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Concept of Property

A comparative Analysis of Property in Islam and Common law

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Sharia in the West



Challenging the myth...

- Sharia is not a set of religious laws
- Sharia is not always inconsistent with Western values
- Sharia and Common law share many similarities
- The origin of common law may be attributed to Sharia
- Property law probably share the most similarities
- Doesn't mean that they are identical – differences are important too

What to expect in my paper



Divided in Four Sections:

- **Section 1:** Overview of the nature of Sharia law and explanation of some key concepts
- **Section 2:** Description of the concepts of property, ownership and possession as defined by various Islamic schools of law
- **Section 3:** Comparison of common law and Islamic concepts of property, ownership and possession
- **Section 4:** Analysis of some prominent common law cases under Sharia to demonstrate how they could have had different outcomes if they had been decided under Sharia

Main Argument

Although Sharia and common law both share similar views on property, they differently characterize and address various property law concepts and rights. These differences affords Sharia not only a greater flexibility to accommodate emerging property law issues but also allows to do it in a way that serves the specific moral and religious needs of the people to whom it applies



The Nature of Shari'a:

- Two key terms that are relevant to this discussion – **Fiqh** and **Sharia**
- **Usul al-Fiqh** – the methodology to the substantive rules of practical jurisprudence (Fiqh)
- Four Sunni schools of thoughts - Hanafi, Shafie, Maliki and Hanbali.
- Categories of Islamic law (a) **ibada** (worship) and (b) **Mu'amalat** (social relationship)

P:S: This paper will only focus on property and relevant concepts according to Sunni Islam.

The Nature of Shari'a Cont'd:



- Overarching objectives: **Maqasid** or **Maqasid al-Shariah**
- Highest category of right - “**daruriyyat**”
- Five essential interests: the preservation of “**Din**” (religion), “**nafs**” (soul), “**aql**” (intellect), “**nasl**” (lineage/progeny) and “**mal**” (property)
- *Ijtihad* - “an effort to find

P:S: This paper will only focus on property and relevant concepts according to Sunni Islam.

The Concept of Property in Sharia Law



- commonly used word for property is “**al-mal**”
- depends on whether it can be possessed
- the concept of “*al-mal*” is left wide open under Sharia
- Professor Kamali who defines property as:

“Anything that has a saleable value, and destroying which could entail to compensation, even if a small amount, yet not so small that people would not consider it to be of that value [i.e., of no value] such as a grain of wheat or handful of grass”

The Concept of Property in Sharia Law Cont'd



- Majority schools of Islamic law seem to share some common understanding of *al-Mal* except the Hanafi School
- in order for something to be considered as *al-mal*, it should meet four characteristics: (a) it should be desired by human beings (b) can be stored for future use (c) can benefit human beings (d) and rules of expenditure and scarcity applies to it
- Hanafi School categorizes *al-mal* into two groups: “*Mutaqawwim*” (valuable) and “*ghayer mutaqawwim*” (things of no value)
- only *Mutaqawwim* is subject to full range of personal or business transactions and an owner is entitled to compensation if it is unjustly destroyed or expropriated

The Concept of Property in Sharia Law Cont'd



- Important to note: Hanafi makes a distinction between legal definition of “thing” and “thing” in general
 - all properties must be things but not necessarily all things are property
 - Mahmassani suggests that a thing implies whatever exists in reality, while property must have certain attributes distinct from those of a thing in general
- The Shafie School, on the other hand, focuses on the usufruct aspect and provides a broader definition of *al-mal* – anything that is capable of benefiting people
- Imam Al-Suyuti's definition: *"the terminology al-mal should not be construed except as to what has value with which it is exchangeable; and the destructor of it would be made liable to pay compensation; and what the people would not usually throw away or disown, such as money, and the likes"*

The Concept of Property in Sharia Law Cont'd



- the Hanbali School defines property as something from which it is permissible for a Muslim to lawfully benefit without resulting from pressing need or necessity
- Al-Buhuti indicates that things that are excluded from this definition are things in which there is no benefit in essence such as insects, or where there might exist benefit but it is legally prohibited such as wine, carcass and pork except in a situation of dire necessity
- The Maliki School's view on property is relative to ownership:
 - Al-Shatibi defined: "*al-mal* is the thing, which can be owned, and once ownership is conferred to an owner, it excludes others from interference
 - affirms that property is the subject matter of ownership – that allows an individual to claim over something and exclude all others from its enjoyment

Summary of The Concept of Property in Sharia Law



- There is no unanimous definition of property.
- *Al-Mal* can be defined widely and factors that are relevant in defining are:
 - whether or not something can be possessed and owned;
 - whether something is beneficial for human beings;
 - if beneficial, the benefit must not be excluded or prohibited by Shari'ah;
 - commercial value – Should be desired by others;
 - transferability or alienability; and
 - storability – whether something can be stored for future benefit
- Applying these factors in order to determine whether or not something is property is a human process, which depends on how a jurist exercises his *Ijtihad*

Concept of Ownership



- Ownership and property are relevant but distinct concepts in Islamic law
- Absolute ownership of Allah, *al-Malik*, the true owner
- The Vice-Regency theory: Allah is the Regent and human beings hold all property that they possess in trust in the name of Allah as a Vice-Regent and beneficiary
- This theory recognizes human discretion and sense of good conduct in spending the wealth or benefits gained from the property, while retaining the Right of God.

Concept of Ownership

- Common law - property as a bundle of rights
- Islamic law - ownership as a bundle of rights over something that is recognized as property
- Property is “substance that lawfully made together with its usufruct, the object of ownership right
- The word **al-mal** is a subject to **milk** or **malikiyah** thus, when it is said that X is the *malik* of Y (*al-mal*), it implies that X has **malikiyah** (ownership) over Y.
- Al- Qarafi: “A ruling of Sharia (*hukum shar'i*), or a juridical attribute (*wasf shar'i*), which is specified in an object (*ayn*) or usufruct (*mana'fa*) and enable a person to control, dispose in any manner he wishes provided that there is no legal impediment against it”

Concept of Ownership



- ownership in Islamic legal term is the exclusive relationship between a human being and property that recognizes and attaches a specific property to an owner and gives her the right to deal with it in whatever way she prefers unless there is a legal impediment preventing such dealing
- Ownership can be further classified into two categories (a) complete (*tamm*) ownership and (b) deficient (*Naqis, da'if*) ownership
- Complete ownership: owner has full rights over both substance and usufruct of the property
- Deficient ownership: when the usufruct and the object are separate at least for a separate period of time and the owner has control over one but not both at the same time

Concept of Possession



- “*yad*” is used to describe possession and a possessor is called “*dhul yad*”
- possession could be classified either as legitimate (*yad muhikka*) or illegitimate (*yad mubtila*)
- different terminologies are used for lands for different legal ramifications and specifications
- The word “*Hawz*” is used to describe the common law concept of *seisin*.
- *ghasb*” commonly used to refer to unlawful acquisition of land
- *Ghasb* – highest degree of liability but no mandatory punishment
- *Ghasib* must return the property and be liable for all damages

Comparing with Common Law: Property, Ownership and Possession



■ Common law:

- No distinction between property and ownership
- property is not a thing but a “relationship” in respect of

the thing

- property” comprises bundles of mutual rights and obligations between “subjects” in respect of certain “objects

■ Islamic Law:

- Distinguishes property from ownership
- Property is a thing
- recognizes those rights and obligations that determine the legal relationship

under the concept of ownership

- defines property, ownership and possession as distinct and independent concepts

Comparing with Common Law: Property, Ownership and Possession



- **Common law:**
 - an individual cannot own a property (such as land) itself but can only own “estates in land
 - Possession seems to play a more important role in common law than Sharia
 - the question of legitimacy – whether a squatter trespassed and illegitimately deprived the true owner from his land is not important
 - the test for adverse possession is met, a court is bound to award possessory title
- **Islamic Law:**
 - Property has its own features and is subject to ownership
 - Maliki school – relative to ownership but property is still a distinct thing and subject to ownership and not merely a bundle of rights
- Existence of property does not create rights rather when its owned rights are created
- Possession is relevant but not more important than true ownership

Legal Implications of the Differences: Case 1



Relevant Principles from Shariah:

- property is defined widely and flexibly
- property can exist without an owner so long as it has the other qualities
- once something is recognized as property, complete or deficient ownership can be assigned depending on the nature of the property and the interest that an owner is entitled to

Legal Implications of the Differences: Case 1



Analysis and Outcome in a Shariah Court

- In a Shariah court – would not have had difficulty in recognizing spectacle as property and then assigning ownership to it since property is defined widely and flexibly
- the information on the spectacle was beneficial and the benefit was not excluded by Sharia
- Information had commercial value as it was desired by people could be transferred to others and stored or kept secret in order to publish or use at some times in the future
- Could be recognized as property and ownership

Legal Implications of the Differences: Case 2



Analysis and Outcome in a Shariah Court

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Legal Implications of the Differences: Case 1



Saulnier v RBC, 2008 SCC 58

- Supreme Court of Canada was asked whether a license is property
- The court found that the license was alienable and there was proprietary interest - sufficient to satisfy the definition of property and possibility of renewal is not a relevant factor
- But here been no possibility of transfer, the SCC might have had difficulty in recognizing property

Legal Implications of the Differences: Case 1



In a Shariah court:

- A Sharia court would also find licenses as property for similar reasons for common law
- However, a Sharia court would always recognize a license as property regardless of its transferability so long as it has commercial value and can be benefitted from.
- The Sharia court would rather award the creditor, in this case RBC, a deficient ownership to take the usufruct from the license until the debt is paid off

Legal Implications of the Differences: Case 3

JCM v ANA, 2012 BCSC 584

- The Supreme Court of British Columbia was asked to decide whether sperm donated by a third-party can be considered as property and divided for the purpose of family law. The Court expressed its difficulty but but ended up deciding that it should be recognized as property :

*“It is clear to me in the context of this dispute that the sperm is the property of the parties. The sperm has been **treated as property** by everyone involved in the transaction, from the donor to Xytex [the company that collected the donor’s sperm for sale], Genesis and the parties. It has been purchased; the parties have a right to deal with it. They have made use of it to their benefit. The respondent’s moral objections to the commercialization of reproduction or the commoditization of the body seem to me to be too late. Certainly, they are interesting arguments for the respondent herself to make given she participated in purchasing and using a donation of sperm from an anonymous donor”*

Legal Implications of the Differences: Case 1



In a Shariah court:

- would have a different determination
- cannot be recognized as property for Muslims though it meets relevant factors for property (i.e. desired by people, has commercial value, can be owned, stored, transferred and benefitted) because the benefit is excluded by Shariah
- On the other hand, it can be recognized as property for non-Muslims since the benefit is not excluded for them in the same way pork and wine are recognized as “*mutaqawwim*” property of value for non-Muslims

Conclusion

- Islamic Law and common law both share many fundamental principles especially, in respect of property law.
- Though there are some variations in the definition of property within different Schools of Islamic law, property is still defined widely and flexibly
- Due to this flexible approach and categorization, Islamic law can avoid facing the challenges that a common law courts encounters while upholding the moral and religious standard that the law is intended to promote.

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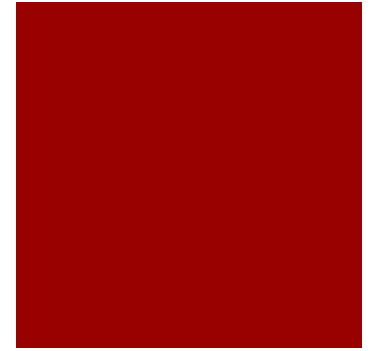
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Thank you