Ownership and Property in Islamic Financial Transactions

By Abdul-Samad bin Saadi
(0900067)
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Introduction

- The purpose of this presentation is to provide a BRIEF summary of what constitutes ownership and clarifying the classifications of property in Islamic financial transactions (so please read up on your own for a more complete understanding of the topic)
- The main references are as follows:  
  - Financial Transactions in Islamic Jurisprudence, al-Zuhayli (vols. 1-2) → primary reference;  
  - Modern Financial Transactions Under Shari’ah, Mohd. Ma’sum Billah;  
  - Shari’ah Standard of Business Contract, Mohd. Ma’sum Billah;  
  - The Mejelle
- It is hoped that this presentation will help to provide explanations that are simple to understand while maintaining enough detail to assist in revision
- This is not meant to replace revision, but it is intended as a quick guide to steer the candidate in the right direction – please do remember that YOU are responsible for your own revision!!
The ‘Aqd

• Before we begin, we must first understand the basic concept of contract in Islamic law
• The ‘aqd in Islamic law of contracts comprises 3 main components or pillars:

1) al-‘Aqidan – parties to the contract
2) mahal al-’Aqd – subject matter(s) of the contract
3) sighah – offer (ijab) and acceptance (qabul)
The subject matter (mahal al-’Aqd)

• As the main concern related to ownership and property lies in the subject matter, it is important for us to now focus on what exactly constitutes subject matter
• Very quickly, the subject matter must satisfy the following conditions:
  1) **Legality** – it must be owned by one of the parties; it is *mal mutaqawwim* which means (a) it is lawful (*halal*); and (b) it is a property of value or which provides a benefit to one of the parties
  2) **Known to both parties** – it must be identifiable by description or by the viewing of a similar object (with the exception for donations or charitable gifts)
  3) **Delivery possible** – it must be capable of being delivered (i.e. transfer of ownership must be possible)
  4) **Must be in existence** – it must be in existence (with the exception for *salam* and *istikna’*)
• Now that it is clear what constitutes subject matter, we can move on to understanding ownership and property
Ownership (al-milikiyyah)

• Before proceeding, it is important to remember that since Man is the khalifah (vicegerent) of this world, all things originally belong to Allah s.w.t. whereas Man has been given the capability to own by proxy (remember your Islamic Economics classes?)

• Al-Zuhayli suggests the following as the best definition of ownership:

  “....an exclusive association of the owned item with its owner, which gives the owner the right to deal in what he owns in any way that is not Legally forbidden....”

• The Mejelle, Art. 127:

  “Mulk” is a thing of which man has become the owner, whether it be the things themselves (A’yan, Art. 159) or whether it be the use (Menafi’).

• A’yan above refers to ‘Ayn or a thing that is physical in nature that is fixed and individually perceptible; Menafi’ refers to Manfa’ah or usufruct
Ownership (cont’d)

- Simply put, a person who becomes an owner by the legal acquisition of a thing, which subsequently becomes property, and enjoys this ownership in exclusivity.
- As the absolute owner (subordinate to ownership by Allah s.w.t.), a person may use or deal in the property in any way whatsoever that is wished or desired; legal impediments (e.g. capacity of the person) may restrict this freedom.
- Exclusivity prevents others from using or dealing in the property without legal authorization (e.g. guardianship, agency....)
Types of ownership

- There are two main types of ownership: total and partial (or complete and incomplete)
- **Total ownership** = Legal and beneficial ownership. This means that the owner enjoys the legal rights associated with legal ownership (e.g. title) and the benefits derivable from usufruct (e.g. habitation within a real estate).
- **Partial ownership** = Legal ownership without beneficial ownership, or vice versa. An owner holding only one or the other is unable to enjoy the full rights or benefits that come with total ownership.
Types of ownership (cont’d)

- There are 3 types of partial ownership:
  - **legal ownership or ownership of the property alone**: an owner has given the ownership of usufruct to another for a specified period of time, at the end of which the legal owner or his heirs will regain complete ownership; a trait of legal ownership is that it is **perpetual**, whilst beneficial ownership is tied to a specific time – thus legal ownership will always result in total ownership eventually (with the exception of *waqfs* or mortmains, where there can be no owners as the property has been relinquished to Allah s.w.t. for the purposes of allowing perpetual good deeds)
  - **personal usufruct ownership**: 5 ways of establishing ownership of usufruct, which are (1) a lease; (2) a loan; (3) a mortmain (*waqf*); (4) a will bequeathing usufruct; and (5) a permission
  - **easement rights (*haqq al-’irtifaq*)**: “rights associated with one immovable property (‘*aqar*) and assigned to another immovable property belonging to another owner” – al-Zuhayli; examples of such rights are *water rights*, *water-flow rights*, *drainage rights*, *passage rights* and *neighbouring rights*
Classification of property

• In Islamic law of contracts, property (mal) has 3 main attributes:

  1) it must have some commercial value;
  2) it must be capable of being legally owned (meaning seller must be able to hold legal title);
  3) it must bring benefit(s) permitted in Islam

• For property to be a valid subject matter, it must fulfil the conditions (which have been outlined earlier)
Classification of property (con’td)

- With regards to eligibility for (private) ownership, there are three types or property:
  - **ineligible for ownership**: all properties that are specified for public usage, such as roads, bridges, rivers, etc.; if the specification is nullified, then revert to being eligible for ownership
  - **ownership possible only through legal means**: properties of waqfs or mortmains, and properties of the national treasury or baitulmal can only be eligible for ownership under certain circumstances; waqfs where the property has been ruined or expenses become higher than revenue (in the latter case, a court may permit replacing such properties with other alternative properties); properties of the national treasury become eligible if the government decides they must be sold if necessity demands it, or if it is of social benefit
  - **unconditional eligibility**: all properties apart from those falling within the scope of the first two categories of eligibility
Establishing total ownership

- There are 4 ways permitted in Islam of establishing total ownership:
  1) claiming commonly accessible property;
  2) contracts;
  3) succession;
  4) derivation from owned property
Commonly accessible property

- This refers to property that initially is ownerless and is eligible for ownership (e.g. water in its spring, trees and tree-wood in ownerless land, wild animals, and fish in the sea)

- There are two main ways of claiming such property:
  - other than acquisition through ownership transfer from one to another, any way which is the only means of establishing ownership of that which is previously ownerless
  - physical possession without the need for language; any individual (regardless of capacity to contract) may acquire ownership thus; this occurs when ownership by way of contracts (with its necessary language) may not be possible, or may be suspended (pending the approval of another, depending on capacity)
Commonly accessible property (con’t)

• There are two conditions for claiming previously ownerless property:
  - no other Muslim has owned that property; Hadith – “Whoever possesses a property that no Muslim possessed before, it is thus his.”; the reason for this is the law of fara’id or probate
  - possession must be taken with the intent of acquiring ownership; therefore unintentional ownership (e.g. a bird becomes trapped in his property) does not result in ownership; legal maxim – “Affairs are judged based on intent.”

• There are 4 ways of acquiring previously ownerless property:
  1) land reclamation
  2) hunting
  3) grass and forests (grass is public property, but forests MAY be claimed under some conditions)
  4) mining and treasure-hunting
Contracts

- This refers to the transferring of ownerships through contracts
- This is the most important and commonly used means of establishing ownership (e.g. sales, gifts, wills, etc)
- There are two types of obligatory contracts which result directly in ownership:
  1) obligatory contracts performed by legal authorities on behalf of the owner (e.g. selling property to repay debts, confiscating illegal property)
  2) obligatory nullification of ownership, of which there are two types:
     (a) pre-emption rights
     (b) public appropriations
Succession

- There are two ways for succession ownership to occur:

  1) inheritance (*al-`irth*)

  2) succession of properties owned by the same individual for compensation (*tadmin*) for destroyed, usurped, or adversely affected property – this category includes compensations for crimes (e.g. *diyah* or blood-rites where transgressor compensates transgressed by giving ownership of some property)
Derivation from owned property

- This is where the owner of a property automatically acquires ownership of all new properties derived from it – either caused by the owner’s actions or by natural causes
The end

Thank you.

Please do take the time, if possible, to read in more detail from various sources to add to what this presentation has provided.