuqaha*, are as follows:

### 1. Perfect Ownership: The Authority of *Al-Mal Al-Mubah*

*Al-Mal al-Mubah* is a public property but can be privately owned as it is permissible under Shariah. Therefore, anyone can hold claim to any undeveloped land, river, grass or hunting animals. The rights to own depends on the actions, not words. Therefore, anyone who owns *al-Mal al-Mubah* through his actions will own the property, based on the saying of the Holy Prophet s.a.w. (p.b.u.h):

Meaning: “Anyone who first owns the property (*al-Mal al-Mubah*) before any other Muslim, the property becomes his.”<sup>14</sup>

Furthermore, opening up a new land that is not presently used for collecting firewood or for breeding livestock during that particular time will enable the individual to legally own the land based on the hadith of Prophet Muhammad s.a.w. (p.b.u.h):

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14 Al-Bayhaqi, Ahmad ibn al-Husayn ibn ‘Ali ibn Musa. 1994. *al-Sunan al-Kubra*. Mecca: Maktabat Dar al-Baz., Vol. 6, p. 142.

Meaning: "Anyone who opens up an abandoned land (that has not been pioneered by anyone else) that land belongs to him."<sup>15</sup>

Livestocks and aqualives captured, through any methods, belong to the hunter. Allah S.W.T. emphasized the need for hunting, according to the following verses:

Meaning: "Animals living in the sea are halal."<sup>16</sup>

Meaning: "After performing your Hajj, you can go hunting."<sup>17</sup>

Trees taken from abandoned areas belong to the person who took it. So does water from river, well and grass can be owned even though it is taken from a private land, based on the following hadith:

Meaning: "Men are partners in three things, in water, pastures and fire."<sup>18</sup>

*Al-Hanafiyah*, *al-Shafi'iyah* and *al-Hanabilah* observed that minerals<sup>19</sup> under the surface belong to the landowner and minerals under the surface found in the unowned land belong to the person who found it.<sup>20</sup>

However, *Fuqaha* differ in terms of the government's rights towards mining natural resources. *Al-Shafi'iyah* and *al-Hanabilah* stated that mined natural resources and *al-rikaz* are different. Natural resources are not taxed, but *al-rikaz* are taxed based on the ratio of 1/5, based on the saying of Rasulullah s.a.w (p.b.u.h):

Meaning: "Sand, well and minerals are not taxable, while *al-rikaz* goods are taxed at the rate of 1/5."<sup>21</sup>

According to them, minerals under the surface have to be paid zakat in accordance to Shariah. *Al-Hanafiyah*, on the other hand, opined that minerals under the surface also fall under *al-rikaz* category; therefore

15 Al-Bayhaqi, Ahmad ibn al-Husayn ibn 'Ali ibn Musa. 1994. *al-Sunan al-Kubra*. p. 143. Abu Dawud. *Sunan Abi Dawud*, Dar al-Fikr, n.d., vol. 3. p. 178; Al-Shafi'i. *Musnad al-Shafi'i*. Dar al-Kutub al-'Ilmiyyah. Beirut. n.d. p. 224; Al-Tahawi. 1979. *Sharh Ma'ani al-Athar*. Dar al-Kutub al-'Ilmiyyah. Beirut. Vol. 3. p. 270.

16 Al-Quran, al-Maidah 5: 96.

17 Al-Quran, al-Maidah 5: 2.

18 Al-Harith ibn Abu Usamah al-Tusiyy & al-Hafiz Nur al-Din al-Haythami. 1992. *Musnad al-Harith*. Al-Madinah al-Munawwarah: Markaz Khidmat al-Sunnah wa al-sirah al-Nabawiyyah, vol. 1. p. 508.

19 Imam Shafi'i defined mineral as salt and everything on the surface such as naphtha, sulphur... not in the ownership of anyone. Minerals under the surface refer to minerals, which cannot be easily accessed except by considerable efforts and expenditure.

20 Al-Shirazi, Ibrahim ibn 'Ali ibn Yusuf. n.d., vol. 1. p. 426; *al-Muhadhdhab*. Beirut: Dar al-Fikr. Al-Siwasi, Muhammad ibn 'Abd al-Wahid. n.d.. *Sharh fath al-Qadir*. 2<sup>nd</sup> ed. p. 235. Beirut: Dar al-Fikr. Ibn Qudamah al-Maqdisi. Al-Imam Abu Muhammad 'Abd Allah ibn Ahmad. 1997. *Al-Mughni*. Vol. 3, p. 62. Cairo: Dar al-Hadith.

21 Al-Bukhari, Muhammad ibn Isma'il. 1987. *Sahih al-Bukhari*, vol. 2. p. 545. Beirut: Dar Ibn Kathir.

should be taxed in the amount of 1/5 from the total value as mentioned by Rasulullah s.a.w. (p.b.u.h)<sup>22</sup>

Meanwhile, *al-Malikiyyah* believed that the ownership of minerals belongs to the government regardless of where they were found.<sup>23</sup>

The writers agree with the opinion of *al-Malikiyyah* since the government has the means to distribute the property to the public at large, in accordance with the following method:

Meaning: "*The interest of the public should prevail over the individual interest*".

*Al-kanz* is treasures buried by man under the earth. If the treasure displays Islamic characteristics such as being carved with Quranic verses, it is called *al-kanz al-Islami*. If the treasure displays unIslamic characteristics such as carved statues, it is known as *al-kanz al-jahili*. *Al-kanz al-Islami* belongs to the rightful owner or the heir. If the first owner is unidentified, the treasures can be given to the poor, as suggested by *al-Hanafiyyah*.<sup>24</sup> Meanwhile, *al-Malikiyyah*, *al-Shafi'iyyah* and *al-Hanabilah* stated that unclaimed *al-kanz al-Islami* belongs to the person who found it.<sup>25</sup> *Al-kanz al-jahili* will be taxed at the ratio of 1/5 and the rest belongs to the person who found it.<sup>26</sup>

Based on the above discussion, this study suggests that if an ordinary person found *al-kanz al-Islami*, which is not claimed by anyone, the treasure belongs to him. However, if a rich person comes across the treasure, he should give it to the needy; therefore integrating both approaches mentioned above.

## 2. Perfect Ownership: The Transfer Of Ownership Contract

There are numerous contracts where ownerships can be transferred. Among them are buying and selling contract, gift giving and wills based on voluntary basis. The frequency of ownership transfers indicates the volume and the velocity of the society's economic activities. However, ownership can also be transferred without the consent of the owner, for example in the case of the sale of seized property of the default debtor

22 Al-Kasani, 'Ala' al-Dinn. 1984. *Badai' al-Sanaif 'ala Tartib al-Sharafi'*. 2<sup>nd</sup> ed. p. 65. Beirut: Dar al-Kitab al-'Arabiyyah.

23 Al-Dardir, Ahmad ibn Muhammad ibn Ahmad. n.d. *Al-Sharh al-Kabir*. p. 486. Beirut: Dar al-fikr.

24 Al-Sarkhasi, Shams al-Din. n.d. *al-Mabsut*. Vol. 2. p. 132; Karachi : Idarat al-Quran wa al-'Ulum al-Islamiyyah. Al-Haskafi, Ibrahim ibn Ahmad ibn 'Ali. 1386H. *Al-Durr al-Mukhtar Sharh Tanwir al-Absar*. 2<sup>nd</sup> ed. p. 216. Beirut: Dar al-Fikr.

25 Khalil ibn Ishaq al-Maliki. n.d. *Mukhtasar Khalil*. Al-Halab: Dar Ihya' al-Kutub al-'Arabiyyah. p. 66; Al-Sharbini, Muhammad ibn Ahmad al-Khatib. n.d. *Mughni al-Muhtaj ila Ma'rifat Ma'ani Alfaz al-Minhaj*. : Dar al-fikr. Ibn Qudamah al-Maqdisi. Al-Imam Abu Muhammad 'Abd Allah ibn Ahmad. 1997. *Al-Mughni*. Cairo: Dar al-Hadith. Vol. 3, p. 580.

26 Al-Sarkhasi n.d. *al-Mabsut*, vol. 2. p.133.

upon court order to repay the loan or the sale of *al-ihthikar*<sup>27</sup> at market price to preserve *maslahah*.

The assets being sold become the property of the buyer even though the contract was performed involuntarily. The ownership can also be transferred via *al-shuf'ah* among business partners according to the majority of jurists; *al-Hanafiyyah* included neighbours as well in his definition.<sup>28</sup>

The idea of combining both business partners and neighbours in *al-shuf'ah* is probably more practical nowadays due to the changing lifestyles of the Muslims. The fact that Malaysians are becoming urbanites and live in either terrace houses or semi-detached houses created the needs for settling neighbourly disputes. Furthermore, homeowners should be granted the rights to choose their neighbours to ensure safe and comfortable neighbourhood.

The government also has the rights to seize private land in the interest of *maslahah* such as for the purpose of building bigger mosques and improving public amenities provided that the owners are justly reimbursed. The government is allowed to do so based on the following fiqh ruling:

Meaning: "*The decisions and actions of the ruler on behalf of the citizens will depend upon maslahah requirements.*"<sup>29</sup>

### 3. Perfect Ownership: Replacement

Replacement is the third mechanism facilitating the transfer of ownership. When a person passed away, his property would be legally transferred to his heir. Transfer of ownership through replacement could also materialise based upon reimbursement. The reimbursement is either due to a damage or loss or due to a loss of life or bodily harm.

### 4. Perfect Ownership: Revenue From The Ownership Of Property

All income derived from the ownership of private property thereof belong to the land owner regardless of whether it happens naturally or through considerable efforts of the owner; examples are the offspring of the animals and plants that grow on the private land. According to the majority of jurists, all plants on seized lands belong to the person who seizes

27 *Al-ihthikar* is monopolization of certain goods with the intention of selling the goods at higher prices at different times.

28 Al-Sharbini n.d. *Mughni al-Muhtaj ila Ma'rifat Ma'ani Alfaz al-Minhaj*, Vol. 2, p. 297; Ibn Qudamah n.d. *Al-Mughni*, Vol. 5, p. 308; Al-Daran, 'Abd Allah ibn 'Abd al-'Aziz, 1994. *Ahkam al-Shuf'ah fi al-Fiqh al-Islami Dirasah Muqaranah bi al-Qanun al-Wad'iyy*. Riyadh: Maktabat al-Tawbah, p. 84; Ibn Rushd, Ahmad Ibn Rushd al-Qurtubi, 1333H. *Bidayat al-Mujtahid wa Nihayat al-Muqtasid*. Matba'ah Ahmad Kamil, Vol. 2, p. 215.

29 Al-Suyuti, *al-Ashbah wa al-Naza'ir*, p. 121, Ibn al-Nujaym, 1983. *al-Ashbah wa al-Naza'ir*. Dar al-Fikr li al-Tiba'ah wa al-Nashr, Damascus, p. 137; Al-Nadawi, 'Ali Ahmad, 1994. *al-Qawa'id al-Fiqhiyyah*. Damascus: Dar al-Qalam li al-Tiba'ah wa al-Nashr wa al-Tawzi', p. 317.

the land because it grew from the seeds that originally belong to him.<sup>30</sup> On the other hand, *al-Hanabilah* opined that the crops belong to the landowner.<sup>31</sup> This is also in accordance with the saying of the Prophet s.a.w.:

Meaning: "Whoever sow on other's land without the land owner's permission, he has no rights upon the crops and he has to bear all costs (agricultural expenditure)."<sup>32</sup>

*Al-Hanabilah* point of view is more practical nowadays to prevent improper and illegal farming activities. The following fiqh ruling supports his opinion:

Meaning: "Blocking the means (that leads to vices or detrimental effects)."<sup>33</sup>

Furthermore, the above hadith is considered as *hasan gharib hadith* by *Imam al-Tirmidhi*, thus strengthened the above argument.<sup>34</sup>

However, Dr. 'Abd al-Karim Zaydan and Badran Abu al-'Aynayn disagreed on the convention of treating the fourth category separately because it is inclusive in the previous three categories of property ownership.<sup>35</sup> Nonetheless, they suggested that it would be better to categorise it differently to prevent any misconceptions regarding the issue.

In addition, *Imam Malik* proposed that *al-hiyazah*, which means keeping somebody's property at length, could also lead to property ownership.<sup>36</sup> Unfortunately, he didn't specify the exact time period of *al-hiyazah*. However, the duration can be determined based on the *hadith mursal*<sup>37</sup> narrated by Sa'id ibn al-Musayyib and Zayd ibn Aslam given below:

Meaning: "Whoever keeps somebody else's property for ten years; he has the rights to the property (instead of the original owner)."<sup>38</sup>

30 Ibn 'Abidin, Muhammad Amin ibn 'Abidin. 1966. *Hashiyah rad al-Mukhtar*. 2<sup>nd</sup> ed. vol. 6. p. 194. Cairo : Maktabah wa Matba'ah Mustafa al-Babi al-Halabi.

31 Ibn Qudamah. 1997. *al-Mughni*. Vol. 7. p. 55.

32 Al-Tahawi, Ahmad ibn Muhammad ibn Salamah ibn 'Abd al-Malik ibn Salmah. 1979. *Sharh Ma'ani al-Athar*. Beirut: Dar al-Kutub al-'Ilmiyyah. Vol. 4. p. 117; Al-Tirmidhi, Muhammad ibn Isa. n.d. *al-Jami' al-Sahih Sunan al-Tirmidhi*. Beirut: Dar Ihya' al-Turath al-'Arabi. Vol. 3. p. 648.

33 Zaydan, Dr, 'Abd al-Karim. 1993. *Al-Wajiz fi Usul al Fiqh*. Kaherah: Dar al-Tawzi' wa al-Nashr al-Islamiyyah. p. 244; Al-Burhani, Muhammad Hisham. 1985. *Sad al-Dharaf fi al-Shar'ah al-Islamiyyah*. Damascus: Dar al-Fikr. p. 69.

34 Al-Tirmidhi n.d. *al-Jami' al-Sahih sunan al-Tirmidhi*. Vol. 3. p. 648; Tahhan, Dr Mahmud Tahhan. 1984. *Taysir Mustalah al-Hadith*. Kuwait: Maktabat dar al-Turath. p. 46.

35 Zaydan, Dr 'Abd al-Karim. 1995. *al-Madkhal li Dirasat al-Shar'ah al-Islamiyyah*. 12<sup>th</sup> ed. Beirut: Muassasat al-Risalah li al-Tiba'ah wa al-Nashr wa al-Tawzi' p. 208; Badran n.d. p. 321.

36 Al-Dardir, Ahmad ibn Muhammad ibn Ahmad. n.d. *Al-Sharh al-Kabir*. Beirut: Dar al-Fikr. Vol. 4, p. 234.

37 Hadith *Mursal* is an incomplete transmitted hadith, where the narrator (among the Prophet's companions) was omitted. The hadith was then claimed to be quoted directly from the Prophet by the *tabi'i*.

38 al-Dardir n.d. *Al-Sharh al-Kabir*. Vol. 4, p. 234.



The writers believe that ownership via *al-hiyazah* is impractical because it might lead to disagreements among the public. Islam recognizes both private and public property rights, therefore taking the property of others via a weak legal term of *al-hiyazah* ownership is not in line with the other methods of acquiring property ownership. Furthermore, the usage of *hadith mursal* in support of the *al-hiyazah* theory is not acceptable according to al-Dimashqi and the majority of the jurists.<sup>39</sup>

## IMPERFECT OWNERSHIP

### Milk al-<sup>ʿ</sup>ayn

*Milk al-<sup>ʿ</sup>ayn* is possession onto property only; also known as *milk al-ruqbah*<sup>40</sup>. The possessor of *Milk al-<sup>ʿ</sup>ayn* could not derive benefit from the property or do anything onto it. i.e. a person who owns a car and put it on rental for three months. The car is owned by its owner in a *milk al-<sup>ʿ</sup>ayn* manner within the three months rental period. During the rental period, the owner could not sell or rent the car to other people. Only after the rental period is over, the owner owns the car completely. Thus, a *milk al-<sup>ʿ</sup>ayn* owner is the true owner that has full and complete possession of the property.<sup>41</sup>

### Milk al-Manfa<sup>ʿ</sup>ah al-Shakhsi

*Milk al-Manfa<sup>ʿ</sup>ah al-shakhsi* is a personal beneficial possession of a property. It is also known as *haq al-intifa<sup>ʿ</sup>*. However, *al-Malikiyyah* distinguishes the term *milk al-manfa<sup>ʿ</sup>ah* and *haq al-intifa<sup>ʿ</sup>*. They stated that *haq al-intifa<sup>ʿ</sup>* is for personal use, while *milk al-manfa<sup>ʿ</sup>ah* can be benefited by others.<sup>42</sup> There are five reasons, which entitle a person to possess a property by a *milk al-manfa<sup>ʿ</sup>ah al-shakhsi*, namely:<sup>43</sup>

#### 1. Al-<sup>ʿ</sup>arah

*Al-<sup>ʿ</sup>arah* is a contract that loans a property to an individual without charges. According to *al-Hanafiyyah* and *al-Malikiyyah*<sup>44</sup>, in this contract, a borrower could own the property by *milk al-manfa<sup>ʿ</sup>ah al-shakhsi* and could utilize the property for himself or his own benefit and he could also loan it to other persons. However, *Al-Shafi'iyyah* and *al-Hanabilah* believe

39 Muhammad Abu Zahrah. n.d. *Usul al-fiqh*. Cairo: Dar al-Fikr al-<sup>ʿ</sup>Arabi. pp.102-103.

40 Badran. n.d. *al-Shar<sup>ʿ</sup>ah al-Islamiyyah Tarikhuha wa Nazariyyat al-Milkiyyah wa al-<sup>ʿ</sup>Uqud*. p. 310

41 Zaydan, Dr <sup>ʿ</sup>Abd al-Karim. 1995. *al-Madkhal li Dirasat al-Shar<sup>ʿ</sup>ah al-Islamiyyah* p. 191

42 Al-Qarafi. Shihab al-Din Abu al-<sup>ʿ</sup>Abbas Ahmad ibn Idris ibn <sup>ʿ</sup>Abd al-Rahman. n.d. *al-Furuq*. Beirut: <sup>ʿ</sup>Alam al-kutub. p. 187.

43 Al-Zuhayli. 1989. *al-Fiqh al-Islami wa Adillatuh*. pp. 60-61.

44 Zadah Afandi, Qadi Shams al-Din Zadah Afandi. n.d. *Nataij al-Afkar fi Kashf al-Rumuz wa al-Asrar*. Cairo: Matba<sup>ʿ</sup>ah Mustafa Muhammad. p. 106.

that a borrower could only use the property for his own benefits and cannot extend the benefits to other parties<sup>45</sup>.

This paper agrees with the latter view with an added requirement that the borrower could not lend the property to other parties without the *Milk al-ʿayn* owner's permission. This is to prevent any unfavourable possibilities unto the property that will trouble the *Milk al-ʿayn* owner and thus, relieving the first and the second borrower of their responsibilities. Nonetheless, Muslim scholars unanimously believe that the property could not be put on loan to other persons.

## 2. Al-Ijarah

*Al-ijarah* is leasing out a property to others with the reciprocation specified during the *aqd*. In this situation, the lessee owns the property based on *milk al-manfaʿah al-shakhsi*. Not only the lessee could benefit the asset for himself and others, he could even rent it to others although the *Milk al-ʿayn* owner specified that the asset should be benefited only to the first lessee<sup>46</sup>.

## 3. Al-Waqf

*Al-waqf* is a prohibition/exclusion of ownership by any parties upon a property by *Milk al-ʿayn*. Whereas its profit can be used by *al-mawquf ʿalayh*<sup>47</sup>. Probably the *al-mawquf ʿalayh* is an individual, organization or public reimbursement. The *al-mawquf ʿalayh* who owns the property by *milk al-manfaʿah al-shakhsi* can benefit it for himself. The property can also be benefited to other people or put on a business for profit purposes with the consent from the owner of the *waqf* property<sup>48</sup>.

## 4. Al-Wassiyah Bi Al-Manfaʿah

*Al-Wassiyah Bi Al-Manfaʿah* is an inheritance for others to gain from a property. The beneficiary owns the property by *milk al-manfaʿah al-shakhsi* and he can use the property for his personal benefits. Utilising the profits to other means is subject to the consent of the owner of the property<sup>49</sup>.

## 5. Al-Ibahah

*Al-ibahah* is consent to make personal profit out of a property; i.e. permission to eat and to stay at someone's place. Thus, the person who obtains the permission cannot pass the consent to others on behalf of him. Dr. Abd Al-Karim Zaydan stated that *al-ibahah* is not a ground to obtain

45 Al-Sharhini n.d. *Mughni al-Muhtaj ila Maʿrifat Maʿani Alfaz al-Minhaj*. p. 264. Ibn Qudamah. 1997. *al-Mughni*. vol. 7. p.24.

46 Al-Zuhayli. 1989. *al-Fiqh al-Islami wa Adillatuh*. pp. 60-61

47 Parties entrusted with the waqaf property

48 Al-Zuhayli. 1989. *al-Fiqh al-Islami wa Adillatuh*. pp. 60-61

49 *Ibid*. p. 61

*milk al-manfa'ah* but it is just an exemption to make profit out of a property.<sup>50</sup>

### MATTER RELATED TO MILK AL-MANFA'AH ALSHAKHSI

Ownership of a property by *milk al-manfa'ah al-shakhsi* can be ascertain (in terms of its duration, place and its nature) in an *aqd* ceremony. According to *al-Hanafiyah* it cannot be inherited because it is not considered an asset. However, the majority of the jurists (*al-Malikiyyah*, *al-Shafi'iyah* and *al-Hanabilah*) opined otherwise<sup>51</sup>.

An owner of a property by *milk al-manfa'ah al-shakhsi* must treat the property as a responsibility. Thus, sufficient compensation will be charged in case of any damage or loss.

Management of its budget is up to the owner of *milk al-manfa'ah al-shakhsi* if it is given free of charge as in *al-i'arah* contract. Whereas if it is given through an exchange as in the *al-ijarah* contract, the responsibility is on the owner of *Milk al-ayn*<sup>52</sup>.

As mentioned before, the ownership of *milk al-manfa'ah al-shakhsi* is limited to a certain duration of time, the property must be returned to the owner of *Milk al-ayn* after the property has been benefited or until the agreed ownership period has been reached. In certain cases that involve the agricultural estate, sometime the crop is not mature enough yet, but the agreed period has been reached. Thus, the ownership of the property must be retained to the owner of *milk al-manfa'ah al-shakhsi* until the harvesting process is completed; on condition that a satisfactory amount of rental fee must be paid to the owner of *milk al-ayn*.<sup>53</sup>

*Al-Hanafiyah* believes that the property owned by *milk al-manfa'ah al-shakhsi* cannot be further benefited under these conditions;

- i. The agreed ownership period has ended- except for cases as cited above.
- ii. The property being damaged where it can no longer be benefited.
- iii. The death of the *milk al-manfa'ah al-shakhsi* owner.

The *al-Hanafiyah* also believes that the death of the *Milk al-ayn* owner in the *i'arah* and *ijarah* contracts will terminate the duration of the ownership of the *milk al-manfa'ah al-shakhsi*. Whereas the majority of the jurists (*al-Malikiyyah*, *al-Shafi'iyah* and *al-Hanabilah*) opined otherwise, and added that the contracts are to be sustained by the heir of the deceased owner.

50 Zaydan, Dr, Abd al-Karim. 1995. *al-Madkhal li Dirasat al-Shari'ah al-Islamiyyah*. p.193.

51 Al-Zuhayli. 1989. *al-Fiqh al-Islami wa Adillatuh*. p. 61

52 Ibid. pp. 61-62

53 Badran Abu Aynayn. n.d. *al-Shari'ah al-Islamiyyah tarikhuha wa nazariyyat al-milkiyyah wa al-uqud*. p. 316.

However, the ulama unanimously said that the duration of the *milk al-manfa'ah al-shakhsi* ownership by the *al-wasiyyah* and *al-waqf* contracts are not subjected to the death of both parties.

## MILK AL-MANFA'AH AL-'AYNI

*Milk al-manfa'ah al-'ayni* or also named as *haq al-irtifaq* are the rights fixed upon *'aqar*<sup>54</sup> property owned by someone for the benefit of *aqar* property belonging to other people; example *haq al-shirb*<sup>55</sup>, *haq al-shafah*<sup>56</sup>, *haq al-majri*<sup>57</sup>, *haq al-masil*<sup>58</sup>, *haq al-murur*<sup>59</sup> and *haq al-jiwar*<sup>60</sup>.

*Haq al-shirb* and *haq al-shafah* are fixed upon public rivers and lakes. Private properties such as canals, wells and man made lakes are considered only as *haq al-shafah* and not considered as *haq al-shirb*, except with the owner's consent.

*Haq al-jiwar* is divided into two, namely:<sup>61</sup>

- a. Next door neighbours
- b. Storeyed neighbours

Rights for next-door neighbours are for both parties (both sides), whereas rights for storeyed neighbours are only for those residing at the upper level. All types of *haq al-irtifaq* could be benefited, provided it does not bring harm to others. This is based on the Prophet's Sunnah:

Meaning: "There is no harm and there is no means in giving harm"<sup>62</sup>

The rights will remain so long as both *'aqar* exist, regardless who the owner is. *Milk al-manfa'ah al-'ayni* exists due to the following reasons:<sup>63</sup>

### 1. General Partnership

*Milk al-manfa'ah al-'ayni* exists through general partnership. General

- 54 *'Aqar* property refers to any irremovable property, such like land and house
- 55 *Haq al-shirb* is the rights to utilize water for the purpose of watering the plants.
- 56 *Haq al-shafah* is the rights and needs of human and animals to consume water and also for daily household consumption, such as for cooking and bathing.
- 57 *Haq al-majri* is the rights to direct water used for agricultural purposes through other people's land
- 58 *Haq al-masil* is the rights to direct excess or used water to the general stream through other person's land.
- 59 *Haq al-murur* is the rights to pass through other people's land to get to the main/public road
- 60 *Haq al-jiwar* is neighborhood rights
- 61 Al-Siwasi. Muhammad ibn 'Abd al-Wahid. n.d. *Sharh fath al-Qadir*. 2<sup>nd</sup>. Ed. Beirut: Dar al-Fikr. p.41
- 62 Malik ibn Anas. n.d. *al-Muwatta'*. Cairo: Dar Ihya' al-Turath al-'Arabi. vol.2. p. 745. Al-Bayhaqi, Ahmad ibn al-Husayn ibn 'Ali ibn Musa. 1994. *al-Sunan al-Kubra*. Mecca: Maktabah dar al-Baz. Vol.6. p. 115. Ibn Majah, Muhammad ibn Yazid. n.d. *Sunan Ibn Majah*. Beirut: Dar al-fikr. Vol.3. p. 106. Al-Hakim, al-Imam al-Hafiz Abi 'Abd Allah Muhammad ibn 'Abd Allah al-Naisaburi. 1995. *Al-Mustadrak 'ala al-Sahihain*. 1<sup>st</sup>. ed. Beirut: Dar al-Kutub al-'Ilmiyyah. Vol.2. p. 66.
- 63 Zaydan, Dr, 'Abd al-Karim. 1995. *al-Madkhal li Dirasat al-Sharifah al-Islamiyyah*. p. 201.

partnership constitutes all types of general benefits that must be given specific rights in order to maintain the overall peace and prosperity in the community, i.e. roads and rivers usage.

## 2. Conditional Contract

*Haq al-irtifaq* can also be achieved through stipulated conditions in a contract. For example, during the *aqd* process, the buyer specifies that in order to get to his land, it has to go through the seller's land. This condition gives the right of *haq irtifaq* to the buyer (the seller's land as the route to the buyer's land)

## 3. Al-Taquadum

*Haq al-irtifaq* could exist through *al-taqadum*. *Al-taqadum* is the existence of something which origin is unknown i.e. someone who inherits a land with stream flowing through other people's land. On the surface, the stream exists due to a certain project being carried out for the benefit of the community. Therefore, *haq al-irtifaq*, which is the benefits of the stream that flow through other people's land (*al-taqadum*) are legal<sup>64</sup>.

From the above explanation, several main differences between *haq al-intifa'* and *haq al-irtifaq* had been identified, namely<sup>65</sup>:-

- i. *Haq al-irtifaq* only relates to *al-<sup>c</sup>aqar*, whereas *haq al-intifa'* includes *al-<sup>c</sup>aqar* and *al-manqul*<sup>66</sup>
- ii. *Haq al-irtifaq* is subjected to *al-<sup>c</sup>aqar* only, except in the case of rights of neighbours, whereas *haq al-intifa'* is subjected to one's personal factor.
- iii. *Haq al-irtifaq* is a perpetual right, even though the owner changes. *Haq al-intifa'*, on the other hand is only limited to a specified period of time.
- iv. According to *al-Hanafiyyah*, *haq al-irtifaq* could be inherited, even though according to *al-Hanafiyyah* it is not a form of property, whereas *haq al-intifa'* cannot be inherited.

## RELATION WITH CURRENT MUAMALAT

The above-mentioned theory of ownership is applicable to every period of time, and it is in tandem with the characteristics of the Islamic teaching. The writer will relate these theories of ownership with the current muamalat practices to prove that every new issue in muamalat has clear connection to the above theories.

64 Ibid., p. 202

65 Al-Zuhayli. 1989. *al-Fiqh al-Islami wa Adillatuh*. pp. 499-500

66 *Manqul* properties are movable properties i.e. pen and cars

## 1. E-Commerce

E-commerce is a business activity through the Internet, whereby a person who wants to purchase a product or service could do so through a transaction in the internet with the company which provides e-commerce facility<sup>67</sup>. After both parties have agreed on the price or service using credit card, the company will arrange on the delivery of the product or service. E-commerce has become "the way" of doing business in developed countries and is increasingly gaining importance in Malaysian business.

If business transactions through e-commerce is widely used and accepted in our economic activities without any discrepancy or conflict, hence it is legal and permissible based on the methods of:

Meaning: "*Custom is an unwritten law*"<sup>68</sup>

According to the ownership theory, items that have been bought and paid for, but have yet to be received by its buyer through e-commerce transaction render the buyer to have imperfect ownership. This is because, even though the buyer owned the item, he or she still could not benefit from it and the item could not be resold to others (*tasarruf*).

## 2. Shares

Share trading can also be connected to the ownership theory. A person who bought a share, received the script, made the payment and registered him/herself as the owner, is said to own the share completely. On the other hand, a person who bought shares, received the script and made the payment without registering him/herself as the owner with the intention of reselling it within a short period of time, is said not to own the share completely (imperfect ownership).

## 3. Rights Authentication Document

Today, several properties, such as lands, motor vehicles and houses have documents to authenticate the owner's right onto such properties. Therefore, to get the legal ownership onto these properties, one needs to have the necessary authentic documents. In the writer's opinion, without these documents, the ownership of the properties will not be complete, because without it the owner will not be able to carry out several *tasarruf*, such as to legally sell the properties to others. An example would be a person who owns a car without having a *green card*, could not legally sell the particular car to others.

67 PC Magazine 1998:16:8-9; *Dewan Ekonomi* 1999:59; Web site <http://www.cobb.com/eca>

68 Al-Suyuti, Jalal al-Din 'Abd al-Rahman. 1998. *al-Ashbah wa al-Nazair fi Qawa'id wa Furu' Fiqh al-Shaff'iyyah*. Beirut: Dar al-Kutub al-'Ilmiyyah. Vol.1. p. 193.

#### **4. Bay' al-Istisna'**

Bay al-istisna' is the trading of carpentry bookings, which in the modern business today is equivalent to the purchase of a house. A person who wants to own a house has to deal with the housing developer. After signing the necessary documents, the buyer is considered to have bought the house from the developer, through bay al-istisna'. The buyer will start paying in installments, even though the house is yet to be completed. The buyer's ownership on the house is considered as imperfect, thus resale of the house is prohibited.

#### **5. Water Ownership**

Based on the previously mentioned hadith, water is something that is shared among the public i.e. rivers and oceans, thus anyone can derive benefit from it. Nevertheless, nowadays, waters from rivers and lakes are processed by certain organizations, such as Jabatan Bekalan Air, Indah Water Consortium and Kuching Water Board, making these organizations the rightful owners of the water. Therefore, people can no longer benefit from these waters without getting prior permission.

#### **6. Grass Ownership**

The above-mentioned hadith also explained that grass is shared by all and anyone has the right to benefit from it. Today, grass can be categorized into two, namely:

- i. Unattended Grass
- ii. Attended grass

Unattended grass is grass being planted or naturally grown and maintained, provided that it is on an owned land. Based on the same hadith, unattended grass will be considered as publicly owned, even if it is located on an owned land. Attended grass, on the other hand is owned by its owner and other people could not benefit from it without the owner's consent.

#### **7. Preserved Forest and National Park**

In order to preserve the natural resources, the government has taken some actions, such as establishing and gazetting preserved forests and national parks. Such acts will in turn attract tourists to visit our country. National parks and preserved forests are gazetted, thus the public must get permission from the government before benefiting from it.

### **CONCLUSION**

Muslim jurists in the past did not specifically discuss the ownership theory in detail, but rather laid out a firm foundation on the topic. This has enabled

today's jurists to further discuss the theory in a more simple, complete, systematic and relevant as time changes. The ownership theory is one of the *fiqh* elements, which are *ijtihad* in nature that allows the scholars and *mujtahid* to study it in depth, in order to provide opinion and solution on the recurring problems.

Therefore, current jurists have to look into the current problem conscientiously and try to apply the basic theories that have been formed by the previous jurists. This is vital in order to retain the glory of Islam as a holistic and ideal way of life.

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