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# AL-MAL: THE CONCEPT OF PROPERTY IN ISLAMIC LEGAL THOUGHT

Muhammad Wohidul Islam\*

## CENTRAL IDEA OF MAL

Human relationships in social life are multifarious, intertwined and complicated; and this is truer particularly in various types of legal transactions. These transactions as a whole involve, closely or tangentially, the individuals themselves or their properties (*amwal* pl. of *mal*). Peoples' properties and wealth are the concern of legal transactions, bearing in mind various rights and obligations arising out of these transactions. The underlying reason for this is simply that *mal* is naturally the subject matter of ownership; and more emphatically, the subject matter of numerous civil transactions such as sale and purchase, rent and lease, partnership, bequest, gift, *waqf*, succession and so on. *Mal* is, of course, one of the most necessary elements of livelihood from which a human being cannot be detached.

## PHILOLOGICAL MEANING OF MAL

*Mal* in the Arabic language signifies whatever in effect a man may acquire and possess; whether that is corporeal (*'ayn*) or usufruct (*manfa'ah*); such as gold, silver, animal, plant and benefit gained out of things such as the riding of vehicles, the wearing of clothes and the residing in houses etc. On the other hand, whatever a man cannot possess, cannot linguistically be regarded as *mal*. For instance, birds in the sky, fish in the water, trees in the forest, and mines in the secret depth of the earth are not linguistically considered *mal*.<sup>1</sup> According to *al-Qamus al-Muhit*, *mal* means all things which are capable of being owned;<sup>2</sup> and according to *Lisan al-'Arab*, *mal* is customarily known as all things capable of being owned.<sup>3</sup> The

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<sup>1</sup> Wahbah al-Zuhaili, Dr, *Al-Fiqh al-Islami wa Adillatuh* (Damascus: Dar al-Fikr, 1985), vol. 4, p. 40; 'Abd al-Salam Dawud al-'Ibadi, Dr, *Al-Milkiyyah fi al-Shari'ah al-Islamiyyah, Tabi'atuha wa Wazifatuha wa Quyuduha* ('Amman: Maktabah al-Aqsa, 1974), p. 171.

<sup>2</sup> *Al-Qamus al-Muhit*, vol. 4, p. 50.

<sup>3</sup> *Lisan al-'Arab*, vol. 11, p. 632.

*Shari'ah* has not imposed unnecessary limitation on the meaning of *mal* by defining it in a narrow perspective; rather the concept of *mal* is left wide on the basis of peoples' customs and usages. Therefore the Arabs in whose language the Qur'an was revealed understood the importance of *mal* whenever they heard the term, in the same way as they understood the terms heaven, earth, etc. That is why some of the philologists contend that *mal* is customarily well known (*al-mal ma'ruf*).<sup>4</sup> The term *mal* or its derivatives has been mentioned in the Qur'an in more than 90 verses and in the Sunnah of the Prophet (pbuh) in as many places as uncountable, and thus these two sources have left the understanding of the terminology open according to the customs of the people. Therefore, whenever an Arab hears or reads the Prophetic hadith (*Kullu al-Muslim 'ala al-Muslim haramun damuhu wa maluhu wa 'irduhu* – Muslims' blood, property and dignity are protected against each other), he understands the meaning of the term *mal* in the same way as he understands the terms *salat*, *siyam*, *hajj* and *zakat* without referring to the specific technical meanings.<sup>5</sup>

#### JURISTIC MEANING OF MAL

After the emergence of various schools in Islamic law, the term *mal* was used to denote different technical meanings and jurists endeavoured to lay down its technical definitions according to their own accounts. Their definitions, therefore, vary from each other according to the purported technical meanings adopted in various schools. In this regard, two definitions are dominantly important: one is the definition of the Hanafi school and the other is of the majority (the schools other than the Hanafi school).

#### The Hanafi definition

The Hanafi jurists have laid down several definitions of *mal* by using different words implying approximately the same meaning and understanding. The variance is not due to the differences of their understanding of the nature of *mal*; rather it is due to their various ways of expression and its subtle scopes in their treatment of the same meaning. Some of the prevalent definitions accorded by the Hanafi jurists in their books are quoted here as follows:

- (1) *Mal* is what human instinct inclines to, and which is capable of being stored/hoarded for the time of necessity;<sup>6</sup>
- (2) Existent to which human nature inclines and which the rule of expenditure and its prohibition/restriction applies;<sup>7</sup>

<sup>4</sup> See *Al-Misbah al-Munir*, vol. 2, p. 288.

<sup>5</sup> Muhammad Abu Zahrah, *Al-Milkiyyah wa Nazariyyah al-'Aqd* (Cairo: Dar al-Fikr, 1996), p. 44.

<sup>6</sup> Ibn 'Abidin (Muhammad Amin), *Hashiah Minhat al-Khaliq 'ala al-Bahr al-Ra'iq*, n.d., n.p., vol. 2, p. 57 and vol. 4, p. 105.

<sup>7</sup> *Ibid.*, quoted from *Al-Durar*, vol. 5, pp. 50–51.

- (3) Which has the status of being stored for the purpose of beneficial use during the time of necessity;<sup>8</sup>
- (4) Which has been created for the goodness of human beings and in regard of which scarcity and stinginess apply.<sup>9</sup>

The *Majallat al-Ahkam al-‘Adliyyah* (known as *Majallah/Mejelle*) defines *mal* as a thing which is naturally desired by man, and can be stored for the time of necessity. It includes moveables (*manqul*) and immoveables (*ghayr manqul*).<sup>10</sup>

All these definitions are not comprehensive as they do not signify the nature of *mal* in the view of the Hanafi school. There are, for example, some properties (*amwal*) which, though not capable of being stored, remain beneficially useful, such as vegetables and fruits; but are not included in the definitions of *mal* according to the Hanafi school. Similarly, there are certain things to which human instinct does not incline but rather dislikes and avoids, such as some medicines, which are not covered by the definitions.

Some contemporary jurists have attempted to redefine *mal* in the light of the Hanafi perspective. Some of them, for example, maintain that *mal* is everything with material value amongst people; while some others define it as whatever is capable of being under possession, protection and customarily recognised to have beneficial use.<sup>11</sup>

The author of *Al-Hawi al-Qudsi*'s definition seems to be accepted by other jurists as relatively more comprehensive and accurate, which is as follows: “*mal* is the non-human things, created for the interest of human beings, capable of possession and transaction therein by free will”.<sup>12</sup>

According to the Hanafi jurists two elements are required in order to confer on a thing the status of *mal*:

- (1) The thing should be material that is susceptible of being possessed and protected. Therefore, if a thing does not comply with this requirement, it is excluded from the definition of *mal*. As a result, the abstract human attributes, such as knowledge, health, dignity, intelligence; all usufructs, debts, mere rights such as the right to development, the right of pre-emption, the right to water, etc., are not considered as *mal*. Similarly, those things upon which human control is impossible are also excluded from the definition of *mal*, e.g. free air, heat of the sun and moonlight etc.<sup>13</sup> It is clear that the Hanafi jurists do not stipulate that the thing, in order to be considered as *mal*, should actually be owned, rather it is sufficient in their view, in contrast to the literal meaning as discussed earlier, if the thing is capable of

<sup>8</sup> ‘Abd al-Salam Dawud al-‘Ibadi, *supra*, note 1, p. 173, quoting from *Al-Talbih*, vol. 2, p. 98.

<sup>9</sup> *Ibid.*, quoting from *Al-Talbih*, vol. 2, p. 230.

<sup>10</sup> Tyser, C.R., *The Mejelle* (Eng. Trans.). (Lahore: Law Publishing Company, 1967), Article 126.

<sup>11</sup> Muhammad Yusuf Musa, *Al-Amwal*, n.p., n.d., p. 162; ‘Ali al-Khafif, *Ahkam al-Mu‘amalat al-Shar‘iyyah* (Dar al-Fikr al-‘Arabi), p. 25.

<sup>12</sup> Muhammad Abu Zahrah, *supra*, note 5, p. 44.

<sup>13</sup> ‘Abd al-Salam Dawud al-‘Ibadi, *op.cit.*, p. 174; Wahbah al-Zuhaili, *op.cit.*, p. 40–41.

- being owned. The hunts in the desert and the birds in the sky are, therefore, *mal* according to them, on account of their capability of being owned.
- (2) The thing should be capable of beneficial use according to the prevailing customs. Therefore, the things which are not beneficial, such as poisonous or harmful food or carrion; or capable of beneficial use but not accorded by the customs of the people, such as a single wheat cereal, a drop of water, or a handful of soil, are not regarded as *mal* because they have no benefit in these small units. It is important to note that the beneficial use should be judged in view of the *Shari'ah* and it should be accorded by persistent custom in normal circumstances. The beneficial use in circumstances of necessity, such as the consumption of carrion for survival in severe hunger, therefore, is excepted and would not confer on the carrion the status of *mal*.<sup>14</sup>

### Definition of the majority (non-Hanafi schools)

The definition accorded to *mal* by the majority is more comprehensive than the Hanafi definition. Here the definitions of the non-Hanafi majority are discussed.

#### *Definition of the Shafi'i school*

Al-Zarkshi states that, "*mal* is what gives benefit, i.e. prepared to give benefit", and he continues to say that *mal* can be material objects or usufructs. The material objects are of two kinds: inorganic solid materials; and animals. The solid materials are regarded as *mal* in all situations. Amongst the animals one group is such that it has no proper physical structure to be used for beneficial purposes and therefore not regarded as *mal*; others are created with submissive natures and are amenable to human beings such as domestic animals, and other tamable animals, which can be categorised as *mal*.<sup>15</sup>

Allama Suyuti refers to Imam Al-Shafi'i as saying that, "the terminology *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".<sup>16</sup> With regard to the considerable value effecting the status of property (*mal*), Imam Al-Shafi'i has made two significant points. Firstly, whatever is evaluated as effectively giving rise to benefit is regarded as financially valuable property, and in contrast, whatever is incapable of showing the effect of giving rise to benefit is excluded from the status of financially valuable property. Secondly, financially valuable property is one which apparently shows the price during a high rate, and one which fails to show it is excluded from that status.<sup>17</sup>

<sup>14</sup> *Ibid.*, *et. seq.*

<sup>15</sup> Al-Zarkshi, *Al-Manthur fi al-Qawa'id al-Shar'iyah*, n.p., n.d., p. 222.

<sup>16</sup> Al-Suyuti (Jalal al-Din 'Abd al-Rahman), *Al-Ashbah wa'l-Naza'ir* (Beirut: Dar al-Kutub al-'Ilmiyyah, 1st edn, 1983), p. 327.

<sup>17</sup> *Ibid.*

*Definition of the Hanbali school*

According to Al-Kharqi, *mal* is something in which there exists a lawfully permissible benefit without resulting from pressing need or necessity.<sup>18</sup> Al-Buhuti, explaining the above definition, maintains that the 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, or there is a lawfully permissible benefit but only in the situation of pressing need, such as keeping a dog, or in the situation of necessity, such as the consumption of a carcass when in dire need of survival, are excluded from the status of *mal*.<sup>19</sup>

*Definition of the Maliki school*

According to the Maliki jurist, Al-Shatibi, *mal* is the thing on which ownership is conferred and the owner when he assumes it excludes others from interference.<sup>20</sup> This definition affirms that *mal* is the subject matter of ownership. It also explains that the basis of property rights is the relationship standing between the thing and the person.

## ATTRIBUTES OF MAL

In the light of the juristic definitions of *mal* we may now determine certain characteristics which qualify things as *mal*:

- (1) In order for a thing to qualify as *mal* it has to be, in the words of the Mejlle (Art. 126), naturally desired by man. In other words, in modern terminology, it must have commercial value;
- (2) It must be capable of being owned and possessed;
- (3) It must be capable of being stored;
- (4) It must be beneficial in the eyes of the *Shari'ah*;
- (5) The ownership of the thing must be assignable and transferable.

If a certain thing attains the above attributes it may qualify as *mal*. Keeping in view the attributes of *mal*, there seems to exist some distinction between a thing (*Shaiy* pl. *Ashya'*) and property (*mal*). Mahmassani maintains that property in a legal sense differs from thing in general to the extent that all properties must be things but not necessarily all things are property. A thing implies whatever exists in reality, while property must have certain attributes distinct from those of a thing in general.<sup>21</sup> Therefore, the relationship between property and thing is that the former is specific while the latter is general.

<sup>18</sup> Al-Kharqi, *Matan al-Iqna'*, p. 71.

<sup>19</sup> Al-Buhuti (Mansur Ibn Yunus), *Kashshaf al-Qana' Matan al-Iqna'* ('Alam al-Kutub, 1983), vol. 3, p. 152.

<sup>20</sup> Al-Shatibi (Abu Ishaq), *Al-Muwafaqat fi Usul al-Shari'ah* (Egypt: Matba'ah al-Rahmaniyyah, n.d.), vol. 2, p. 17.

<sup>21</sup> Mahmassani (Sobhi Rajab), *Al-Nazariyyah al-'Ammah Li'l-Mujibat wa'l-Wuqud* (Beirut: Dar al-'Ilm Li-l-Malayin, 3rd edn, 1983), p. 8.

USUFRUCTS (MANAFI‘) AND RIGHTS (HUQUQ) AS PROPERTY  
(MAL)

As indicated above, the Hanafi school recognises property only in material things which have tangible substance or corpus. Usufructs (*manafi‘i* pl. of *manfa‘ah*) and rights (*huquq* pl. of *haqq*) are not therefore, according to Hanafi jurists, property but rather a sort of dominium. The non-Hanafi jurists, on the other hand, hold that usufructs and rights are also property, because by thing they mean the beneficial use and the benefit of it and not the thing itself. This view is in line with the customary usage of people and therefore accorded wide legal recognition.

The word *manafi‘* is the plural form of *manfa‘ah* which is a verbal noun (*masdar*) emanating from the root *nafa‘* which literally means benefit and advantage or the means used in achieving such benefit and advantage or reaching a beneficial goal.<sup>22</sup> Accordingly, the term *manafi‘* includes in general whatever benefit is taken of a thing – that thing being either in physical structure, or in the form of substance, for example, the milk and calf of a cow, the fruits of a tree, the rents of a house, and such like.

The majority of jurists have used the term *manafi‘* to imply only the benefits taken out of material things by way of their utilisation which are ostensible, such as residing in a house, riding in a car, the wearing of a cloth and the work of an employee. The benefits in the form of substance, such as the milk of a cow, the fruits of a tree, as well as the rental proceeds of a rented house, and such like, are not, therefore, juridically regarded as *manafi‘*. These are rather called produce or proceeds of material things.<sup>23</sup>

The term rights (*huquq* pl. of *haqq*), on the other hand, means something that can be justly claimed, or the interests and claims that people may have by law. According to Dr Wahbah al-Zuhaili, *haqq* is what the law recognises for an individual to enable him to exercise a certain authority or bind others to perform something in relation to him. He further maintains that *haqq* sometimes relates to *mal*, e.g. the right of ownership (*haqq al-milkiyyah*), and the right of easement (*haqq al-irtifaq*) in adjacent land particularly with respect to rights to passage, water and development. Sometimes it may not relate to *mal*, rather it may denote some legal authority or claim due to someone who possesses such *haqq*, e.g. the rights of custody and guardianship upon a person of incapacity.<sup>24</sup> The *huquq* therefore, as envisaged by him, are of two types: property rights and mere rights or non-property rights. ‘Ali al-Khafif contends that *haqq* is a general term, and accordingly it comprehends all usufructs (*manafi‘*) and applies to all interests (*maslahah*) to which individuals are entitled by law, and thus they are the owners of such interests. According to him, all usufructs are rights but not all rights are usufructs *per se*.<sup>25</sup> In other words, *haqq* is general (*‘am*) and *manfa‘ah* is specific

<sup>22</sup> *Al-Misbah al-Munir*, vol. 2, p. 328.

<sup>23</sup> ‘Ali al-Khafif, *Al-Manafi‘*, in *Majallat al-Qanun wa’l-Iqtisad*, (1950), vol. 20, part 3–4, p. 27.

<sup>24</sup> See *Al-Fiqh al-Islami*, *op.cit.*, p. 42.

<sup>25</sup> See *Al-Manafi‘*, *op.cit.*, p. 98.

(*khass*). It follows, therefore, that they share with each other the scope and extent of *manfa'ah*, that is to say, they apply equally to those things which are utilised for benefits, such as residing in a house and riding in a car; and vary from each other when *haqq* further applies to the interests not resulting from the beneficial use of things, for example, the right of pre-emption, the right of option, the right of guardianship and the right of custody etc.<sup>26</sup> The *haqq* has, however, a specific implication in contrast to its generality as indicated above. Some jurists have used it as a synonym of *manfa'ah*. Nevertheless, there still exists a distinction between them. When we use the term *haqq* attention is made to the person who is entitled to it by law, while in the case of *manfa'ah* attention is paid to the subject matter from which a person receives benefit. Riding in a car is the benefit (*manfa'ah*) which attaches to the car, while the capability and authority of riding in a car is a *haqq* (right) which is conferred on the person who is entitled to it. It follows that the meaning of the right to beneficial use is different from the meaning of benefit itself, in the sense that the former is the attribute of the person entitled to it, and the latter is the attribute of the subject matter from which such benefit (*manfa'ah*) emanates.<sup>27</sup>

According to the Hanafi school, *manafi'* (usufructs) and *huquq* (rights whether property rights or mere rights) are not property, because, these by their nature are not capable of being possessed and, even though they come into existence for some time they do not have subsistence and continuity; rather they cease to exist gradually following their gradual consumption and enjoyment. The majority jurists (non-Hanafi) hold the view that *manafi'* and *huquq* qualify as property (*mal*) because they are regarded as capable of being possessed by virtue of the capability of their sources and bases to be possessed even though not by virtue of their own nature. Furthermore, these *manafi'* and *huquq* are the desired outcome of the material things, and in the absence of such outcome the material things would fall short of human demand and inclination.

This conflicting interpretation between the Hanafi and non-Hanafi majority jurists culminates in some practical problems, particularly on the issues of usurpation, lease and inheritance. If someone usurps certain property and thereafter enjoys some benefit out of it for a certain period and then returns it to its true owner, he is obliged, according to non-Hanafi majority jurists, to compensate for the benefits so enjoyed. However, according to the Hanafi school, the usurper is not liable to pay compensation for the benefit enjoyed out of the usurped property, rather mere restitution of the property to its true owner would suffice. Nevertheless, some Hanafi jurists have made certain exceptions to the above general rule. They maintain that if the usurped property is a trust (*waqf*) property or if it belongs to an orphan or is prepared for certain further development or utilisation purposes or prepared for lease (e.g. hotels and restaurants etc.), then the usurper is liable to pay compensation for the benefits

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*, at p. 99.



in addition to restitution of the property. This exception is based on *istihsan* (juristic preference on the ground of equity to avoid the rigor of law) and is, thus, justified due to great need for the protection of such properties. This view is, it is submitted, somehow weak. In fact, all properties are entitled to protection against the interference and usurpation of non-owners, and therefore compensation for unauthorised enjoyment of the benefits should be the law in all usurped properties, and thus the exception is unnecessary.<sup>28</sup>

With regard to the contract of lease, the Hanafi jurists are of the opinion that by the death of the lessee the contract would prematurely dissolve, while the non-Hanafi majority's view is that it would continue until the fixed period notwithstanding the death of the lessee. This difference of opinion results from the difference of conception in the formation of a lease contract. The Hanafi jurists perceive that lease takes place in relation to benefits (*manafi'*) according to their gradual accrual, i.e. the lessee owns benefits out of the leased object gradually with the passage of time. A lessee cannot own the benefits accrued out of the lease after his death as it terminates all his mundane legal claims.

Furthermore, as the benefits are not *mal*, in their opinion, the legal heirs of the deceased lessee cannot inherit them. As a result, the lease contract does not continue after the death of the lessee. The non-Hanafi jurists, on the other hand, hold the view that the benefits (*manafi'*) are considered to be present as a whole during the formation of the lease contract and the lessee owns it at once at the beginning by virtue of the contract legally concluded. Furthermore, *manafi'* are too, in their view, considered as property (*mal*). They can, therefore, be inherited like any other properties. Thus, the lease contract like other sale contracts does not dissolve on the death of the lessee.<sup>29</sup>

On the issue of inheritance, it is important to note that the rights, such as rights in the sale contracts in respect of the options of stipulation, investigation of the defective commodities, etc. are, according to non-Hanafi jurists, inheritable, because they regard these as property which should be devolved by the death of the owner upon his legal heirs. However, according to Hanafi jurists, these are not inheritable as they are not property.<sup>30</sup>

<sup>28</sup> Wahbah, Zuhaili, *op.cit.*, p. 43.

<sup>29</sup> *Ibid.*, at pp. 43 and 278.

<sup>30</sup> *Ibid.*, at p. 43.