MAX PLANCK INSTITUTE
FOR COMPARATIVE PUBLIC LAW
AND INTERNATIONAL LAW

Directors: Professor Dr. Armin von Bogdandy · Professor Dr. Dr. h.c. Rüdiger Wolfrum

Max Planck Manual on Property, Ownership in Afghanistan

Author:
Nezamuddin Abdullah

1st Edition
(August 2011)

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ABBREVIATIONS

AC	Afghan Constitution
CC	Civil Code
CPC	Civil Procedure Code
LoLM	Law on Land Management
LoPL	Law on Pasture Land
LoJ	Law on Jungles
LoW	Law on Water
LoM	Law on Mines
LoPG	Law on Petroleum and Gas
LoEL	Law on Expropriation of Land
LoSIDI	Law on Sale of Immovable Property to Diplomatic Agencies of Foreign Countries and International Organizations
PC	Penal Code

Foreword

The three decades of war in Afghanistan have created basic problems in judicial and legal, economic, cultural, political and social fields. In the judicial and legal field there are numerous major problems one of which is the problem of property and ownership.

As a result of war, many Afghans immigrated to foreign countries and returned back to Afghanistan after 2001 where they mostly settled in the cities. Likewise, when the internally displaced persons returned they mostly did not go back to their villages of origin but resided in the cities, particularly, in Kabul.

Besides these, another negative consequence of war was the failure of the government to provide enough public service such as establishment of enough schools in sub-districts, provision of electricity, provision of drinking water, paving the way for working, provision of health services and so on in the villages and sub-districts. Consequently, the Afghan nationals who were living in villages and sub-districts came to cities, particularly, to Kabul to have access to these public services.

Moreover, the previous governments as well as the current one were unable to systematically and continuously distribute land to the nationals in a just manner. Failure of the state authorities resulted in usurpation of privately owned lands by others, creation of legal disputes about pasture land between different tribes, usurpation of state and public owned lands by warlords and their illegal redistribution which resulted in increase of price for immovable property in Afghanistan.

To solve these problems, the previous states including the current one have enacted a number of laws such as the civil code (CC), law on land management (LoLM), law on pasture land (LoPL), law on jungles (LoJ), law on water (LoW), law on mines (LoM) and so on. The presidents have also issued a number of presidential decrees.

The present manual which has been written under the promulgated laws of Afghanistan including the Afghan Constitution (AC), CC, LoLM, LoPL, LoJ, LoW and LoM and presidential decrees that are generally regulating the issues relating to property and ownership aims at firstly enlisting and compiling all these laws and decrees into one manual and secondly elucidating the provisions of these laws and decrees. So, this manual only discusses theoretical aspects of property, ownership and natural resources, not the practical problems.

The present manual contains three chapters: Chapter One discusses the sources of rules of property and ownership and some basic principles enshrined in the AC on possession, protection and utilization of property and ownership. Chapter Two discusses the issues on property and Chapter Three discusses the issues on ownership.

Chapter I: Sources of law of property and ownership and basic principles concerning property, ownership and natural resources

This chapter is going to discuss the following topics: A) Sources of rules of property, ownership and natural resources in Afghanistan; B) Basic principles of property and ownership in the AC:

A. Sources of law of property, ownership and natural resources in Afghanistan

Source literally means base, root and origin. Source legally means the base and origin of something[1]. The sources of rules of property and ownership and natural resources in the Afghan legal system are: laws and presidential decrees, *Fiqh*[2] and customs and traditions.

I. Afghan constitution, ordinary laws and presidential decrees

The word law *(qanoon)* literally means rule and procedure[3]. Article 94 of AC defines law as: "Law shall be what both houses of the National Assembly approve and the President endorses, unless this Constitution states otherwise." The laws that regulate the issues relating to property, ownership and natural resources in Afghanistan are the following:

1) AC:

The first source of property, ownership and natural resources is the AC. In the AC there are numerous provisions that regulate the issues pertaining to property, ownership and natural resources. For example, article 9 AC states that the mines and natural resources are considered the property of the State. Article 14 AC sets forth that the State shall adopt necessary measures for provision of housing and distribution of public lands to deserving Afghan citizens. Article 40 AC states that property shall be safe from violation and no one shall be forbidden from owning property. Furthermore, no one's property shall be confiscated without the order of the law and decision of a competent court. Search and expropriation of private property shall be carried out in accordance with provisions of the law for the benefit of the public interest. Finally, article 41 AC states that, firstly, foreign natural and legal persons shall not have the right to own immovable property in Afghanistan and that, secondly, lease of immovable property for the purpose of capital investment shall be permitted in accordance with the provisions of the law.

2) Ordinary laws

The ordinary laws that are the sources of rules of ownership, property and natural resources are:
1) CC of 1976: CC is in fact one of the major sources of property and ownership in Afghanistan. Volume one, chapter three, articles 472 – 483 of CC envisage certain provisions on definition of property, basic classifications of properties and differentiation of public and private properties. Volume four part one, articles 1900 – 2298 envisage certain provisions on definition of

[1] Masoud Ansari and Dr. Mohammad Ali Taheri, dictionary of private law, volume 3, p 1982.
[2] For definition of *fiqh* please see page 4 below.
[3] Saleh Ali Pasha, history of law, pp 8 -9.

ownership, restrictions of ownership, area of ownership, joint ownership and its division, mandatory joint ownership and ownership of multi-story-buildings, causes of acquisition of ownership which includes acquisition of unowned (*mobahat*), inheritance, will, adhesion, preemption and contracts that will be further discussed in chapter two of this manual.

2) Civil Procedure Code (CPC): CPC also procedurally stipulates certain provisions on the filing of claims for property and ownership, some examples of which will be discussed in the context of this manual.

3) LoLM:[4] The LoLM is also one of the sources of rules of property and ownership which regulates the provisions on classifications of land, distribution of lands to citizens and lease of land.

4) LoEL:[5] The LoEL and its amendments is also one of the sources of property and ownership which regulates the issues on expropriation of immovable property of natural and legal persons by the State for the benefit of public interest.

5) LoPL:[6] The LoPL is also one of the sources of property and ownership which regulates the issues on pasture lands.

6) LoM:[7] This law is also one of the sources of rules of property and ownership which regulates the issues on proper use of mines and other natural resources and their ownership.

7) LoSIDI:[8] This law regulates the issues on sale of immoveable property to diplomatic agencies of foreign countries and international organizations.

8) LoW: [9] This law regulates the issues on ownership and method of using water.

3) Presidential decrees

In addition to these laws, there are a number of presidential decrees issued by the President to regulate issues on ownership of public properties such as:

- Decree number 83 dated 8/18/1382 (2003) published in official gazette number 816 dated: 8/18/ 1382(2003) on properties which regulates the issues relating to differentiation of state-owned and privately owned lands and restoration of state-owned lands
- Decree number 99 dated: 4/2/1381 (2001) of the President of the interim administration of Afghanistan on none-distribution of dead lands published in official gazette number 802 dated 28/3/1381
- Decree number 830 dated 11/2/1381 (2001) of the President of the interim administration of Afghanistan on the ban of distribution of state-owned lands contrary to the Master Plan published in official gazette number 802 dated 28/3/1381 (2001).

II. Fiqh

Fiqh literally means understanding. The Holy Qur'an in the history of Musa says:

[وَاحْلُلْ عُقْدَةً مِّن لِّسَانِي يَفْقَهُوا قَوْلِي]- [طه: ٢٧-٢٨]

[4] The LoLM entered into force in tenth *Asad*, 1387 (2008), and published in official gazette no: 958.

[5] The LOEL published in official gazette no: 794 and entered into force in 1421 lunar year (2000) during the government of Taliban. This law is composed of three chapters and 23 articles. Subsequently, some provisions of this law was amended based on decree no: 7, dated 14/ 1384(2005) and its amended has been published in the official gazette no: 849 dated: 31/ 1/ 1384 (2005).

[6] The LoPL entered into force in 2000 and has been published in official gazette no: 795 dated 12 *Shawal-ul mokarem*, 1421 lunar year (2000)

[7] The LoM and LoPG entered into force in 2008 and published in official gazette no: 972 dated 20 *Delwa*, 1387 (2008).

[8] The law on sale of immovable property to diplomatic agencies of foreign countries and international organizations entered into force in 2008 and published in official gazette no947 dated 29 *Jowza*, 1387 (2008).

[9] The LoW entered into force in 2009 and published in official gazette no980 dated 6th *Sour*, 1388 (2009).

"And remove the impediment from my speech so that they understand me."
The islamic jurists define *fiqh* as "knowing the provisions of *Shar'ia* derived from detailed reasoning".[10] *Fiqh* is also one of the sources of property, ownership and natural resources since when there are no legal provisions in civil disputes, judges have to resolve the civil disputes including the cases involving property and ownership based on *fiqh* (article 2 of the CC).

IV. Customs and tradition
Based on the CC, customs and traditions are also one of the sources of civil law, a part of which is property and ownership. Article 2 of the CC in this regard states that: "Where there is no provision in the law or in the fundamental principles of the *Hanafi* jurisprudence of Islamic *Shari'a*, the court issues a verdict in accordance with the generally accepted customs, provided that the custom does not contradict the provisions of the law or principles of justice." Based on this article, customs and traditions also constitute one of the sources of civil law. It is why, the CPC has obliged the judges to understand the generally accepted customs and traditions. Article 498 of CPC states that: "The judge must, in addition to having complete grasp and understanding of the effective laws of the country and of the rules of the Islamic law, have complete awareness of the general culture, manners and customs of the society."

B. Basic principles of property, ownership and natural resources in the Afghan Constitution

The AC contains some basic principles concerning the rights of Afghan nationals pertaining to acquisition of ownership, prevention of foreigners to acquire immoveable property and protection of ownership of persons which are discussed below:

I. Acquisition of ownership and property as a fundamental right of Afghans
Based on the AC acquisition of ownership and property is a fundamental right of the Afghan nationals. Article 40 of AC states: "…No one shall be forbidden from owning property and exercising right on it, unless limited by the provisions of law…" Under the provision of this article acquistion of ownership and property is a fundmental right of Afghan citizens, however, the AC is silent on causes of acquistion of ownership and property. But, the CC describes explicitly the causes of acquisition of ownership. Based on the CC (articles 1985-2255) the causes of acquisition of ownership include: 1)inheritance based on which the ownership is transferred from devisor to inheritor after the death of the devisor; 2) will based on which the ownership is transferred from testator to the one in favor of whom the will has been made after the death of the testator; 3) adhesion to moveable and immoveable properties which takes place while the human being is alive; 4) contracts which take place between living human beings; 5) preemption; and 6) attainment of unowned things which do not have any owner whether they are moveable or immoveable
Adhesion means attachment of a property to another property in a way that it should be part of it regardless of whether both properties belong to one owner such as the installation of a tableau on the wall. Inheritance is the automatic transfer of the dead's legacy to his inheritors. Preemption constitutes the right of acquisition of all or some of the property sold from the buyer against payment of price and expenses incurred even though it may be mandatory. Will constitutes possession in the patrimony in a way that it would become effective after the death of the bequeathed. Contract constitutes the agreement of wills on creation, amendment, transfer, or

[10] Dr. Waheba Zohelai, Usol-ul- fiqh- ul- Islami, volume 1, p 19; and Dr. Abdul Karim Zeadan, Alwajeez fee Usol-ul-fiqh, p 9.

elimination of right within the limits of the law. These means will be discussed in detail in chapter three of this manual.

II. Limitation of foreigners to possess immovable property in Afghanistan

Based on the laws of Afghanistan there are rights which are recognized as exclusive rights of Afghan nationals. This means foreigners may not be able to enjoy these rights, such as the right to candidacy, vote, the right to become judge, prosecutor, representative in the National Assembly, the right to establish political parties and so on.[11] Article 25 of the „Law on travelling and staying and inhabitancy of foreign nationals" in this regard states that "the foreign national who enters the Islamic Republic of Afghanistan based on provisions of this law, except in circumstances foreseen in the Afghan laws, shall enjoy the same social and individual rights like Afghans". One of the rights that the foreign nationals are not able to exercise in Afghanistan is the right to own immovable property[12] in Afghanistan. Article 41 of AC states: "Foreign individuals shall not have the right to own immovable property in Afghanistan."

Foreign nationals can also not possess immovable property by the virtue of will. Article 2112 paragraph 2 of CC states that "foreigners may not have the right to possess immovable property based on will under paragraph 1 of this article." The reason for the ban of possession of immovable property by foreigners, although it is a fundamental right of human beings, is precaution in order to save and safeguard the territory of the country and prevent it from being at the disposable of foreign countries or their nationals because Afghanistan is at the developing stage and there are not enough national investors. Therefore, if foreigners are allowed to purchase and possess immovable property in Afghanistan, there will be the possibility and the risk that a part of the territory of Afghanistan will be purchased and possessed by foreigners who could dominate the country.[13]

III. Protection of ownership of persons (natural and legal) by law

Based on the laws of Afghanistan, ownership of natural and legal persons is safe from violation. Article 40 AC states: "Property shall be safe from violation. No one shall be forbidden from owning property and acquiring it, unless limited by the provisions of law. No one's property shall be confiscated without the order of the law and decision of an authoritative court. Acquisition of private property shall be legally permitted only for the sake of public interests, and in exchange for prior and just compensation. Search and disclosure of private property shall be carried out in accordance with provisions of the law." The provision of this article states that the ownership of natural and legal persons is safe from violation. Therefore, other natural and legal persons may not invade their ownership and steal, usurp and waste it. Moreover, the state can only expropriate a private person based on legal provisions which aim at fulfilling a public interest, such as the establishment of hospitals, streets, mosques, schools. The legal consequence of this principle, therefore, shall be as follows: no one may have the right to steal,[14] usurp and waste[15] others'

[11] Concerning the rights and obligations of foreigners in Afghanistan please see: Nezamuddin Abdullah, private international law, chapter four.

[12] For definition of immovable property please refer to: chapter two of this manual.

[13] Mohammad Eshraf Rasooli, analysis and critique of the constitution of Afghanistan, volume 1, pp 405- 406.

[14] Concerning stealing please see: articles 454-464 of PC.

[15] Regarding usurp and waste please see: Nezamuddin Abdullah, commentary on the civil code of Afghanistan, law of obligations, pp 120-170.

properties. The government may neither without the permission of law expropriate, seize and search ownerships of legal and natural persons.[16]

IV. Expropriation *(estamlak*)

Under article 40 AC the government may not take individuals' property except provided by law. In addition to the AC, article 1903 CC also protects individuals' property and states: "No person may be dispossessed of his property except by law." Based on this article and article 41 of AC property of natural and legal persons is safe from violation. Therefore, the government shall not take legal and natural persons' property but based on legal provisions on expropriation. It is why the Law on Expropriation of Land (LoEL) and its amendment entitle the government to expropriate property of natural and legal persons. Article 2 LoEL stipulates: "Expropriation of land or a part of such land, which is needed for public purposes, shall be carried out upon the approval of the Council of Ministers, and with provision of prior and adequate compensation (based on the market price of the land)."

1. Definition of expropriation

The LoEL and its amendments have not defined expropriation. The Dari term *Estamlak* is derived from *malk*, which literally means becoming the owner, possessing, allocating property for someone and exercising ownership right. In law and *fiqh*, expropriation is compulsory dispossession of ownership from its onwner by the state *vis a vis* the fair price for the public interest such as expansion of street, mosques and so on.[17]

2. Purposes of expropriation

The purposes for which private ownership of natural and legal persons may be expropriated are numerous. Of course, the main criterion for expropriation is the public interest. Therefore, no one can definitely deem the cases based on which the ownership of natural and legal persons may be expropriated since the criterion of that is public interest. Despite this, article 3 LoEL and its amendment enumerates some examples. The above article states: "The council of ministers shall be empowered to expropriate a piece of land totally or partly for the following purposes: 1) Construction of manufacturing institutions, highways, pipelines, extension of communication lines, power transmission cables, sewerage canalization, water supply network, mosques, *madrases* and schools, implementation of city plans and other public welfare entities; 2) Mining and extraction from underground reservoirs; 3) Lands with cultural or scientific importance, cultiveable lands, vast gardens and major vineyards, which have economic importance, and lands located within the area of jungles and dams may be expropriated in exceptional circumstances upon the approval of the council of ministers, pursuant to permission by law and *Shar'ia*."

3. Authorized entity for expropriation and its legal procedure

Based on the LoEL, expropriation of ownership may be carried out based on the proposal of a government administration which needs the property. The proposal then has to be approved by the Council of Ministers and carried out by the municipality. Article 2 LoEL states: "Expropriation of land or a part of such land, which is needed for public purposes, shall be

[16] Concerning confiscation and search of property please see: Mohammad Eshraf Rasooli, analysis and criticizing of constitution of Afghanistan, volume 1, pp 141-142.

[17] Dr. Waheba Zohelai, al- fiqh- ul- Islami wa adaltoho, volume ٦, p 2875; Masoud Ansari and Dr. Mohammad Ali Taheri, dictionary of private law, volume 3, pp 1653- 1966; Dr. Mohammad Jafar Jafary Langrody, Mobsoot in law dictionary, volume 1, world number 1371.

carried out upon the approval of Council of Ministers, and with provision of prior and adequate compensation (based on the market price of the land)"

4. Informing the owner, renter or their attorney three months prior to expropriation

The law on land expropriation obliges the municipality to inform the owner of property, the owner of benefit rights, such as a renter, or their representative which includes their attorney, custodian and legal guardian, of the intended expropriation of property by the government. This has to be done three months prior to actual expropriation.The rationale behind this is following: 1) allow the owner or renter some time to find new housing ; 2) enable him to empty the house carefully; 3) give him time to prepare for moving out; and 4) assure that the owner is present during the valuation of the property through the valuating committee. In case the owner or his or her representative intentionally does not appear before the valuating committee, the committee may price the cost of property in absence of the owner or his or her representative. Article 20 paragraphs 1 and 2 of the amendment of the LoEL states: "(1) The owner or user of the land subject to expropriation, or their legal representative shall be notified three months in advance concerning land expropriation and the price thereof. Absence of the owner or the user of the land or their legal representative in the meeting of the commission assigning value to the property subject to expropriation despite being notified in advance shall not impede the work of the commission and planned implementation; (2) Where the person concerned or his legal representative did not appear in accordance with paragraph (1) of the present article to complete the expropriation process the property shall be valued in his absence and the price thereof shall be deposited with the bank in the interest trust account and the plan shall be implemented." The valuating committee of the municipality is composed of the owner of the land, the renter or their representative, a representative of that government administration for need of which the property is to be expropriated and a representative each of the municipality, the ministry of finance and a representative from the state cases department of the ministry of justice which defends from the property of state *vis a vis* the individuals (article 5 of the LoEL).

5. Compensation

Under the LoEL compensation of property constitutes compensating the value of the property in money or providing the owner with another property equivalent to the expropriated property. The property under expropriation always is the land itself and any buildings constructed on it. In case trees or other plants have been planted on the property, these are also included. Since the owner of the land is the owner of anything that is on the land and under the land, the government has to pay the cost of these plants – as well as any fruit they may bear –, too. Article 8 of the LoEL states that: "The following compensations shall be provided for land expropriation: 1) the price of the land; 2) the price of any residential houses, buildings and other constructions located on the land; and 3) the price of any fruit bearing or ornamental trees, or other saplings set on the land."
Below we will first discuss the remuneration for the land itself; secondly for buildings and thirdly for cultivation and trees.

a) Compensation of land

Based on the LoEL the government is obliged to pay the cost of the land. When paying the cost the location and grade of land have to be taken into consideration (article 10 of the LoEL) since the cost of lands may differ based on their grade and location. For example, there is a big difference between the cost of lands located in *Wazir Akbar Khan, Shirpoor, Shahr-e-now, Khair Khana* and other places of Kabul city. The LoEL allows the owner to choose whether he wants to be remunerated in money or whether he instead wants to receive another plot of land.. Therefore,

if the owner wishes the government has to pay the cost. Likewise, if the owner so decides, he or she can get another lot of land from the government. In the latter case, if the value of the parcel of land provided by the government is less than that of the original land of the owner, the government has to pay the difference. Likewise, if the original land of the owner is worth less than the new piece of land attributed by the government, the government may demand the difference of the cost. Article 14 LoEL states: "Instead of paying the price for an expropriated land to the owner of such land, another piece of land, equivalent to such land, may be distributed to the owner upon his agreement. If such new land has a grade higher than that expropriated, the owner shall pay the difference to the state and vice versa." The council of ministers may determine the cost of the land (article 10 of the LoEL).

b) Compensation for buildings

Under the LoEL the government also has to pay the cost of house or building to the owner of the land. In receiving the cost of house or building the owner has the option to opt for money or another piece of residential land. Despite this, the LoEL sets forth specific provisions in case the owner decides to receive land in residential projects *vis a vis* his house. Article 13 of the LoEL and its amendment states in this regard: "In accordance with the following criteria residential land plots shall be distributed to individuals whose lands or houses have been expropriated against a fixed project price:

- (One) land plot, where the person possesses up to 600 m² landed property;
- (Two) land plots, where the person possesses 600 to 1200 m² landed property;
- (Three) land plots, where the person possesses more than 1200 and up to 2000 m² landed property;
- (Four) land plots, where the person possesses more than 2000 and up to 5000 m² landed property;
- (Five) land plots, where the person possesses more than 5000 and up to 10000 m² landed property;
- (Six) land plots, where the person possesses more than 10000 and up to 20000 m² landed property; and
- where a person possesses a landed property above 20000 m², he shall be granted (one) land plot in lieu of each additional 20000 m2 landed property."

Contrary to land whose price may be determined by the Council of Ministers, the price of house may be evaluated by a committee of the municipality concerned, in accordance with The Unified Table for Valuation (article 11 of the LoEL).

c) Cost of trees and cultivation

In addition to the land and house, the government also has to pay the cost of cultivation and trees that are on the land to owner because owner of the land is recognized as owner of everything that is on the land and under the land. The cost of trees and other cultivation shall be determined by the municipality and the representative of the ministry of agriculture.

6. Conditions of compensation

For paying compensation there are two conditions: firstly, the compensation has to be paid by the government to the owner prior to expropriation and secondly the compensation has to be just. Article 2 LoEL states: "Expropriation of land or a part of such land, which is needed for public purposes, shall be carried out upon the approval of the Council of Ministers, and with provision of prior and adequate compensation (based on the market price of the land)."

This article clearly states that adequate compensation is the sum that the owner of the land could without interference of the state have realised for the sale of his property on the free market.

7. Legal consequence of expropriation to the government and owner

Based on *fiqh* and law, expropriation is a sort of compulsory sale from a private person to the state carried out for the public interest. As a result, expropriation – like a sales contract – creates specific legal consequences for the government and owner.

a) Compensation: Prior to the act of expropriation the above discussed compensation has to be provided to the owner by the government.

b) Delivery of land, house and plantations to the government: The owner of the property is obliged to give the land, house and plantations to the government.

c) Transfer of ownership: Due to the expropriation, the government becomes the owner of the expropriated property and has to use the property for the purpose for which the property was expropriated.

d) Excercise of ownership rights: As mentioned above, the government has to pay the compensation to owner of the property before the expropriation is carried out. That is why the LoEL forbids the owner of the land or the renter to benefit from benefit of the land which has to be expropriated three months prior to expropriation. Hence, if the owner receives the compensation, he or she cannot benefit from the ownership. The LoEL specifies this period three months. Article 6 paragraphs 1 and 2 of the LoEL states: "1) The right to own or use the land shall be terminated, in accordance with articles eight and nine of this law, three months prior to the actual start of the project, provided that the rights of the owner or the damages incurred by the user of such land are compensated; 2) Termination of ownership right shall not deprive the owner or the user of the land from collecting the [agricultural] products of or the fruits of the trees in the land, except where urgent use of the land shall require rapid evacuation of the land."

4) Destruction of building and right to construction material: Under the LoEL the owner of the land has to destroy the house or building located on the land which is to be expropriated. In case of non-destruction, the government may destroy it. In both cases, construction materials such as stone, brick, wood and so on shall belong to the private owner. Article 12 of the amendment to the LoEL states: "Constructional materials, residential quarters and other buildings shall belong free of charge to the owner after payment of the costs by the government. Under such circumstance the process of demolishing the building shall be undertaken by the owner. In case of refusal or negligence on the part of the owner to voluntarily demolish, forced demolition shall take place by the municipality assisted by the security organs […]."

Chapter II. Property

This chapter is going to discuss the following topics: A) Definition of property; B) Difference between property, thing and ownership; and C) types of property:

A. Definition of property

"Maal" (property) is derived from "*mool*" which means wish and tendency. [18] Article 742 of CC defines property: "Property is a thing or right which is of material value before the people." Based on this definition property covers things, namely material property that exist and can be felt by feelings such as: house, garden, land and so on rights such as: easement rights and so on. However, the gap that exists in this definition is, this definition property only covers things and right and not benefits. This definiation is not accurate. In *Fiqh*.[19], *Hanafi* jurists define property as "anything which can be attainable and is habitually beneficial." Based on this definition property must be composed of the two following elements:

1) It has to be attainable: Therefore, anything which cannot be attained cannot be considered property, such as ideal things, e.g. knowledge, health, intelligence honour, weather and sunshine.

2) It has to be habitually beneficial: Therefore, anything which cannot be originally beneficial such as the meat of dead or spoiled or poisoned food, cannot constitute property. Moreover, or can benifitable but not customarily such as single wheat, drop of water and so on are not considered as property because from one hand these things are not benifitable alone and on the other hand it is not common in the customs. Therefore, these objects are not considered property when they are alone

Nonen *Hanafis (Malekia, Shafia and Hanabela)* define property as follows: "Property constitutes anything which can have material value[20] The differences that exist between these two definitions is *Hanafi* jurists have restricted property to things that can be stored. This restriction can be critized because benefits is property as well as. Also, there are some properties which cannot be stored such as fruits and vegetable. Likewise, *Hanafi* jurists have restricted properties to things that are liked by human nature whereas there are some properties which are not liked by human nature such as medicines and unripe fruits. Likewise, unowned things such as hunting and trees before attainment are not considered property although they are liked by human nature. However,

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[18] Dr. Ali Mohyeddin algaradaghi, introduction to property, economy, contract and ownership, p 23; and Dr. Waheba Zohelai, al- fiqh- ul- Islami wa adaltoho, volume 4, p 2875.

[19] The reason for referring to *fiqh* are: a) most definitions and provisions of the CC is derived from fiqh. To better understand and interpret these definitions and provisions, we have to refer to *fiqh*; and b) in case the CC and other laws are silent, we have to refer to the second source of property and ownership which is fiqh in Afghanistan.

[20] Concerning definition of property please refer to: Mostafa Ahmad ulzarqa, almadkhalel fiqh-e-ulham, volume 3, pp 113- 122; Wazar-ul- aoqhaf wa-ul- shoon-ul-eslamia, almost-ul-fiqhia, volume 36, pp31 and 32, Dr. Ali Mohyeddin algaradaghi, introduction to property, economy, contract and ownership, pp 23- 27; and Dr. Waheba Zohelai, al- fiqh- ul- Islami wa adaltoho, volume 4, pp 2875- 2877.

None-Hanafi jurists do not restrict the property to material things but have extended spheres of the property. Based on *None-Hanafi* jurist property constitutes: things, benefits and rights. Despite these, both *Hanafi* and *None-Hanafi* jurists consider the value and benefit important elements in property. Therefore, in a broad sense jurists definite property as such: "Property constitutes any object or right that has material value and customarily benefits." Based on this definition, property covers: physical objects, such as: houses, cars and so on benefits such as: renting of a house, drive of a car and so on and rights.such as right to use a property, right to benefit from a property, right of exercise right on a property and so on[21]

B. Difference between property, thing and ownership

Property, ownerhsip and things are not the same. So, this topic is going to firstly discuss the difference between property and thing and secondly between property and ownership.

I. Difference between property and thing *(shey)*

"Shey" literally means thing, plural of which is *"ashya"*. In *fiqh* and law, thing has two meanings: in a broad sense, anything which exists is called thing. However, in a narrow sense, anything which has material value is called thing.

Nonetheless, anything which can be sold is called property. Therefore, the relation between property and thing is the relation of special to general *(hamoom wa khosoos)* i.e any property is thing, but all things are not property. For example, sun and air that cannot be sold and do not have economical value and are not possessable are things, but not property.[22]

II. Difference between property and ownership *(melk)*

"*Melk*", the Dari word for ownership, literally means attainment of a property by a human. Likewise, ownership is a special relationship between human and property that is confirmed by *Shari'a* and the *Shari'a* specializes the property to human and as long as there is no *Shari'a* obstacles such as lack of legal capacity human can exercise any right on it. Possessed property is also called ownership. For example, it is said: this is my ownership. The meaning of definition of ownership in article 125 of *Mojal-ul-Ahkam* also means anything that has been possessed by human. The above article states that: "ownership constitutes anything that has been possessed by human be it things or benefits" [23]

Based on what was said, it is concluded that: any property that has been placed under the ownership of persons is called ownership. However, a property that has not yet been placed under the ownership is called property not ownership. Therefore, there is a general special *(hamoom wa khosoos)* relationship between property and ownership i.e. any ownership is property, however, all properties are not ownership such as unowned things (*mobahat*) that are property not ownership.

C. Types/ classification of properties

Based on *fiqh* and CC (Articles 473- 480) properties are classified into: moveable and immovable, valueable and unvalueble (*motaqawam wa gheer motaqawam*), identical and none-

[21] Please refer to: Mostafa Ahmad ulzarqa, almadkhalel fiqh-e-ulham, volume 3, pp 113- 122; Wazar-ul- aoqhaf wa-ul- shoon-ul-eslamia, almost-ul-fiqhia, volume 36, pp31 and 32, Dr. Ali Mohyeddin algaradaghi, introduction to property, economy, contract and ownership, pp 23- 27; and Dr. Waheba Zohelai, al- fiqh- ul- Islami wa adaltoho, volume 4, pp 2875- 2877.

[22] Mostafa Ahmad ulzarqa, almadkhalel fiqh-e-ulham, volume 3, p 232.

[23] Dr. Waheba Zohelai, al- fiqh- ul- Islami wa adaltoho, volume 4, p 4546.

identical (*masli wa qayami*), useable and consumable property (*estahmali* and *estahlaki*) and allowable that are discussed separately:

I. Moveable and immovable property

Properties from viewpoint of stability and none-stability on the ground is classified into immoveable and moveable properties that are discussed below:

1. Definition of moveable and immoveable property

Anything can be moved is called moveable. However, anything which has a fixed base is called *"Eqar"* (immovable) such as land, house whose plural is *"eqarat".*There are different definitions for moveable property in *fiqh*. Jurists define moveable property as "a thing which can be transmitted from one place to another place." It makes no difference whether its form is changed or not which covers animals, things sold by measure (*makel*) and metering (things sold by meter) (article 128 of *Mojal-ul-Ahkam).* Based on this definition building, trees and cultivation on the ground are considered immoveable property unless they are subject to immoveable property. Therefore, in case land is sold with building, tress and cultivation, they are subject to provisions that applying on immoveable property.

However, when building, tree and cultivation are sold solely without land, they are considered as moveable. As a result, based on the theory of *Hanafi* jurists, immoveable property covers land and other things considered immoveable under the circumstances of the specific situation.

Maliki jurists have limited the concept of moveable and have expanded the concept of immoveable. They define "moveable property as a thing which can be transmitted from one place to another place with survival of its primary form such as clothes, books and cars". Immovable things are such which have a fixed base and where transportation would be impossible without destroying them. Things which are not of this characteristic are deemed as movables.[24] In definition of the property, the CC has derived the definition of *Malikis.* Article 478 of CC states about definition of moveable property "immovable things are that which have a fixed base and transportation would be impossible without destroying them. Things which are not of this characteristic are deemed as movables."

۲. Changing of moveable property to immovable property and *vice versa*

Sometimes immoveable property may turn to moveable such as things that are separated and extracted from land such as gas, coal, stone, precious stones, soil and so on and pieces of destroyed house which were primarily immoveable and then turned to moveable property. As soon as all these things are separated from land and are ready for transmission, they lose the characteristic of immoveable and turn to unnatural moveable property.

Sometimes, moveable property becomes immoveable property such as doors of the house, locks of the house, line of electricity, water pipe and so on which were natural moveable and after connection with the immoveable, have turned to unnatural immoveable property and become subject to provisions that are applying on immoveable property. [25]

[24] Dr. Abdul Razaq Ahmad-ul-sanhori, alwaseet, volume 9, pp 11-16; Dr. Waheba Zohelai, al- fiqh- ul- Islami wa adaltoho, volume 4, p 2882; Mostafa Ahmad ulzarqa, almadkhalel fiqh-e-ulham, volume 3, pp 147-149 ; Dr. Ali Mohyeddin algaradaghi, introduction to property, economy, contract and ownership, pp 46 and 47; Wazar-ul- aoqhaf wa-ul- shoon-ul-eslamia, almost-ul-fiqhia, volume 36, p 37.

[25] Dr. Abdul Razaq Ahmad-ul-sanhori, alwaseet, volume, 8, pp 13 and 14; Dr. Naser Katozian, property and ownership, p 46.

4. Types of immoveable property

Based on the CC immoveable property is classified into: natural immoveable property and unnatural immoveable property which are discussed below:

a) Natural / real immovable property

As stated immoveable property are things which have fixed base and transportation would be impossible without their destruction. Based on this definition, natural immoveable is only land. However, sometimes, a plant grows in the land or a tree is cultivated on land or a building is built on the land that is also considered natural immoveable property, unless they separated from land. Therefore, natural immoveable properties are three kinds:

1) Land: land is natural immoveable property whether it is agricultural, residential or urban or rural. Land be it any kind anywhere is recognized as natural immoveable property since land has a fixed place and never changes its place. Land covers surface and underground of the land. Thus, land covers surface of land and anything that are on the surface of the land such as building, tree and so on and the things that are underground. As a result, things that are under the ground such as precious stones, gas, mines and so on are natural immoveable property before separation from land. Nonetheless, when they are separated from land, they become moveable property.

2) Plant and tree: concerning plant and tree the CC is silent. Some lawyers consider them natural immoveable property unless they are separated from land. In this case, they turn to moveable property. [26] In *fiqh* there are different opinions: some jurists consider them natural immoveable property. However, *Hanafi* jurists consider them moveable property unless they are subject to immoveable property. In this case, they are considered unnatural immoveable property.

3) Building: concerning building the discussion on plant and tree apply i. e some lawyers consider them natural immoveable property and some jurists (*Maliki*) consider them natural immoveable property and some (*Hanafi*) natural immoveable property.

b) Unnatural (spiritual) immoveable property

Based on 479 of the CC "Moveable property appropriated by the owner for the use in the immoveable property shall be deemed as immovable property." This article which is translation of article 82 of the Civil Code of Egypt states that there are some properties that are naturally moveable. However, the use of these properties becomes a cause to recognize these properties as unnatural immoveable property such agricultural instruments and animals that are allocated for immoveable property. The kind of use of moveable property which are allocated for immoveable and are considered unnatural immoveable is different based on the customs and traditions. Therefore, the use can be agricultural such as the use of animals allocated for the use of immoveable property, seed, machinery, agricultural instruments and so on. The use as well can be manufacturing such as the use of moveable instruments that are allocated for a factory.

3) Use of natural moveable property: the third condition for a moveable property to become unnatural moveable property is the use and exploitation of natural moveable property in the natural immoveable property. [27]

The legal consequence of unnatural movable property is as follows:

[26] Dr. Abdul Razaq Ahmad-ul-sanhori, alwaseet, volume, 8, pp 14 and 22.

[27] Dr. Naser Katozian, property and ownership, pp 51 and 52; Dr. Abdul Razaq Ahmad-ul-sanhori, alwaseet, volume, 8, pp 29-50 ; and Masoud Ansari and Dr. Mohammad Ali Taheri, dictionary of private law, volume 3, pp 1653- 1656.

By allocation of moveable property to immoveable property, properties that are not naturally moveable, unnaturally become immoveable and become subject to provisions of laws that are applying on immoveable property. As soon as moveable property becomes unnatural immoveable property, the provision of the law that are applying on immoveable property apply on it. Therefore: a) unnatural immoveable property can not be confiscated but with natural immoveable property; b) owner of the natural immoveable property can not mortgage the natural immoveable alone because unnatural immoveable property is considered part of it. Therefore, owner has to mortgage the unnatural immoveable property as well; c) between natural moveable and unnatural immoveable property a strong relation is created and they become part of each other; and d) in case of transmission. For example sale of natural immoveable property, unnatural immoveable property is also conveyed with it because unnatural immoveable property is subject to natural immoveable property and owner of the principle is considered owner of the branch. [28]

e) Subtypes of immoveable property in Afghan legislations
Based on the Afghan legislations immoveable properties are divided into the followings:

aa) Private immovable property
Under article 481 of CC "properties relating to ownership of individuals shall be considered as privately owned property, and properties which are not relating to ownership of individuals and have been allotted for public utility shall be considered as public property". Likewise, based on article 7 of decree no 82, 1382 (OG# 816, January/ 5/ 2004) of president of interim administration of Afghanistan "private properties are those to which ownership of persons have been proven based on law and *shari'a*. Private ownership shall be proven based on valid legal and *shari'a* document provided that its invalidator document are not available." Based on these articles private property constitute any property to which ownership persons including legal and natural have been proven based on law and *shari'a* (please also see article 2 paragraph 7 of the LoLM).

bb) State owned immoveable property
Based on article 2 paragraph 8 of the LoLM " The lands belonging to state shall be plots of orchard, irrigated and rain-fed lands, hills, marshy lands, forests, pastures, reed-beds and other lands being registered in the principal book of the State".

cc) Public immoveable property
Concerning public immoveable property 482 of CC provides "Public properties are as follow:

1. Moveable and immovable property of state;
2. Moveable and immovable property of legal persons;
3. Moveable and immovable properties which have been allotted for public interests; and
4. Moveable and immoveable properties which have been recognized as public property based on the law provisions."

1) Moveable and immoveable property of the State: State, in a broad sense, is legal person which is composed of three forces: legislation (parliament), judiciary (Supreme Court) and executive (government) each of which has specific aims and does specific things. Based on

[28] Dr. Naser Katozian, property and ownership, pp 51 and 52; Dr. Abdul Razaq Ahmad-ul-sanhori, alwaseet, volume, 8, pp 29-50 ; and Masoud Ansari and Dr. Mohammad Ali Taheri, dictionary of private law, volume 3, pp 1653- 1656.

article 482 of CC moveable and immoveable properties belonging each of these forces is considered public property.

2) Moveable and immoveable properties allocated for public interests: all moveable and immoveable properties allocated for public interests is considered as public property such as streets, parks, hospitals, mosques and so on.

3) Moveable and immoveable properties recognized as public owned land in accordance with law provisions: all the properties that are recognized as public property by provisions of the law is considered public property.

As stated under the CC, the moveable and immoveable property of the state is considered public owned property. However, under the new legislations of Afghanistan (article 2 paragraphs 8 and 26 of the LoLM) all public property are considered state owned property. The main reason for recognition of public property as state property is that the government of Taliban and the current government have tried to prevent from usurpation and sale of public immoveable property through recognition of public property as state property since after 1356s (1977s), as stated in forward, the civil war and the communist regime started and this war is still going on. At this period, due to the failure of the government to provide systematically and continuously land to the nationals in a just manner, a great deal of public land were grabbed by Afghan nationals and a great deal was usurped by powerful person and illegally distributed to some nationals of Afghanistan the result of which is , for example, turning of 70 % of Kabul city to informal settlements.

ee) Endowment lands

Endowment lands are those which have been endowed by their owner for mosques, graveyards and so on in order to gain reward (article 2 paragraph 8 of the LoLM).

dd) Dead land (*arazi mowat*)

Dead land is that which has never been cultivated. Article 2 paragraphs 11 and 12 of the LoLM defines dead land as land "which has never been brought under cultivation. With the exception of individual, state, pasture, and endowed lands, all desserts, mountains, hills, rivers, arid and rocky lands and jungles shall be deemed dead lands".

ff) Sterile / arid (*bayer)* land

Sterile land is that which has not been cultivated for a period of five years under normal circumstances. Article 2 paragraphs 11 and 12 of the LoLM defines sterile land as " sterile land is that which under normal conditions has not been cultivated for a period of 5 successive years, and which can be brought under cultivation after improvement or construction of a new irrigation system."

gg) Pasture land

Article 2 paragraph 8 of the LoLM defines pasture land as "Where a person having a loud voice screams with full strength from the last house of a village or a town, the distance up to which his scream is heard, shall be deemed pasture land."

5. Advantage of classification of properties to moveable and immoveable and its legal consequence

The classification of properties to moveable and immoveable has vital importance and has the followings legal consequences:

1) Under the AC the foreign nationals do not have the right to purchase immovable property and possess it. However, sale of immoveable property to diplomatic missions of foreign countries as well as international organization's to which Afghanistan is a member is permitted. Likewise, foreign nationals may also lease immovable property for the purpose of capital investment in Afghanistan. Article 41 of CC states that "Foreign individuals shall not have the right to own immovable property in Afghanistan. Lease of immovable property for the purpose of capital investment shall be permitted in accordance with the provisions of the law. The sale of estates to diplomatic missions of foreign countries as well as international organization's to which Afghanistan is a member, shall be allowed in accordance with the provisions of the law"
2) Foreign nationals can not also possess immovable property by the virtue of will. Article 2112 paragraph 2 of CC states that " the foreigner may not have the right to possess immovable property based on will under paragraph 1 of this article" Likewise, the foreign nationals may not possess immoveable property based on inheritance. Article 2000, paragraphs 1 and 2 of CC states that "The right of inheritance does not exist between Moslem and none-Moslem, but non-Moslems may inherit from one another. The dispute between two countries shall not be an impediment to inheritance among Moslems or non-Moslems except when the law of the foreign country prohibits the right of inheritance to foreigner; and (2) Aliens may not, on the basis of inheritance included in section one of this article, shall seek the right of ownership in immoveable property". However, the foreign nationals may buy and possess moveable property;
3) In disputes on immoveable property, that court within jurisdiction of which the immoveable property is located is considered as authorized court to deal with the case (article 92 of the CPC). However, in other disputes the court of domicile of defendant is authorized (articles 81- 85 of CPC);
4) Sale of immoveable property is civil transaction and is transferred from one person to another one by official document. Article 53 of the LoLM states " transfer of ownership of land, buildings and other immoveable equipment of ownership shall be carried out based on official document". However, sale of moveable property is commercial transaction and is commonly transferred from one person to another one without legal document;
5) Based on article 2213 of CC and *fiqh* preemption may be proven in immoveable thing which is subject of sale whereas preemption may not be proven in moveable property which is sold without the immoveable property. Likewise, mortgage is also belonging to immoveable property not moveable property;
6) Based on *fiqh* guardian of minor child may not sell immoveable property of minor child, but based on permission from *Shari'a* in urgent circumstance such as payment of minor child's debt which may be carried out based on permission of judge since keeping the immoveable property of minor child for him is more for the benefit of minor child rather than selling it and keeping its money;
7) For payment of the debt of bankrupt in order to ensure his interest firstly his moveable property will be sold. In case the money of sale of moveable property of bankrupt does not suffice his debts, his immoveable property may secondly be sold;
8) *Imam Ibu Hanifa* and *Imam Ibu Yousef* his student contrary to other *fiqh jurists* believe that sale of immoveable property before delivery by seller and taking by buyer is permissible. However, sell of moveable property before delivery by seller and taking by buyer is not permissible since moveable property may always be subject to perish; and
9) Easement rights such as right of way, right of water passage and right of flood passage are belonging to immoveable property not moveable.

II. Valueable and unvalueable (*motaqawam wa gheer motaqawam*)

from viewpoint of lawfulness and unlawfulness of utilization property is divided into valueable and nonevalueble which are discussed below:

1. Definition of Valueable property

Valueable "*motaqawam"* is derived from "*qawam"* which is applied on any property which has value.[29]However, valueable in *fiqh* is not used in this sense. Based on *fiqh* valueable is any property which can be utilized based on *Shari'a* in normal circumstance [30] In other word: valueable is any property which can be attained by act and *Shari'a* considers its benefit permissible such as immoveable properties , moevable propeties , eatables and so on. This definition defines that valueable property contains two elements: first, it should be attainable by act and second it can be benefitted based on *Shari's*. Therefore, fish in the river, bird in the sky, mines in the ground and so on prior to attainment are unvalueable from viewpoint of *Sharia* and customs and traditions valueable after attainment.

2. Definition of Invaluable property

Article 127 of *Mojal-ul-Ahkam* define valueable and unvalueble property as " valueable property maybe used in two senses: first, anything whose benefit is permissible and second any attained thing. Thus, fish in the river is unsalable, however, it becomes valueable after hunting" based on this definition unsalable property also contains two elements: firstly, it should not be attainable and secondly from viewpoint of Shari'a it can not be benefitted. Hence, fish in the river and bird in the sky in case they are not attainable are unvalueable. Likewise, wine and swine for Moslems are unvalueable sine their exploitation for Moslems is not permissible except in exigency circumstances which threatens to death such as severe thirstiness.

However, wine and swine for None-moslems in accordance with *Hanafi* jurists is considered valueable and any one who wastes wine and swine of None-moslems is obliged to pay the compensation. However, based on the *None-Hanafi* jurists wine and swine of none-moslems is also considered unvalueable since *None-hanif* jurists believe that none-moslems who are living in Islamic country are obliged to observe the provisions of Islamic transactions and whatever the Moslems have to observe they also have to observe.[31]

3. Theory of valueable property in *fiqh*

Concerning valueable and unvalueable property there are different views between the *fiqh* jurists and lawyers. The *fiqh* jurists, as stated above, say that anything which can be exploited based on *Shari'a* is called valueable and anything which can not be exploited based on *Shari'a* is called unsalable.

4. Theory of Valueable property in law and CC

The lawyers, however, believe that valueable is any property which has material value before people and unvalueable salable is exit of things from trade based on their nature or provisions of the law. Therefore, things that are out of trade based on their nature all people can jointly exploit them and no one can attain them such as rays of sun and so on. Based on the lawyers the things

[29] Dr. Ali Mohyeddin algaradaghi, introduction to property, economy, contract and ownership, p 52.

[30] Wazar-ul- aoqhaf wa-ul- shoon-ul-eslamia, almost-ul-fiqhia, volume 36, p 34; and 32; Mostafa Ahmad ulzarqa, almadkhalel fiqh-e-ulham, volume 3, p 123.

[31] Dr. Waheba Zohelai, al- fiqh- ul- Islami wa adaltoho, volume 4, pp 2879- 2880; Mostafa Ahmad ulzarqa, almadkhalel fiqh-e-ulham, volume 3, p 124 147-149 ; and Wazar-ul- aoqhaf wa-ul- shoon-ul-eslamia, almost-ul-fiqhia, volume 35, pp 34 and 35.

that are out of trade by virtue of law provisions are also considered unsalable such as forbidden narcotic, warfare material and the properties that are belonging to State, public legal persons, public property and so on. As a result, all the things that are out of trade by the nature or by virtue of law provisions are considered unsalable property and no one can allocate their attainment to him or her. Articles 473 until 475 of CC have derived the theory of valueable and unvalueable property from the new Civil Code of Egypt. Based on articles 473 until 475 of CC things are divided into three categories:

1) Things that are out of trade by their nature and therefore no one can allocate them for him or herself and all people can exploit them such as sunshine, running water and so on; article 474 of the CC states that: "Things which cannot be traded by reason of their nature are those which are not specially possessed by any" .

2) Things that can not be traded by virtue of law provisions are those whose purchase is forbidden by law provision such as narcotic drugs such as opium, wine, weapons and public property.

3) Things that are not out of trade and can be traded such as house, land, garden, clothes, eatables and so on. As a result, things that are out of trade by their nature or by virtue of the law provisions, have no material legal consequence. However, things that can be traded shall have material legal consequence. Article 475of CC states that "things which cannot be traded by provisions of law are those to which no right shall be attached". In addition, article 473 of CC states that "things which are traded by reason of their nature or by the provision of law shall have financial rights". Examples for financial rights the subject of which is thing are numerous such as real actual property such as ownership rights, benefit right, easement right and unactual property right such as right to mortgage, priority right and personal right such as right of buyer to receive the object of sale and transfer of its ownership, right of renter to receive the rented thing, right of creditor to receive the credit and so on. [32]

5. Advantage of classification of properties to valuable and unsalable

The advantages of classification of property to valueable and unvalueable are as follows:

1) From viewpoint of validity and invalidity of contract: valueable property can be subject of all contracts such as sale, rent, donation, mortgage, will, partnership and so on. Nonetheless, unvalueable property can not be subject of the mentioned contracts. Therefore, sale of swine and wine by Moslems is considered invalid since the main aim of contract of sale is the thing which is subject of sale whose saleability is one of the conditions for contract of sale;

2) From view point of paying and none-paying compensation in case of waste of property: if someone wastes other's valueable property, in case the property is identical the waster has to pay the same kind and in case the property is none- identical the waster has to pay the cost. However, if the property is unvalueable, the waster does not have to pay the compensation if the unvalueable property belongs to Moslems. As a result, if someone wastes a moslem's swine or wine, he or she does not have to pay the compensation. Nonetheless, if someone wastes valueable property of a tributary (Nonemoslem residing in Islamic country), he has to pay the compensation based on *Hanafi* Jurist since the abovementioned property is considered valueable based on them. [33]

[32] Dr. Abdul Razaq Ahmad-ul-sanhori, alwaseet, volume, 8, pp 6-8; Dr. Waheba Zohelai, al- fiqh- ul- Islami wa adaltoho, volume 4, pp 2880 and 2881; Dr. Ali Mohyeddin algaradaghi, introduction to property, economy, contract and ownership, pp 46 and 47; and Mostafa Ahmad ulzarqa, almadkhalel fiqh-e-ulham, volume 3, pp 127- 129.

[33] Dr. Waheba Zohelai, al- fiqh- ul- Islami wa adaltoho, volume 4, p 2880 and 2881; Dr. Ali Mohyeddin algaradaghi, introduction to property, economy, contract and ownership, pp 52 and 53; and Mostafa Ahmad ulzarqa, almadkhalel fiqh-e-ulham, volume 3, pp 126- 127.

III. Identical and none- identical property (*masli wa qayami*)

As mentioned above, properties from viewpoint of similarity of its parts and elements are divided into identical and none- identical which are discussed below:

1. Definition and types of identical property

Masli (identical) is derived from *masl* which literally means equivalent, like, similar and so on. In *fiqh* proverbial is anything which is the same in all main characteristic with other things that are considered to be similar to them.[34]It is why, *fiqh* jurists define identical property as "identical property is that whose proverb can be found in market without any difference in parts. Article 145 of *Mojal-ul-Ahkam* define identical property as "identical property is that whose proverb can be found in market without any difference". CC also has derived the definition of identical property from *fiqh* and articel 476 of CC defines identical property as "Identical things are those whose parts or elements are similar to each other and can be sued in substitution without any considerable difference"

Identical property is divided into four categories:

1) Bushel: Things that are sold by measure such as oil, rice and so on that were used to be sold by measure in the past and some properties that are sold currently by liter such as gas and so on.

2) Weighted (*mowzonat*): Weighted properties are those that are sold based on weight such as: oil, rice etc.

3) Numerical: numerical properties are those which are sold based on number such as: eggs and so on. Article 135 of *Mojal-ul-Ahkam* defines numerical property as "Numerical properties are those which can be counted"

4) measured (*Zryat*): measured properties are those which are sold based on measure (meter) such as cloth and so on. Article 136 of *Mojal-ul-Ahkam* defines measured property as: " measured properties are those which can be measured by meter and so on"[35]

2. Definition of none- identical property

None- identical (*qayumi*) attributed name to "qayum" which is the plural form of price which means price and cost.[36] In *fiqh* and law none- identical properties are those whose like can not be found in the market or can be found, but with difference in price such as members of animals, land, homes, trees, carpets, jewels such as ruby and diamond, used and crossed books and so on. [37] Article 146 of *Mojal-ul-Ahkam* defines none- identical property as "none- identical properties are those whose like can not be found in the market or can be found, but with difference in price" in definition of none- identical property the CC has followed the *fiqh*. Article 476 paragraph 2 of CC defines none- identical property as "none- identical things are those whose parts or elements are different from each other and can not be sued in substitution without any considerable difference"

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[34] Wazar-ul- aoqhaf wa-ul- shoon-ul-eslamia, almosohat-ul-fiqhia, volume 34, pp 35 and 36; Mostafa Ahmad ulzarqa, almadkhalel fiqh-e-ulham, volume 3, p 130; and Dr. Waheba Zohelai, al- fiqh- ul- Islami wa adaltoho, volume 4, p 2885.

[35] Al amam Alahuddin Ibibaker alkasani, Badayeh al sanaya, volume 6, p 143, Dr. Waheba Zohelai, al- fiqh- ul- Islami wa adaltoho, volume 6, pp 4800- 4802; and Ashad Mohammad Sayeed al sagharji, al- fiqh- ul Hanifi wa adatoho, volume 3, p 106.

[36] Dr. Hassan Hameed, Persian dictionary of Hameed, p 950; and Masoud Ansari and Dr. Mohammad Ali Taheri, dictionary of private law, volume 3, p 1586.

[37] Dr. Waheba Zohelai, al- fiqh- ul- Islami wa adaltoho, volume 4, pp 2885; Mostafa Ahmad ulzarqa, almadkhalel fiqh-e-ulham, volume 3, p 130 ; and Wazar-ul- aoqhaf wa-ul- shoon-ul-eslamia, almost-ul-fiqhia, volume 35, pp 36.

3. Changing of identical property to none- identical property and *vice versa*

In the following circumstances the identical property may change to none- identical and *vice versa*:

1) Discontinuity of identical property in market: When identical property is cut off in the market, the identical property becomes none- identical;

2) Mixing: if two identical properties whose kinds are different such as mixing of wheat and barley are mixed, such mixture is known none- identical;

3) Exposure to risk: when identical property is exposed to risks such as exposure of property to fire and sink, the property gains special price and become none- identical; and

4) Using: when identical property is used, it gains special price and turns to none- identical property such as used and old cars, books etc..

To the contrary, in some circumstances none- identical property becomes identical property. For example, in case of plenty of existence after the rareness. Therefore, when a property is rare in the market and then becomes much, this property becomes identical. [38]

4. Advantage of classification of properties to identical and none- identical

When a person wastes identical property of another person, he or she has to pay the compensation (the same property). However, in case the property is none- identical, the waster has to pay the cost. [39] For example, if someone wastes another persons precious stones not found in the market, he or she has to pay the cost.

IV. Useable and consumable property (*estahmali* and *estahlaki*)

Property from the viewpoint of survival and the none-survival in case of using is divided into useable and consumable properties which are discussed below:

1. Definition of useable property

Lawyers and Islamic jurists believe that: useable property is that whose essence remain the same with its repeated exploitation such as immoveable property, carpets, cloths, books and so on. [40] In definition of useable property the CC adopts the definition of Islamic jurists and lawyers. Article 477 of the CC defines the useable property as:" Useable things are those whose originally remain the same with its repeated exploitation."

2. Definition of consumable property

Based on *fiqh* and law consumable property are those whose essence is annihilated due to use such as: food, drinks, papers and so on.[41] In definition of consumable property the CC adopts the

[38] Mostafa Ahmad ulzarqa, almadkhalel fiqh-e-ulham, volume 3, pp 131 and 132; Dr. Waheba Zohelai, al- fiqh- ul- Islami wa adaltoho, volume 4, pp 2885 and 2886; and Dr. Ali Mohyeddin algaradaghi, introduction to property, economy, contract and ownership, pp 42 and 43.

[39] Al Imam Alahuddin Ibibaker alkasani, Badayeh al sanaya, volume 6, p 14;3 Mostafa Ahmad ulzarqa, almadkhalel fiqh-e-ulham, volume 3, p 140; and Dr. Ali Mohyeddin algaradaghi, introduction to property, economy, contract and ownership, p 43.

[40] Dr. Waheba Zohelai, al- fiqh- ul- Islami wa adaltoho, volume 4, p 2891.

[41] Dr. Ali Mohyeddin algaradaghi, introduction to property, economy, contract and ownership, p 50; Mostafa Ahmad ulzarqa, almadkhalel fiqh-e-ulham, volume 3, p 143; and Dr. Waheba Zohelai, al- fiqh- ul- Islami wa adaltoho, volume 4, pp 2891.

definition of lawyers and Islamic jurists. Article 477 paragraph 2 of CC defines consumable property as: "consumable things are those whose exploitation is impossible without consumption."
Despite this, it does not mean that useable property never gets unprofitable, but clothes and other useable property one day become old and rotten.
Nevertheless, consumable property is annihilated with a single usage. For example, food is annihilated with single eating. The standard by which we can differentiate between useable and consumable property is the nature of things. For example, the nature of food and drinks are such that their essences are annihilated with a single usage. To the contrary, the nature of clothes, cars and so on are such that their essences are not annihilated with a single usage. [42]

4. Advantage of classification of properties to useable and consumable

The advantages of classification of properties to useable and consumable are the followings:
1) There are some contracts whose object can only be useable property such as contract of loan (*haria*) whose of object of contract can not be consumable property. As a result, the object of contract of loan should be a property whose essence should not be annihilated with usage. Likewise, in contract of lease the object of contract of lease should be useable since after termination of contract, the objec to contract has to be returned to leaser. Therefore, if object of contract of the lease is consumable, with the usage its essence will be annihilated and the leaseholder will not be able to return it to leaser; and
2) The object of contract of debt is normally useable things because the contract of debt is a contract that the debtor becomes committed to transfer the ownership of certain amount of money or identical thing to borrower so that the borrower returns its proverb from viewpoint of amount, type and description in due time. As a result, consumable things can not commonly be the object of contract of debt [43] because if the object of contract of debt is useable things, then this contract is not called contract of debt, but contract of loan as stated above.

V. Unowned property (*mobahat)*

Properties from viewpoint of entry and none entry into ownership is divided unowned property.

1. Definition of Unowned (*mobah)* property

mobah is derived from "*bowaha*" which literally means unowned and explicit.[44] In *fiqh* from viewpoint of means of acquisition of ownership, unowned property is a property owned by no one and there is not any *Shari'a* obstacles to possess it such as water, dry and sea hunt, herb grown in the jungle and so on.[45]From the above definition it is clearly understood that in order that a property is considered unowned property there has to be two preconditions: 1) the property should not have owner; and 2) none-existence of *Shari'a* obstacles and the possibility to possess and use it based on the law provision. [46]

[42] Dr. Abdul Razaq Ahmad-ul-sanhori, alwaseet, volume, 8, pp 84 and 85; Mostafa Ahmad ulzarqa, almadkhalel fiqh-e-ulham, volume 3, p 144; and Dr. Waheba Zohelai, al- fiqh- ul- Islami wa adaltoho, volume 4, p 2891.
[43] Dr. Abdul Razaq Ahmad-ul-sanhori, alwaseet, volume, 8, pp 85 and 86; Mostafa Ahmad ulzarqa, almadkhalel fiqh-e-ulham, volume 3, pp 144- 147; and Dr. Waheba Zohelai, al- fiqh- ul- Islami wa adaltoho, volume 4, p 2891; and Dr. Ali Mohyeddin algaradaghi, introduction to property, economy, contract and ownership, p 51.
[44] Masoud Ansari and Dr. Mohammad Ali Taheri, dictionary of private law, volume 3, p 2684.
[45] Dr. Waheba Zohelai, al- fiqh- ul- Islami wa adaltoho, volume 4, p 2902; and Mostafa Ahmad ulzarqa, almadkhalel fiqh-e-ulham, volume 3, p240.
[46] Dr. Naser Katozian, property and ownership, p 71; and Masoud Ansari and Dr. Mohammad Ali Taheri, dictionary of private law, volume 3, p 2685.

2. Types of *mobah* property

Based on *fiqh* unowned properties are divided into seven categories: 1) dead land; 2) hunting; 3) herbs/ plants; 4) jungles; 5) mines and treasure (*kan)*; 6) water; and 7) fire. *mowat* literally means dead, breathless and anything unanimated. In *Fiqh* there are different definitions which have the same meaning for *mowat. Hanafi* jurists say that: dead land is a land which is free of building and residence. Some others say: dead land is that which does not have owner and no one takes benefit from it. Article 1272 of *Mojal-ul-Ahkam* defines dead land as:" dead land is that which should not be *mohtahtab* (place for collecting wood) of the village and should be far from the village…"
From the above definitions it is understood that dead as: "dead lands are those which are owned by no one and should not in any case be benefitable and should out of the city. In case, its ownership of someone, or in the city or should be *motahtab* of residents of a city or pasture of their animals, this land shall not be considered dead land. [47] Under *Fiqh* water is considered unowned and everybody can benefit from it. Article 1234 of *Mojal-ul-Ahkam* states that: "water, herb and fire are unowned and people are sharer in these three things." As a result, "the running under ground water is not ownership of any one." (Article 1235 of *Mojal-ul-Ahkam*). Likewise "oceans and big pools are considered unowned" (Article 1236 of *Mojal-ul-Ahkam*).
"klah" means wet and dry herb. In *Fiqh klah* is an automotive herb grown without cultivation and used for fodder of animals. Article 1242 of of *Mojal-ul-Ahkam* states that: "weedy and dry *klah* is herb without stalk. Thus, it does not include tree. Mushroom is also considered herb." [48]
"hajam" is the plural form of *"ajmah"* which means tree with bush. In *fiqh hajam* means dense trees in jungles and lands owned by no one. Based on *fiqh* if *hajam* are grown in lands owned by no one they shall be considered unowned property. Article 1243 of *Mojal-ul-Ahkam* states that: "trees grown in the mountains automotively are possessed by no one and considered unowned".Another sort of unowned property based on *fiqh* is fire. Article 1234 of *Mojal-ul-Ahkam* states in this regard that: "water, herb and fire are unowned and people are sharer in these three things."
The basis of provision of this article is an hadith of prophet (pbu) which states:
«**الناس شركاء فی ثلاثة: الماء والكلاء والنار**».[49]
"People are partner in three things: water, automotive herb and fire"
Based on *fiqh* another kind of unowned property is *rakaz. Rakaz* is derived fom *rakz* which means burry. As a result, *rakaz* means God and natural buried things. In *Fiqh* anything buried under the land is called *rakaz.* However, anything created by Allah on the day of creation of earth is called mine and anything buried by human is called treasure (*kanz)*. It is why *Hanafi* jurists believe that *rakaz* includes treasure (*kanz)* and mines. [50]
Literally the principle, center and place of everything is called "*mahden" the* plural of which is *"mahaden".* Based on *fiqh* mine includes anything found from underground such as: gold, silver, iron, copper and so on.

[47] Al amam Alahuddin Ibibaker alkasani, Badayeh al sanaya, volume 5, p 283; Ibn Habuddin, Rad-ul-Mokhtar- ul-Dar- ul- Mokhtar, volume 10, p 5., Dr. Waheba Zohelai, al- fiqh- ul- Islami wa adaltoho, volume 6, pp 4800- 4802; and Ashad Mohammad Sayeed al sagharji, al- fiqh- ul Hanifi wa adatoho, volume 3, p 106.

[48] Al Imam Alahuddin Ibibaker alkasani, Badayeh al sanaya, volume 5, p 281; Dr. Waheba Zohelai, al- fiqh- ul-Islami wa adaltoho, volume 6, p 2909; and Masoud Ansari and Dr. Mohammad Ali Taheri, dictionary of private law, volume 1, 16.

[49] رواه احمد .

[50] Abdullah bn Ahmam bn Mahmood-ul-nasafi, kanz ul daqayeq, p 97; and Masoud Ansari and Dr. Mohammad Ali Taheri, dictionary of private law, volume 3, p 2685.

Based on *fiqh* treasure *(kanz)* is anything buried by people under the ground. [51]
The sixth sort of unowned property under *fiqh* is hunting. Article 1293 of of *Mojal-ul-Ahkam* states that: " hunting is a hazed animal running away from human beings.".

[51] Abdullah bn Ahmam bn Mahmood-ul-nasafi, kanz ul daqayeq, p 97; Dr. Waheba Zohelai, al- fiqh- ul- Islami wa adaltoho, volume 6, pp 4646 and 4655; and Masoud Ansari and Dr. Mohammad Ali Taheri, dictionary of private law, volume 3, p 1p 1039.

Chapter III. Ownership

This chapter is going to discuss A)definition of ownership; and B) types of ownership which are complete and incomplete ownerships:

A. Definition of ownership

Malkayet "ownership" is derived from *malk* which means asset and anything possessed by human being the plural form of which is *amlak*. Article 1900 of CC defines ownership as: "ownership is a right by reason of which a property is placed under the will and dominance of the owner; only the owner may, within the limits of law, use and utilize it, and may exercise possessory rights in it." This definition clearly states that ownership is a right by reason of which a property is placed under the dominance of a person and the person may within the limits of the law, use, exploit and exercise possessory right on it. Therefore, there are three pillars for ownership: the right to use, the right to exploit and the right to exercise possessory right:

1) Use: the ownership right empowers the owner to use the ownership for the purpose it is prepared in a possible way. Thus, owner may use the ownership personally. For example, if the ownership is house, owner may live in it, or if the ownership is car, owner may drive it, or if the ownership is cloth, owner may put on it, or if the ownership is jewelry, owner may put on it, or if the ownership is food or fruit, owner may eat it.

2) Exploitation: the ownership right also entitles owner to exploit the ownership. The exploitation can be direct. For example, if the ownership is agricultural land, owner may cultivate it, or if the ownership is car, owner may work with it as a driver. Exploitation can also be indirect. For example, if the ownership is house or agricultural land, owner may lease, may give it for plantation (*mozarahat*) or gardening (*masaqat*) and gain the wage, or product from planter, gardener or leaser.

3) Exercising possessory right: in addition to entitling owner to use and exploit the ownership, ownership right also entitles owner to exercise possessory right on ownership. As a result, owner provided that there are not *Shari'a* and legal obstacles, may exercise possessory right on ownership. For example, owner may sell it to another person, donate it, make a will, endow it and so on. [52]

B. Types of ownership

Ownership is divided into two kinds: complete ownership and incomplete ownership which are discussed below:

I. Complete ownership

The first kind of ownership is complete ownership which is discussed below:

[52] For further details please see: Dr. Abdul Razaq Ahmad-ul-sanhori, alwaseet, volume, 8, pp 493- 501.

1. Definition of complete ownership

Complete ownership includes the ownership of essence and benefit of a thing.[53] In other words: complete ownership is that ownership that the owner can be considered as owner of essence and benefit of thing. [54]

۲. Sources of complete ownership

fiqh jurists and lawyers have different opinion on sources of complete ownership. *Mastafa Ahmad ul Zarqa and Dr. Zohelai* recognize the sources of complete ownership four things which are: attainment of unowned property, contracts, succession and birth by owned property. Succession is also two sub- kinds: succession of person instead of person which is inheritance and succession of thing instead of thing which is replacement. [55]However, *Sayoti* recognizes the sources of complete ownership eight things which are: inheritance, contracts, donation, will, endowment, booty, vivification of dead land and charities. *Sabaki* has said: there are other sources which are finding of lost property and blood money. However, *Ibn Najeem* generally in *Eshba* recognizes sources of complete ownership thirteen things which are: 1) contracts, 2) dowry; 3) female divorce (*khal*); 4) inheritance; 5) donations; 6) charities; 7) will; 8) endowment; 9) booty; 10) attainment of unowned property; 11) vivification of dead lands'; 12) receiving lost property; and) blood money. [56]However, the CC recognizes seven things as sources of ownership which are: 1) Attainment of unowned things which do not have any owner whether they are moveable or immoveable; 2) inheritance based on which the ownership is transferred from devisor to inheritor after the death of the devisor; 3) will based on which the ownership is transferred from testator to the one in favor of whom the will has been made after the death of the testator; 4) Adhesion to moveable and immoveable properties which takes place while the human being is alive; 5) contracts which takes place by alive human beings; 6) preemption; 7) and attainment. These sources are discussed briefly below:

a) Attainemnt of unowned things (*ehraz mobahat*)

Based on *fiqh* taking over is one of the sources of complete ownership. Article 1249 of *Mojal-ul-Ahkam* states in this regards that: "anyone who attains an unowned thing, this unowned thing shall be considered his/ her property. For example, if some attains water with hand, this water shall be considered his/ her ownership and others may not be allowed to take benefit from it. If others waste it without permission of owner, they are obliged to pay the compensation." Under *fiqh* there are two conditions for attainment of unowned properties:

1) No one must have antedated to attain it; and

2) Attainer should have the intention to possess it. As a result, in case a thing enters into ownership of a person without his/ her intention, he she may not be considered the owner. For example, if someone puts the net under the sun so that it gets dry and the hunting is trapped in it, owner of the net may not be considered the owner. [57] Concerning attainment of unowned properties CC also has adopted the *fiqh*. Under the CC unowned properties can be divided into moveable unowned property which includes: mines and treasure, hunting, lost property, historical and cultural properties and immoveable property which include unowned dead land which are discussed below:

[53] Dr. Waheba Zohelai, al- fiqh- ul- Islami wa adaltoho, volume 6, p 4549.

[54] Mostafa Ahmad ulzarqa, almadkhalel fiqh-e-ulham, volume 1, p 251.

[55] Ibid, volume 1, pp 242 – 250; and Dr. Waheba Zohelai, al- fiqh- ul- Islami wa adaltoho, volume 6, p 4562.

[56] Wazar-ul- aoqhaf wa-ul- shoon-ul-eslamia, almosohat-ul-fiqhia, volume 39, pp 38 and 39.

[57] Dr. Waheba Zohelai, al- fiqh- ul- Islami wa adaltoho, volume 4, p 2907; and Mostafa Ahmad ulzarqa, almadkhalel fiqh-e-ulham, volume 1, pp 240 and 241.

aa) attainment of moveable property in CC

Under CC attainment of moveable properties are divided into five categories: 1) attainment of unowned moveable; 2) attainment of mines and treasures; 3) attainment of dry and sea hunting; 4) attainment of lost property; and5) attainment of historical relics which are discussed separately below:

aaa) Attainment of unowned moveable property

Sometimes it is possible that a moveable property does not have owner from beginning such as: joint things like fish in water, bird in the air and wild animal. Sometimes it is possible that a moveable property has an owner, but the owner has given up from its ownership and the moveable ownership has been changed to unowned moveable property.[58] Article 1986 of CC states in this regard that: "In case the owner of the movable goods renounces his possession, the said goods becomes unowned property." This article clearly states that: any person who gives up the ownership of a moveable property, this moveable thing will turn to unowned moveable thing. As a result, everyone can own its ownership via attainment. For example, if someone owns the ownership of wild animal via attainment and then gives up its ownership, anyone can own its ownership via attainment. Article 1985 of CC states in this regard that: "A person who acquires unowned movable goods prior to others, he shall be considered the owner thereof."

bbb) Attainment of mines and treasures

In attainment of mines and treasures the AC and the CC are against *fiqh* since as mentioned earlier based on *fiqh* mines and treasures are considered unowned property and anyone can attain their ownership. Concerning attainment of mine and treasure CC anticipates two circumstances: finding of mines and treasures in private land and government land. If mines and treasures are found in private land, this mine and treasure is considered to be the ownership of government. In this case, the government may expropriate the land and provide owner reward. Article 1988 of the CC states that: "Whenever mine, treasure, or ancient relics are found in privately owned land, they shall belong to the state. The owner shall receive reward in addition to expropriation of the land in accordance with the law". However, if the mines and treasures are found in government land, the person who has found them shall be given reward by the government and the mine and treasure shall be the ownership of the state. Article 1989 of the CC states that: "Whenever a person finds mine, buried treasure, or ancient relics on publicly owned land, the owner shall be the state, and the said person shall receive appropriate reward defined by concerned authorities". Nonetheless, under the AC mines and other natural resources are considered the ownership of state. Article 9 of AC states in this regard that: "Mines and other subterranean resources as well as historical relics shall be the property of the state. Protection, management and proper utilization of public properties as well as natural resources shall be regulated by law".

ccc) Attainment of historical and cultural relics

Article 3 of the law on maintenance of historical and cultural relics defines historical and cultural relics as: "historical and cultural relics in this law shall include: all moveable or immoveable products produced by human beings which has high and broad historical, scientific and cultural value and at least one hundred years of ancientness". Historical and cultural relics are considered public property. Article 9 of AC states that: "Mines and other subterranean resources as well as historical relics shall be the property of the state…" Likewise, article 8 of the law on maintenance of historical and cultural relics states that: "all moveable and immoveable historical and cultural relics that are discovered or hidden under

[58] Dr. Abdul Razaq Ahmad-ul-sanhori, alwaseet, volume, 9, pp 13- 16.

ground shall be considered public property based on provision of this law and all kinds of its transfer shall be considered stealing."

ddd)Attainment of hunting

Under the law on hunting and maintenance of wild animals hunting is one of the sources of complete ownership. Article 13 of the law on hunting and maintenance of wild animals states that: "hunting is a wild animal that will be considered the ownership of hunter after hunting." The provision of this article clearly states that hunting is one of the sources of complete ownership. Therefore, the hunter may after hunting exercise possessory right on hunting. For example, the hunter may sell, use, donate and export the hunting.

eee)Attainment of lost property

Lost property is a property which is lost from its owner and someone else has found it. The CC does not recognize finding lost property as a source of complete ownership and refers it to special laws (Article 1990 of CC). However, under *fiqh* finding lost property is considered one of the sources of complete ownership. [59]

fff)Attainment of jungles

Under the law on jungles (LoJ) jungles are considered as public property. Article 2 paragraph 1 of LoJ defines jungles as: "jungle: includes areas that are covered by herbs and fruitful and unfruitful trees partly or totally. Areas that were jungle before, but were destroyed due to some reasons and the government lands that were changed to jungle artificially shall be included in this definition" The LoJ divides the jungles into three categories:

1) Manufacturing jungle: under article 2 paragraph 9 of the LoJ: "manufacturing jungle: includes the jungle whose woods can be used in manufacturing"

2) Fruitful jungle: under article 2 paragraph 10 of the LoJ: "fruitful jungle: includes the jungle whose main product is fruit"

3) Unfruitful jungle: under article 2 paragraph 10 of the LoJ: "unfruitful jungle: includes the jungle whose woods can be used for firings"

Under the LoJ jungles are considered the ownership of state and persons may not be allowed to exercise possessory right on it. For example, cut and sale them, export them and so on. Article 3 of the LoJ states that: " jungles are under the ownership of state and exercise of possessory right of individuals on jungles are not allowed" as a result " exploitation from product of the jungles may belong to the state" (article 7 paragraph 1 of the LoJ). the state, therefore, may sell product of the jungles to individuals and companies (article 2 paragraphs 2 and 3 of the LoJ).

bb) attainment of immoveable property

The CC differentiates between unowned agricultural lands and unowned none-agricultural lands (dead lands) and does not allow attainment of the first and allows attainment of the second based on permission from President of the state. In addition, under the law on pasture land (LoPL) pasture lands are recognized as public ownership and its attainment is not allowed that are discussed separately below:

bbb)Attainment of unowned agricultural lands

Agricultural lands that do not have specific owner is considered the ownership of state. Therefore, no one may have the right to attain them. Article 1991 of CC states that: "Unowned arable lands are the ownership of the state, possession thereof without the

[59] For further details please see: Masoud Ansari and Dr. Mohammad Ali Taheri, dictionary of private law, volume 3, pp 1637- 1639.

permission of the state, and in contravention of the provisions of the law, shall not be permitted"

ccc) Attainment unowned none-agricultural lands (dead lands)

Concerning attainment of dead land that is called unowned none-agricultural land CC has accepted the opinion of *Imam Ibu Hanifa*. Attainment of dead land is discussed firstly under the CC, secondly under the presidential decree on none-distribution of arid and dead lands and thirdly under the law on land management (LoLM):

- Attainment of dead land (unowned none-agricultural lands)

Concerning attainment of dead land that is called unowned none-agricultural land CC has accepted the opinion of *Imam Ibu Hanifa*. Article 1992 of CC states that: "Uncultivated, none- usable land, when unowned, shall be deemed the property of the person who has taken possession of it with the permission of the government. In case arid and unowned land are built with the permission of the government, and is farmed and construction is built, the builder shall be recognized as owner and shall be obliged to pay tax except when special law provides otherwise".

This article clearly states that attainment of immoveable dead land is not permitted unless the president of state permits. In case of permission of president, the rehabilitator will be considered the owner.

- Attainment of dead land based decree number 99 dated 4/ 2/ 1381

The decree number 99 dated 4/ 2/ 1381In 1381 (2002) of president of interim administration of Afghanistan banned sale of arid and dead lands of government. Article 1 of this decree states that: "all ministries, administrations and international organizations are instructed strictly to avoid distributing dead and arid lands to residents as plots of lands".

- Sale of dead land based the Law on land management (LoLM)

The decree number 99 dated 4/ 2/ 1381In 1381 (2002) of president of interim administration of Afghanistan banned sale of arid and dead lands. However, the LoLM abolished the decree number 99 and allowed sale of dead land. Article 46 paragraphs 3 to 6 of the LoLM states that: "3) sale of virgin and arid lands to individuals, agriculture, and livestock institutions, private and joint domestic companies shall be carried out by the general land management department of the ministry of agriculture, irrigation and livestock, on the basis of auction after approval of president of state; 4) Virgin and arid lands shall be put at the disposal of the purchaser after meeting legal formalities vis a vis a just price by ministry of agriculture, irrigation and livestock to buyer. Of course, former possessor shall be granted the right of priority; 5) The price of virgin and arid lands shall be determined on the site by a commission hereinafter referred to evaluation and land disposal commission, composed of representatives of agriculture, land management, irrigation, mines and industries and tax departments as well as of the representative of the general mapping and land registration (cadastre) department after approval of council of minister and approval of president of state; 6) The price of virgin and arid lands shall be equally received in 5 annual installments" concerning the way of selling of arid and dead land article 49 of the LoLM states that: "A person asking for virgin and arid land shall submit his application for receiving land to the ministry of agriculture, irrigation and livestock. The application shall be reviewed by the evaluation and assessment commission within one month and shall be sent to the general land management administration. Actions shall be taken in regard to land distribution through the general land management department in accordance with the provision of the present law"

- Pasture lands

Article 2 paragraph 1 of the law on pasture land (LoPL) defines pasture land as: "The entire land stretches, including wastelands, hillock and the meadows, marshy lands on both sides of a river and woodlands covered with herbaceous plants and natural shrubs and bushes and which can be used as animal fodder, is called a pasture. Pasture lands are considered as public ownership and everyone can use it for fodder of their animal. Article 3 paragraph 1 of the LoPL states that: "The right to use a pasture shall confine to cattle grazing"

Despite this, using the pasture lands as fodder for the animal depends on whether the pasture land is private or public land. If pasture land is public pasture land, everyone can graze their animal. However, if the pasture land is private, only the people of the village who are living near the pasture can graze their animals. Article 3 paragraphs 2 and 3 of the LoPL states that: **2)** only the cattle of the nearby villages can be grazed on the private pasture; and **3)** the public pasture can be used for grazing cattle belonging to all people"

b) Succession

the second source of complete ownership is succession. Succession literally means substitute and recompense. [60]In *fiqh* and law succession is substitution of person instead of person and thing instead of thing. Hence, succession is two kinds: succession of person instead of person which is inheritance and succession of thing instead of thing which is recompense or collateral:[61]

bb) inheritance

Inheritance is one of the compulsory cause of transfer of complete ownership based on which the heirloom of the dead is transferred to his/ her heirs and the heirs become owner of the heirloom.[62]The heirloom from dead to heirs can be transferred only if the conditions and causes of inheritance are realized and there should not be any obstacle of inheritance. [63]

cc) recompense

Whenever a person wastes another person's property, or usurps another person's property and the property is wasted, or when a person inflicts damage through crime or causation, in such circumstances he or she has to pay the compensation of whatever he or she has wasted and the compensation of the damage he or she has inflicted. In such cases, the person whose property has been wasted or who has suffered the damage receives the compensation based on succession since compensation is succession of the wasted or damaged property. [64]

dd) will

The third source of complete as well as incomplete ownership is will. Article 2103 of CC defines will as: "Will constitutes possession in the patrimony in a way that it would become effective after the death of the bequeather."

[60] Dr. Mohammad Moheen, dictionary of Moheen, p 428.

[61] Dr. Waheba Zohelai, al- fiqh- ul- Islami wa adaltoho, volume 6, p 4572; and Mostafa Ahmad ulzarqa, almadkhalel fiqh-e-ulham, volume 1, p 2499.

[62] Dr. Waheba Zohelai, al- fiqh- ul- Islami wa adaltoho, volume 6, p 4571; and Mostafa Ahmad ulzarqa, almadkhalel fiqh-e-ulham, volume 1, p 2499.

[63] For further details about the conditions, causes and obstacles of inheritance please see: Nezamuddin Abdullah, law of actual property, pp 212- 225.

[64] Dr. Waheba Zohelai, al- fiqh- ul- Islami wa adaltoho, volume 6, p 4571; and Mostafa Ahmad ulzarqa, almadkhalel fiqh-e-ulham, volume 1, p 2499.

ff) Adhesion (*altasaq*)

"*Altasaq"* (adhesion) is derived from " *lasq*" which literally means adjoining of one thing to another thing.[65]In law, adhesion is unity of two things different from each other possessed by different owners without their agreement.[66]In other words: adhesion is merge and unity of two things which are different and separated from each other and are property of two different owners without their agreement on unity of the two things. Under the CC adhesion is divided into three kinds:

fff) Natural adhesion to immoveable property

Concerning the natural adhesion to immoveable property there are different circumstances:
1) Based on the CC if new land comes into being due over flooding of the river, although it joins the land owned by another person, the new land shall be considered property of the state. Article 2198 of CC states in this regard that: "In case new land comes into being from over flooding of the river, joining land owned by another person, the new land shall be considered property of the state";
2) Lands that are newly discovered on the banks of stand up waters, these lands shall be considered the property of the state. However, if private lands of individuals are drown due of rise of water; owners of the lands do not lose ownership of the land after water subsidence. Article 2199 of CC states in this regard: "Lands newly discovered on the banks of standup waters, shall not be considered the ownership of adjoining land, however, owners of adjoining lands do not lose the ownership of the land they lost as a result of the rise in the level of water"
3) Lands that are discovered on the banks of rivers shall be considered as the property of the state (Article 2200 of CC); and
4) Based on article 2201 of CC: "The ownership of the land that comes to being as a result of river changing course, and the islands that are formed in its course shall be regulated through special law".

ggg)Adhesion of moveable property to immoveable property

Owner of land is considered the owner of anything that is on and under the ground. Thus, owner of the land is considered the owner of all building, trees and other establishments resulting from his or her action. Article 2202 of CC states in this regard that: "All structures, trees planted, and other establishments created by action of the owner of land shall be considered his property". This article clearly states that: the principle is that all establishments that are on land and are a result of the action of the owner are considered the ownership of owner of the land. This principle can be proven vis-versa namely another person proves that he or she has paid the cost of the establishments that are on land. In such a case, there are three circumstances under the CC:
1) Owner of the land has built the building and other establishments with constructing material of others. Article 2203 of CC states in this regard that: "Every structure, trees planted, or other establishments created by the owner making use of materials owned by others, shall be considered the property of the owner of the land and he shall be obliged to pay the price of materials used and when pertinent reasons exists, compensation too, provided that retrieving of the materials would not be possible without infliction of grave damage to the said establishments."
2) Owner of the construction material builds building and other establishments on land of another person: if a person grabs another person's land and pretends him or herself the owner and builds buildings or other establishments on it with his or her own construction material

[65] Dr. Hassan Hameed, Persian dictionary of Hameed, p 187.
[66] Dr. Mohammad Jafar Jafary Langrody, Mobsoot in legal terminology, volume 1, world number 2200.

and then owner of the land sues him or her, the question of building and other establishment arise. In this regard article 2204 of CC responds that: "In case a person, using personally owned materials, builds structure or other establishments on the land of another person, despite awareness of the ownership of the land by other, without the consent of the owner of the land, the owner of the land may demand removal thereof at the expenses of the builder or establisher. In case of existence of logical reasons compensation may also be demanded. In case the removal of the building or structure is not possible without infliction of damage to the land, the owner of the land may acquire the ownership of the things which have to be removed against payment of cost".

In such cases, if the builder has good faith, i.e. he or she believes that he or she is entitled to do so because , the owner of the land has given him or her the permission so that the builder builds the building on the land, or he or she has benefit right and the owner of essence of property has given him or her the permission so that he or she builds the building, or he or she believes that he or she has possessed the land through inheritance or will, in all these circumstances if owner of the building does not demand removal of the building and other establishments, owner of the land may pay cost of the construction material, fees of workers to owner of the establishments. Article 2205 of CC states in this regard that: "In case the person building the structure, or establishments set forth under article 2204 of this law, believes in good faith that he is rightful in building of the said establishments, the owner of the land may not demand removal thereof, but may pay the cost of materials, wages of the workers or what is added in the price of the land by virtue of the new establishment whichever he likes provided that the owner of the establishments does not demand removal thereof."

If course, this can be done only if the price of establishment and building is less than the cost of the land. If the cost of establishment and land is more than the cost of land and the owner of the land can not pay the cost of the establishment and building to owner of the establishment, owner of the land may demand sale of land to owner of the establishment and buildings. Article 2206 of CC states in this regards that: "In case the structure or establishments included in article 2205 of this law are so big that the owner of the land cannot afford paying their cost, the owner of the land may propose sale of the ownership of the land to the builder of the establishments *vis- a- vis* fair compensation".

3) Building of building on another person's land with his or her permission: if a person builds establishments and building with his or her permission, owner of the land may not demand removal of establishment and building from authorized court. In this case, owner of the land is obliged to pay the fair cost to owner of the establishment and building unless owner of the establishment and building wishes to do so. Article 2207 of CC states in this regard that: "Whenever the establishments, making use of materials owned by the builder of the establishments, are built with the permission of the owner of the land, even though no agreement is reached on the specifications of these establishments, the owner of the land may not demand the destruction thereof, but is obligated to pay their costs when they remain; unless the builder of the establishments demand the destruction thereof."

hhh) Adhesion of moveable property to moveable property

Concerning adhesion of moveable to moveable property article 2209 of CC states that: "In case two movable properties of two different persons, with good faith and without their agreement get together in a manner that they can not be separated without their perishing, the owner of the most of the mixed commodities, shall be recognized as the owner of the movable against payment of the cost thereof" This article clearly states that for adhesion of moveable property to moveable there are four conditions which have to be met:

1) Both moveable properties should be possessed properties of two different owners: If owner of both moveable properties are one person, the provisions of adhesion shall not apply on them since after adhesion they are considered as property of one owner;
2) Two moveable properties should have gotten together in a way that can not be separated without perish;
3) Prior to adhesion there should not be any agreement between two owners on what should they do after adhesion. This is a basic condition since in case of their agreement the provisions of adhesion shall not be applicable. Therefore, if two moveable properties with different price get together, the justice require that owner of the bigger thing, possess the smaller thing and pay the price of the smaller thing to its owner. [67]

ff) transfer contracts

The fifth source of complete ownership is transfer contracts such as sale and so on. Transfer contracts are the most import source of complete ownership which are occurring a lot in civil life of human beings. Therefore, transfer contracts by which ownership is transferred from one person to another person is one of the most important sources of complete ownership. [68]Transfer contracts may be compulsory and satisfactory: in compulsory transfer contracts there are two circumstances:
1) Compulsory contracts that are carried out directly by authorized court on behalf of the real owner of the property such as sale of debtor or hoarder compulsory for paying their debt. In such contracts, the purchaser possesses the property based on the direct sale carried out by authorized court; and
2) Taking off ownership from ownership of owner compulsory which has two circumstances:
- Preemption: *Hanafi* jurists believe that preemption is the right of partner or neighbor to possess the sold immoveable property compulsory from buyer *vis a vis* the money. As a result, preemptor based on preemption buys the property compulsory from buyer; and
- Expropriation of property for the public interests: expropriation is dispossession of ownership compulsory *vis a vis* just compensation for benefits of public interest such as expansion of street, mosque and so on. Based on expropriation the government becomes owner based on compulsory contract which was discussed in detail before.69

ee) born by possessed property

The seventh source of complete ownership is born by possessed property since one of the accepted principle is that: anything born by possessed property is considered possessed property of owner. Therefore, the owner of principle is considered owner of branch whether birth is by action of the owner or naturally. As a result, fruit of tree, animal reproduction, wool and mil of sheep and do on are all considered the possessed property of owner of the principle.[70]

ff) dowry (*Mahr*)

The eighth source of complete ownership under CC and *fiqh* is dowry. The CC is silent on definition of dowry. However, the *Hanafi* jurist define dowry as: dowry is property that is

[67] For further details on adhesion pleaes refer to: Abdul Razaq Ahmad-ul-sanhori, alwaseet, volume, 9, pp 243-230.
[68] Dr. Waheba Zohelai, al- fiqh- ul- Islami wa adaltoho, volume 6, p 4570.
[69] Dr. Waheba Zohelai, al- fiqh- ul- Islami wa adaltoho, volume ٦, p 4570 and 4571; and Mostafa Ahmad ulzarqa, almadkhalel fiqh-e-ulham, volume 1, pp 246 and 247.
[70] Dr. Waheba Zohelai, al- fiqh- ul- Islami wa adaltoho, volume 6, pp 4571 and 4572; and Mostafa Ahmad ulzarqa, almadkhalel fiqh-e-ulham, volume 1, p 257.

given to women after marriage or intercourse.71Under the CC dowry is considered the ownership of wife and wife can exercise any kind of possessory right on it. Article 110 of CC states in this regard that: "dowry shall be considered the property of the wife. She can exercise any ownership power over her marriage dowry". The provision of this article is derived from *fiqh* since all *fiqh* jurists believe that wife can exercise any possessory on the dowry. Therefore, wife can sell it or donate since dowry is her complete ownership. [72]

gg) Female Divorce *(Khul*)

As stated above under *fiqh* and CC another source of complete ownership is female divorce (khul). Article 156 paragraph 1 of the CC defines khul as: "(1) female divorce is the dissolution of the marriage contract in return to the property that the wife may offer to the husband."

Based on the female divorce, husband gets the property from wife and instead divorces the wife.

hh) Donation

Another source of complete ownership is donation. Under *fiqh* and law donation is a contract based on which a person freely gives a property to another person while he or she is alive. [73]

ii) Gift and its difference with donation

Another source of complete ownership is gift. Article 834 of *Mojal-ul- Ahkam* defines gift as: " gift is a property given or sent to other person to respect and dignify him or her" the convergence between donation and gift is that both are transfer of property by donator or the one who gives the gift to another person freely. However, the difference between donation and gift is most of the *fiqh* jurists believe that acceptance of the donated person is prerequisite, however, in gift acceptance of the one to whom the gift is given is not prerequisite. [74]

jj) Charity

Another source of complete ownership is charity (*sadaqa*). Article 853 of *Mojal-ul- Ahkam* defines charity as: "charity is a property donated in order to receive reward from Allah"

II) Incomplete ownership (ownership of only essence or benefit of a property)

The second kind of ownership is incomplete ownership. Incomplete ownership is the ownership of essence of property without benefit or the benefit without the essence.[75]For example, if a person rents his or her property to another person, the renter will be the owner of the benefit of property and the one who has given his property for renting will be the owner of the essence of property.

It is understood from this definition that incomplete ownership includes only ownership of essence of a property and ownership of benefit of property which is also called ownership of sole benefit right76 which are discussed below:

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[71] Abdul Rehman Aljazayeri, al- fiqh al-ul mazaha-u-arbaha, volume 4, p 78, and Dr. Waheba Zohelai, al- fiqh- ul- Islami wa adaltoho, volume 9, p 6578.

[72] Ibid, volume 9, pp6759 and 6760.

[73] Wazar-ul- aoqhaf wa-ul- shoon-ul-eslamia, almosohat-ul-fiqhia, volume 42, p 120; and Dr. Waheba Zohelai, al- fiqh- ul- Islami wa adaltoho, volume5, p 3980

[74] Wazar-ul- aoqhaf wa-ul- shoon-ul-eslamia, almosohat-ul-fiqhia, volume 42, p 120; and Dr. Waheba Zohelai, al- fiqh- ul- Islami wa adaltoho, volume5, p 3980

[75] Ibid, volume6, p 455.

[76] Mostafa Ahmad ulzarqa, almadkhalel fiqh-e-ulham, volume 3, pp 259 and 260; and Dr. Waheba Zohelai, al-fiqh- ul- Islami wa adaltoho, volume ٦, p 4550.

1) Ownership of sole essence of property *(Malk-e hen faghat)*
Ownership of essence of property is an ownership that the essence of a property belongs to one person and its benefit to another person. For instance, if a person makes will on benefit of his or her house to another person, in such a situation, when the bequeather dies and the bequeathed accepts the will, the essence of property is the ownership of heirs of bequeather and the benefit is ownership of bequeathed. Therefore, the bequeathed can take benefit from benefit of ownership in accordance with the will until the time of will expires and when the time of the will expires, returns the benefit of essence of property to heirs of bequeather so that the incomplete ownership of heirs become complete ownership.77

2) Ownership of sole benefit of property (*malk-e- manfahat faqhat*)
The second kind of incomplete ownership under *fiqh* and CC is ownership of sole benefit of a property which is also called benefit right in *fiqh* which is discussed below:

a) Definition of sole ownership of benefit or benefit right
Article 2299 of CC defines benefit right as: "benefit right is the right of the beneficiary for using and utilization of the property until it remains in its previous status even though its essence may not be within his ownership" It is very well understood from this definition that: benefit right is the right of beneficiary to use the benefit of a property whose essence is possessed by another person provided that the beneficiary maintains the essence of the ownership and returns it after expiration of benefit right to its owner. For example, in lease (*karaya*) the lessee can use the benefit of thing s/he has leased and at the same time tries to maintain its essence and returns the object of contract of lease to leaser after expiration of time of lease to leaser.

b) Sources of benefit right
Under *fiqh* the sources of ownership of benefit or benefit right are: loan *(haria)*, lease (*hajara*), endowment, will and permitting (*ebaha)* which are defined below:

aa) loan *(haria)*
Article 1456 of CC defines loan as: "loan constitutes the commitment of the loaner utilization of benefit of property to the borrower freely for a determined or undetermined period, provided that it should be returned after use". There are plenty of examples of loan in social life. For example, if a person gives his or her book to his/her friend for studying so that s/he studies it and returns it to his friend, this action is loan; or if a person gives his bicycle or car to his friend so that his or her friend uses the benefit of the bicycle or car, and return it back to his or her friend this act is loan. [78]

bb) Lease (*Hajara*)
The second source of benefit right is lease. Articles 1322 of CC states about definition of lease that: "Lease contract is a contract whereby the lessor grants benefit of a property leased to the lessee against compensation." [79]

cc) endowment
Another source of incomplete ownership is endowment. Article 343 of CC states about definition of endowment that: "endowment is to retain the exercise of the right of ownership of a property and to dedicate the profits accruing from it to charitable purposes" [80]

[77] Ibid, volume ٦, p 2896.
[78] For detailed study on laon please see: Nezamuddin Abdullah, law of obligation, pp 606-613.
[79] For detailed study on laon please see: Nezamuddin Abdullah, law of obligation, pp 533- 605.

dd) will

The fourth source of incomplete ownership is will. As stated before will is possession in the patrimony in a way that it would become effective after the death of the bequeather (Article 2103 of CC). [81]

ee) Permission *(ebaha)*

Under *fiqh* the fifth source of benefit right is *ebaha*. *Ebaha* is derived from "*bawaha*" which literally means legitimizing, making lawful and permitting.[82]Under *fiqh ebaha* is permitting to use or perish a thing such as permitting to eat the food or fruit. In *ebaha* permitting can be general such as using the public utility based institution such as passing from streets, going sightseeing to parks, entering into hospitals and schools, or may be special such as permitting specific person to use the ownership such as using animal, staying in house and so on. The difference between ownership and *ebaha* is that: ownership entitles its owner to exercise all kinds of possessory right on the ownership. However, in *ebaha* human can only use the benefit of property based on permission of the owner. Permitting may also be given by owner such as permission to drive the car, or by *Shari'a* and law such as permission to use the public utility based institution such as ways, rivers and so on. [83]

3) Easement right

The third kind of incomplete ownership is easement right which is discussed below:

a) Definition of easement right

As mentioned earlier, incomplete ownership constitutes the ownership of essence of property without benefit or the benefit without the essence. It is understood from this definition that incomplete ownership includes either ownership of sole essence of property or sole benefit of property. The ownership of sole benefit is also called personal benefit right or benefit right which can be personal right that based on which beneficiary pursue the person not the property, or object right which may be subject to essence regardless of its owner which is called easement right (*haq ertefaq*).[84]"*ertafaq*" (Easement) is derived from "*rafaqa*" which literally means taking benefit from something, [85] to lean on someone's elbow, or to escort someone.[86] In *fiqh* easement right is a kind of objective right which constitutes the right on immoveable property for the benefit of immovable property of another person such as right of water (*haq shorb/ haqaba*), right of water passage, right of water course, right of passage and right of neighborhood. [87]

On definition of easement right, the CC derives from *fiqh*. Article 2340 of CC states about the definition of easement right that: "the easement is the right held by a person to make use of the land of another". It is clearly understood from this definition that easement right is incomplete right based on which owner of a property may benefit from another property

[80] For detailed study on endowment please see: Nezamuddin Abdullah, sources of law, application of law from view point of time and persons, pp 318- 357.

[81] For detailed study on will please see: Nezamuddin Abdullah, law of actual property, pp 222- 309.

[82] Masoud Ansari and Dr. Mohammad Ali Taheri, dictionary of private law, volume 1, p 25.

[83] Dr. Waheba Zohelai, al- fiqh- ul- Islami wa adaltoho, volume ١, p 4553; Dad Mohammad Nazeer, general principles of Islamic Law, p 205.

[84] Dr. Waheba Zohelai, al- fiqh- ul- Islami wa adaltoho, volume ١, p 4550 .

[85] Ibid, volume ١, p 4556.

[86] Dr. Hassan Hameed, Persian dictionary of Hameed, p 99.

[87] Dr. Waheba Zohelai, al- fiqh- ul- Islami wa adaltoho, volume ١, p 4656; and Masoud Ansari and Dr. Mohammad Ali Taheri, dictionary of private law, volume 2, p 837; and Dad Mohammad Nazeer, general principles of Islamic Law, p 206.

through his or her property. As a result, the easement right is always subject to immoveable property not person.

b) Sources of easement right

Concerning the sources of easement right article 2342 of CC states that: "Right of easement can be acquired by a legal commitment or by inheritance. The lapse of time does not cause the right of easement to be acquired except the right of passage" This article clearly states that: the sources of acquisition of easement right are legal commitment, inheritance and lapse of time. Legal commitments are divided into contracts and individual will. Therefore, contracts such as sale, donation and individual wills are considered the sources of easement right. Likewise, the right of passage may also be acquired by lapse of time. For example, if someone commutes via land of another person to his or her land for the time specified in the law, [88] the right to passage will be proven for him or her. However, under *fiqh* the sources of the easement right are: 1) public participation; 2) stipulation in contracts; and 3) lapse of time[89]which are discussed briefly below:

aa) public participation

One of the sources of easement right is participation in public properties such as public ways, public rivers that easement right may be proved for owners of the nearby lands as a result of passages, irrigation of lands and sending used waters to them since benefit of public properties is joint by all people and everybody can benefit from it provided that s/he does not inflict damage to others. [90]

bb) stipulation (*eshterat*) in contracts

"eshterat" (stipulation) is derived from *"sharata"* which literally means put, condition and suspend on the condition. In *fiqh* any kind of condition or commitment that a person accepts in contract is called stipulation.[91]The second source of easement right is stipulation in contracts such as stipulation of seller on buyer the right of passage or water right on the land that s/he sells to buyer. Due to such conditions, the easement right is proved for seller.[92]

cc) lapse of time

The third source of easement right is lapse of time. For example, if easement right is determined for an immoveable property and no one is found to understand the time of determination, for instance, a person who inherits an agricultural land with passage and with right of water passage and the time of determination of right for this immoveable property is not known and afterwards this land is inherited, due the lapse of time and inheritance, the mentioned right is transferred to this person. [93]

c) Types of easement right

There are different types of easement rights.

cc) right of water

The first kind of easement right under *Hanafi fiqh* and CC is the right of water.

[88] The Civil Code and other laws are silent about the time period.
[89] Ibid, volume ٦, p 4560; and Dad Mohammad Nazeer, general principles of Islamic Law, p 206.
[90] Dr. Waheba Zohelai, al- fiqh- ul- Islami wa adaltoho, volume ٦, p 4560 and 4561.
[91] Masoud Ansari and Dr. Mohammad Ali Taheri, dictionary of private law, volume 1, p 837; and Dad Mohammad Nazeer, general principles of Islamic Law, p 206.
[92] Dr. Waheba Zohelai, al- fiqh- ul- Islami wa adaltoho, volume ٦, p 4561.
[93] Ibid, volume ٦, p 4561; and Dad Mohammad Nazeer, general principles of Islamic Law, p 207.

ccc) Definition of right of water

Right of water is also called "*haq shorb"* in *fiqh. "Shorb"* literally means a portion of water. Also, *"Shorb"* means time of irrigation. In *fiqh* water right is a portion of water for irrigation of lands and trees.[94] In definition of right of water the CC has derived from *fiqh*. Article 2346 of CC states about definition of water right that: "water right is the use of a portion of water for irrigation of lands and trees".

ddd) Kinds of waters from viewpoint of right of water

Waters from viewpoint of water right are divided into four categories:

1) Waters that are kept in special containers: no one, except the owner has the right on waters that are kept in special containers. Therefore, no one can benefit from waters that are kept in special containers except based on permission from the owner. In case a person is in state of emergency, s/he may use it to the extend that s/he survives even if s/he uses the force. However, in this case s/he has to pay the compensation based on the principle of "state of emergency shall not cause annulment of right of others". [95]

2) Waters of springs, wells and private pools: In waters of springs, wells and private pools like waters that are kept in special containers "the right to drink" is proven for others. Therefore, other people are entitled to drink from these waters. However, if owner of the water forbids others to use water, no one will be entitled to use it.[96]Article 1267 of *Mojal-ul-Ahkam* states in this regard that "water of private streams is allocated to their owner, but all people may only be entiled to drink from these waters. No one may irrigate their lands from the water that belong to others except based on their permission, but they may be entitled to drink. Likewise, they can guide their animals into rivers, streams and canals provided that there is no fear of destruction of these rivers, streams and canals".

3) Waters of owned streams: Waters of small special steams are those waters that are belonging to ownership of certain people. In such waters everybody has the right to drink. Consequently, everyone can drink it and give water to their animals, but they can not irrigate their lands.[97]Article 2388 of CC states in this regard that: "A person who constructs a special ditch for the purpose of irrigating his land can make use of the ditch, and others do not have the right to make use of the said ditch without the permission of the person who has constructed it".

4) Waters of big rivers: Waters of big rivers such as *Neel* river, *Dajla* and *Farat* and other big rivers are those waters that run in the channel owned by no person. The rule that governs big river is: no one can possess the waters and the channel for water since waters of public rivers belong to all people. Consequently, everyone has benefit right including water right, right to drinking, right for establishment of streams and establishment of installations for irrigation of lands.[98]Article 1264 of *Mojal-ul- Ahkam* states in this regard that: "Just as everybody is entitled to benefit from air and sunshine, everyone is entitled to use water of seas and unowned pools". However, based on the Islamic principle that harming others is not allowed, the use of public rivers is allowed provided that it does not harm others.[99] Article 2387 of CC deriving from *fiqh* states in this regard that: "The water of rivers and their tributaries are considered public property and everybody has the right to irrigate his land from

[94] Ibid, volume ٦, p 4660.
[95] Ibid, volume ٦, p 4557.
[96] Ibid, volume ٦, p 4557.
[97] Ibid, volume ٦, p 4556.
[98] Ibid, volume ٦, p 4665.
[99] Ibid, volume ٦, p 4560.

that water or draw a ditch for irrigation purposes except when it is contrary to public interests or special laws" As a result, from the waters of public rivers everybody can benefit and the governor (*hakem*) can not stop people to benefit from waters provided that it does not harm others and the public interests. Hence, the major condition for using the waters of public rivers is not harming others. For example, if someone irrigates his or her land in a way that the water steeps and destroys the adjoining land, or uses the public waters in a way that stops the ship. [100]Article 1265 of *Mojal-ul- Ahkam* states in this regard that: "everyone may irrigate his or her land from waters that are not owned by anyone and establish ditches for irrigation of his or her land or mill provided that it does not harm the public. In case the water increases, floods from the ditch and harms people or in case the flow of water totally stops or ships are stopped, the usage shall be terminated".

dd) Right of water passage

The second kind of easement right is right of water passage which is discussed below.

ddd) Definition of right of water passage

"*Majra*"(passage) literally means passageway. Concerning the definition of right of passage the CC is silent. However, under *fiqh* the right of passage is: "the right of owner of a land which is far from the water channel on another land through which the water runs to his or her land for irrigation of land, garden and trees".[101]In other word: the right of water passage is the right of water to flow through land of others.[102]

eee) Rules of the right of water passage

The general rule that governs the right of water passage is that: owner of land via whose land the water passes can not forbid passage of water from his or her land.[103]Article 1913 of CC deriving from *fiqh* states in this regard that: "Whenever a person has the right to pass water through other's land, the owner of the land may not prevent the passage of water through his land". Likewise, article 2352 of CC states in this regard that: "If a person held a right of way, water passage or flood passage over the land of another, the owner of the land cannot deprive him of such rights". Owner of a land can not transfer water channel through the land of others unless he or she holds such a right. Article 2350 states in this regard that: "The owner of the land who irrigates his land through instruments and machinery or directly from the ditch, cannot compel owners of lands located at the water course to pass the course of water over their lands unless he has the right to flow water over their lands".

ee) Right of water course

"*maseel*" Literally means water course and place for water course. In *fiqh* based on article 144 of *Mojal-ul- Ahkam*: "the right of water course is the right of flow of water from home to outside".

The right of water passage comprises the right of flow of used waters from houses to outside. The main condition for using the right of water course is it should not harm the public. Article 2351 paragraph 2 of CC states in this regard that: "If the water course of a residence is led to the public way or private way which would harm people, the harm shall be eliminated even if it is from old times".

[100] Mohammad Khalid Atasi, commentary on *Mojal-ul- Ahkam*, translated into Dari by: Mowj Samanqani and Abdul Wahed Nahdat Farahi, section 2nd, p 116.
[101] Waheba Zohelai, al- fiqh- ul- Islami wa adaltoho, volume ٦, p 4674.
[102] Dad Mohammad Nazeer, general principles of Islamic Law, p 207.
[103] Dr. Waheba Zohelai, al- fiqh- ul- Islami wa adaltoho, volume ٦, p 4674.

ff) Right of passage

The fourth type of easement right is right of passage which is discussed below:

fff) Definition of right of passage (*haq-e- moror*)

"*Moror*" literally means passage. In *fiqh* according to article 142 of *Mojal-ul- Ahkam:* "right of passage is the right to commute through others' property". in a broader sense: the right of passage is the right of commute of human being in his or her property through others property be it private or public.

ggg) The consequence of right of passage

The consequence of right of passage may differ taken into consideration the kind of way. Hence, if the way is a public way, all people may have benefit right on it including the right to commute, open windows, open shops and so on. However, there are two conditions for exercising this right which have to be met: firstly, exercising these rights should not harm others and secondly the permission from the governor (*hakem*) has to be taken. However, if the way is private way, the benefit right shall be exclusive only to its owner. Consequently, others may not open door and so on in it, but they may commute on it and owners of the mentioned ways can not forbid others or destroy the way.[104] Deriving from *fiqh* article 2354 of CC states in this regard that: "construction of gutters or cesspools in the public way, if they generate harm to the public, shall not be permitted. Likewise, the construction of the above in the private way shall not be permitted without the permission of the municipality of the dwellers of the street".

gg) The neighborhood right (*haq-e-jowar*)

The neighbourhood right is divided into two kinds: the right of the owner of the top floor towards the owner of the lower floor and *vice versa* as well as the right of an adjoining neighbour.

ggg) The right owner of top floor on owner of low floor *(haq-e-jowar tahali)*

The right of the owner of the top floor towards the owner of the lower floor is the right to reside on the top floor and benefit from the lower floor.[105]Based on *fiqh* owner of the top floor is entitled to reside on the ceiling between the top and low floors and may benefit from it within limits of law. However, the ceiling is considered the ownership of owner of lower floor.[106]Article 1979 of CC states in this regard that: "In case one is the owner of the upper and the other the owner of the lower floor of a building, the owner of the upper floor has the right to use the ceiling between the floors, and the ceiling is deemed as the property of the owner of the lower floor. The owner of the upper floor has the right of normal use of the roof of the lower floor [..]". *Haq-e-jowar tahali* is always the right of owner of the top floor. Hence, this right may not be terminated due to destruction of the whole building or destruction of the low floor since owner of the lower floor or his or her heirs have to rebuild it in case of destruction. In case, they deny to reconstruct it, the authorized court can oblige them due to the request of owner of the top floor to do so. Also, owner of the top floor may upon receiving permission from authorized court, reconstruct it with his or her own expenses and demand the reimbursement from the owner of lower floor.[107]Article 1982 paragraph1 of

[104] Ibid, volume ٦, p 4678.
[105] Ibid, volume ٦, p 4678.
[106] Ibid, volume ٦, p 4558.
[107] Ibid, volume ٦, p 4678.

CC deriving from *fiqh* states in this regard that: "(1) In case the lower floor of the building is destroyed without the action of the owner thereof he shall be obliged to reconstruct it. In case the owner of the lower floor refrains from reconstructing it, and the owner of the upper floor builds it with the permission of the owner of the lower floor or by virtue of permission of the court, he may retrieve the expenses he incurs from the owner of the lower floor" This is in case where the low floor of the building is destroyed without the action of owner of the lower. Therefore, if in case the lower floor is destroyed as an act of aggression of the owner, he does have to rebuild it. Article 1981 of CC states in this regard that: "In case the owner of the lower floor demolishes the said floor as an act of aggression, he shall be compelled to reconstruct the building" However, if owner of the up floor rebuilds it without the permission of owner of low floor or authorized court, the costs will be paid to him based on the market price. Article 1982 paragraph 2 of CC states in this regard that: "In case the owner of the lower floor refrains from reconstructing it, and the owner of the upper floor builds it with the permission of the owner of the lower floor or by virtue of permission of the court, he may retrieve the expenses he incurs from the owner of the lower floor" In case owner of the low floor denies to rebuild it and owner of up floor rebuilds it with his or her own expenses and owner of the low floor denies to refund the expenses, owner of up floor can forbid him or her to use the mentioned floor. Article 1983 of CC states in this regard that: "The owner of the upper floor in both circumstances described in article 1982 of this law, may bar owner of the lower floor from residing in or using the lower floor until he receives what is due to him. Similarly, with the permission of the court, he may lease it, and recoup his right from the lease amount." The question which may raise in this regard is: is the owner of up floor allowed to exercise all possessory right in up and low floors? In this regard there are two opinions in *fiqh* which are discussed below:

1) Opinion of *Imam Ibu Hanifa*: *Imam Ibu Hanifa* believes that: the general rule for exercising the right on ownership when the right of another person is associated with, the owner may not act in a way that would sustain loss on the other person's right. Article 1905 of CC deriving from the opinion *Imam Ibu Hanifa* states in this regard that: "Where the right of another person is associated with the property, the owner may not act in a way that would sustain loss on: the right of other except with his permission". As a result, based on opinion of *Imam Ibu Hanifa* and article 1905 of CC owner of low floor may not be able to bring any change in the low floor such as establishment of window, raising the height of wall and so on except with permission of owner of low floor. Likewise, owner of up floor may not be able to build another floor on the top of the building without the permission of owner of the low floor.

2) Opinion of *Imam Ibu Mohammad and Ibu Yousef: Imam Ibu Mohammad and Ibu Yousef* believe that: the general rule on exercise of right on ownership is freeness (*ebaha*) since owner exercises right on his or her ownership and as long as this exercise does not harm others, owner may do it. However, when the exercise of right harms others, owner from one hand is forbidden to do so and on the other hand, in case of aggression and inflicting harm on others, s/he shall be obliged to pay the compensation.[108] Article 1984 of CC deriving from opinion of *Imam Ibu Mohammad and Ibu Yousef* statas in this regard that: "The owner of the upper floor may not construct a new structure on it, or raise the height of his residence without the permission of the owner of the lower floor, except when it is proven that such an action will cause no damage to the lower floor."

[108] Ibid, volume 4, p 4558 and 4559.

hhh)The right of adjoining neighbours (*haq-e-jowar janebi*)

The right of adjoining neighbors is the right that neighbors have on each other.[109] This right is due to the vicinity of two immoveable properties based on which owner of each immoveable property is given certain right on other. The general rule concerning the right of adjoining neighbors is none inflict of major damage to the neighbor.[110]Article 1907 of CC states about the definition of major damage that: "Major damage is that which causes a cracking or destruction of the building, or prevents fulfilling of real needs which are the intended benefits from the property". For example, based on article 1908 of CC: "Full blockage of light from residence shall be considered gross damage; no one may build a construction that closes the window of the neighboring residence and causes full blockage of light to it. In case of construction of such a building the neighbor may demand, when possible, to eliminate damage, and when impossible, the demolition of the construction to eliminate damage". Also, based on article 1909 of CC: "A person who builds a building must construct it in such a manner that the window thereof shall not damage the already existing neighboring constructions".

C) Restrictions of ownership

As stated in the topic of characteristic of ownership, nobody's ownership is complete. Article 1904 of CC states in this regard that: "The owner may exercise possessory rights in his property within the limits of the law". To provide further emphasis for this principle, *Shari'a* and CC anticipated specific provisions in this regard. In case of breach of these provisions and breach of restrictions of ownership, the affected person may file claim against the owner and demand elimination of loss (restoration of the initial status) and if this is impossible, demand paying the compensation. Therefore, firstly some restrictions of ownership that are laid down by *Shari'a* and CC, secondly, condition of realization of breach of restrictions of ownership and thirdly legal consequences breach of ownership of studied below separately:

1) Restrictions belonging to owner and neighbour and public interests

Restrictions of ownership are those restrictions that no owner can breach them. These restrictions are numerous: some of these restrictions are for the interest of owner and neighbor and some are for the public interested which are discussed separately:

a) Restrictions for the interest of owner and neighbour

Following the *fiqh* and *Mojal-ul- Ahkam* the CC sets forth certain provisions on exercise of right by owner on his or her ownership for his or her benefit and for the benefit of the neighbor. Some of these provisions have to be observed before establishing windows, building house, irrigating lands and some have to be observed after establishment of streams, walls and so on. Generally, these restrictions belong to water right, right of passage, right to establish windows, joint wall and so. Below some examples of these restrictions are discussed:

aa) Restriction regarding opening window

Under article 1909 of CC: "A person who builds a building must construct it in such a manner that the window shall not damage the already existing neighboring constructions". The provision set forth under this article has to be observed by persons having single story building in formal and informal settlements and also in villages and want to build the second

[109] Ibid, volume 6, p 2902.
[110] Ibid, volume ٦, p 4558.

and third floor on it. Therefore, a person who has a single floor house in an informal settlement and in villages and wants to build the second and third floors on it, should build it in a way that should not inflict damage on the neighbor. For example, he or she should not be able to open the window in a way that the house of neighbors, women and girls should be seen. Also, under article 1929 of CC: "A neighbor may not construct a window or skylight at less than one meter distance from his neighbor. The distance is measured from the back of the wall on which the window or small window is constructed". However, if the distance is less than one meter from the house of neighbor; owner of the single story building who want to build the second and third floor window does not have such a right. There are two exceptions for this rule:

1) If between the skylight of the owner of the house and house of neighbor there is a public way such as two front neighbors between whose houses there is a public or subsidiary way, establishment of window or skylight is not forbidden. Article 1930 states in this regard that: "The neighbor may have window or skylight opening in front of the neighbor's property provided that is opens at the same time on public way"; and

2) The neighbor may open skylight regardless of the one meter distance on the first, second and third floor. The rule that has to be observed in establishment of small window is the height of small window should be higher than the height of a human in a manner that human normally can not see the house, girls and women of the neighbor. Article 1931 of CC states in this regard that: " The small window whose base from the floor stands higher than the height of a man, and is built to admit air and light, and from which looking on to the neighboring property is not normally possible, is not subject to provision pertaining to distance".

bbb) Changing the height of joint wall

Given this rule that owner may not excise possessory right on a property to which the right of another person is associated, article 1922 of CC states that: "In case a wall is common between two properties , either party may not change the height thereof, or add another building on it." The provision set forth under this article clearly states that: if a wall whether wall of house or garden be it in the formal settlements or villages is joint between two persons, none of the neighbors can without the permission of another change the height of the wall. However, if they both agree they can do so.

ccc) Using joint wall

The principle on using the joint property is that each partner can use the joint property in proportion to their share. This principle is also applicable on using the joint wall. Article 1923 of CC states in this regard that: "Each of the partners may place beams or other supporting staff on the common wall, proportionate to the partner, provided that it is does not surpass the strength of the wall". In case of none-resistance of the joint wall and its destruction, neighbors have to commonly destroy and rebuild it. If one of the neighbors denies, another neighbor can demand his or her coercion from authorized court. Article 1924 of CC states in this regard that: "In case the common wall has lost its strength, and is threatened by destruction, when one of the partners intends to demolish it, and the other prevents this, the preventer shall be compelled to demolish".

cc) Restriction on establishment of factory and commercial buildings

Another restriction laid down for the interest of neighbor is that: any person who wants to build factory of a wedding hall and other disturbing establishment, the distance of these establishments should a way from adjoining houses that the sound of music of hotel and the smoke and sound of the factory should not annoy the residents of these houses. If factory

and wedding hall are near the houses to the extent that annoys owners of the houses, this act is considered the breach of restriction of ownership. Consequently, the owners of adjoining houses can file a claim against the owner of the factory and wedding and demand elimination of the damage. Article 1932 of CC states in this regard that: "Factory, business shop, well and other establishments that would inflict damage on the neighbor must be constructed at a distance that it will not sustain damage on neighbor".

b) Restrictions of ownership for the public interests

The second categories of restrictions on exercise of right, exploitation and use of ownership belong to the pubic interests. The CC does not contain any examples in this regard. However, in *Mojal-ul- Ahkam* there are some examples in this regard which are mentioned below:

1) Based on article 1214 of *Mojal-ul- Ahkam*: "harmful things that are harming the traveller even though they are old, shall be eliminated such as shops and lump of part of a wall on the public way near to travellers".

2) Based on article 1215 of *Mojal-ul- Ahkam*: "if a person puts the dust on the way in order to build a house, he or she can put it on the side of the street and use it in his or her house as soon as possible provided that it does not harm the travelers".

3) Under article 1217 of *Mojal-ul- Ahkam*: "Any person can buy a piece of land that is not needed by the government for the realization of public interest and attach it to his or her house provided that this action does not harm passers-by.".[111]

2) Conditions for realization of breach of restrictions of ownership

Realization of breach of restrictions of ownership some examples of which were mentioned in the first part of this topic is dependent on the realization of two conditions: practical violation of restrictions of ownership and creation of gross losses. So, firstly, we discuss the practical violation of restrictions of ownership and secondly gross and none gross loss:

a) Breach of owner his or her authority and violation of restrictions of ownership

The first condition for achieving the conditions of violation of restrictions of ownership is that owner exercises right on his or her ownership in a way that violates the restrictions of ownership. For example, the owner of the land, irrigates his or her land in a way that the water steeps from his or her land and destroys the agriculture of the adjoining neighbor, owner of the house opens window in less than a meter distance from the house of neighbor in the second or third floor, one partner without the consent of another partner destroys the joint wall and so.

b) Violation of restrictions of ownership causes gross damage to neighbour

The second condition for realization of gross violations is creation of gross damage to the neighboring. Therefore, if violation of restrictions of ownership causes none gross damage to the neighbor, the neighbor can not demand restoration of the initial status or the compensation from the aggressive owner.

bb)Definition of damage and it classification into gross and none gross damage (*zarer*)

"*zarer*" literally means damage whose plural is "*azrar*". In law and *fiqh* damage is an unpleasant annoyance or depletion occurring on one of the five necessities of life which are

[111] For further details on restrictions of ownership please refer to: Dr. Abdul Razaq Ahmad-ul-sanhori, alwaseet, volume 8, pp 638- 792; and Mohammad Khalid Atasi, commentary on *Mojal-ul- Ahkam*, translated into Dari by: Mowj Samanqani and Abdul Wahed Nahdat Farahi, section 2, companies.

spirit, religion, intellect, prestige and wealth..[112] This examples of gross and none gross damage were mentioned under the right of adjoining neighbors (hhh).

- 3) Legal consequence of breach of ownership

If a person violates the restrictions of ownership in a manner that causes gross damage to others, the damaged person may file a lawsuit against the violator to repel the gross damage because "Major damage, be it old or new, shall be eliminated" (Article 1906 of CC). Elimination of damage usually takes place in two ways: restoration of the initial status and if it is not possible paying the compensation:

a) Elimination of damage through restoration of initial status

The CC does not contain any provision on elimination of damage through the restoration of initial status; however, there are certain provisions in *Mojal-ul- Ahkam* in this regard:

1) Article 1200 of *Mojal-ul- Ahkam* states on gross damage that: "Gross damage shall be eliminated in any case. For example, if a blacksmith shop or mill is established beside a house and grinding of iron and running of mill result in destruction and weakness of the house, or if someone establishes oven or a juice shop beside a house and smell of smoke and juice of fruit disable owner of the house to stay in, are all considered gross damage and shall be eliminated. Also, if some establishes a steam for his mill running through the house of another person, and as a result of which destruction or weakness occurs on the wall of the house, or if someone makes a dustbin beside the wall of another person, and puts the garbage in and causes damage to the wall of neighbour, owner of the wall may oblige him or her to eliminate the damage. Also, if someone establishes a place for harvest close to wall of house and coming of dust annoys the owner in a way that can not live in the house, owner of the house may oblige the owner of harvest to eliminate the damage. Likewise, if some builds a high house beside the harvest of another person in a way that stops the wind to blow, s/he shall be obliged to eliminate the damage. Likewise, if someone establishes a bakery in the draper market and the smoke causes gross damage to drapers, the baker shall be obliged to eliminate the mentioned damage…"

2) Based on article 1195 of *Mojal-ul- Ahkam:* "if some builds a new room in his or her house, he or she may not be entitled to let the outgrow of room in the air of house of neighbor, if he or she does so, the lump shall be eliminated to the extent it has taken the air".

3) Based on article 1196 of *Mojal-ul- Ahkam:* "if the branches of tree of garden reaches to the garden or house of neighbor, the neighbor may be entitled to oblige the owner to cut the braches or tie it to let the air come in her or his garden or house. If owner of the tree proves that the shadow of the tree does not harm to cultivations of the garden, the tree may not be cut".

b) Elimination of damage through paying the compensation

In case there is no possibility to restore the initial status, such as building of the joint wall by one of the neighbors, in case of denial of another neighbor, the neighbor who has destroyed the wall which was subject to destruction and rebuilt it, may demand paying the compensation from the other neighbor.

[112] Masoud Ansari and Dr. Mohammad Ali Taheri, dictionary of private law, volume 2, p 1264.

D) Joint ownership

a) Definition of joint ownership

The CC is silent on definition of joint ownership. However, under article 138 of *Mojal-ul-Ahkam:* "joint ownership is that which is consisting of the joint". and under article 139 of *Mojal-ul- Ahkam:* "joint parts constitutes parts which is incorporated in all components of the joint ownership". Therefore, owners of joint ownership are owners of each component of joint ownership.

b) Administration of joint ownership

Under article 1937 of CC: "The administration of the joint property is the right of all partners except when agreement is reached otherwise". It is clearly understood from provision of this article that: the principle is that the administration of joint ownership is the right of all partners since the joint ownership is the ownership of all partners. As a result, if one of them wants to independently administer the joint ownership, his or her act is considered violation of rights of others. Despite this principle, the joint ownership may be administered through the following ways:

1) Administration of joint ownership by one of the partners: The joint ownership may be administered by one of the partners and other partners do not protest. In such a case, the administrator shall be considered client of himself and attorney of partners in administration of joint ownership and the acts as they relate to administration of the joint ownership are binding. Consequently, if one the partners leases the joint ownership, this lease shall be binding on other partners. The same applies if he or she receives the payment, takes measures to keep the joint ownership and paying the taxes. Furthermore, he or she can cultivate the joint ownership provided that it is agricultural land and collects the fruitage.

2) Administration of joint ownership by majority of partners: It is also possible that the joint ownership is administered by majority of partners. In such case, the administration of joint ownership by majority of partners is binding on others.

3) None agreement on administration of joint ownership by majority of partners and appointment of someone by judge to administer the joint ownership: If there is no agreement on administration of joint ownership by majority of partners, there is no possibility except to refer to judge. Hence, if one of the partners refers to authorized court, the judge can order the partners to take necessary measures such as lease of joint ownership. In addition, the judge can appoint one person who is a partner to administer the joint ownership. Article 1938 of CC states in this regard that: "The partners of joint property are subject to majority vote, and the majority is ascertained in accordance with the cost of shares. In case majority can not be ascertained, the court may adopt necessary measures on the basis of the appeal of one of the partners. Similarly the court may, when necessary, appoint a person for the administration of the undivided property".

c) Maintenance and expenses of maintenance of and administration of joint ownership

In accordance with article 1939 of CC: "Every partner of joint property may take necessary means for the protection of the said property even though the rest of the partners may agree not with it". Based on this article, every one of the partners of the joint ownership may take necessary measures on his own to maintain, repair, counter claim on attainment, claiming on usurp and so on.

Concerning the expenses of maintenance of joint ownership article 1948 of CC states that: "Administration and protection expenses, taxes and other fixed or incurred expenditures related to the common property shall be paid by all partners each in accordance with his share in the property, unless agreement is reached otherwise". This article states that: each partner is considered owners of the joint ownership. Therefore, the expenses resulting from maintenance of joint ownership such as: expenses of repairing and maintenance, drawing the boundaries, counter claim, claim, expenses of rehabilitation and repairing of join wall, paying the taxes and so on divided on them in accordance with their shares. This provision is applicable provided that the partners have not agreed otherwise.

d) Repair of joint ownership

As for as right of each partner in joint ownership is proportion to his or her share, his or her responsibility is also basically in proportion to his or her share. As a result, if joint ownership needs to be repaired, each partner in proportion to his or her right has to repair it Article 1942 of CC states in this regard that: "Where commonly owned property requires repairs, the partners shall share it in accordance with their shares". Also, one of the partners may repair it based on permission from other partners and after repairing refer to them in order to refund the expenses in proportion to their shares. Article 1943 of CC states in this regard that: "In case one partner, with the permission of other partners, constructs the common property, he may demand the expenses from each partner in accordance with his share…". However, if he or she does so without permission of other partners, he or she may not refer to other partners. Article 1943 of CC states in this regard that: "…and when he does so without permission he is considered as donator. Every partner who has not permitted the construction of his part can not be asked to pay the cost". The reason for collapse of demand of the expenses by partner as mentioned in above article is: that the joint ownership is the common ownership of several persons. Hence, exercise of right on it by one of the partners is subject to receiving the permission from other partners. As a result, if one of the partners exercises right on joint ownership without permission from other partners although this exercise is for repairing of the joint ownership, the partner may be eligible to receive the expenses. Likewise, if joint indivisible property requires repairs, and one of the partners is present and at least one of the other partners is absent, the present partner may after getting the permission from authorized court, repair it and after repair demanded the expenses from other partners in proportion to their shares. Article 1944 paragraph 1 of the CC states in this regard that: "Where the common indivisible property requires repairs, and one of the partners is absent, obtaining of the court permission as regards construction of the property is imperative. In this case the partner who does the repairs may demand the expenses he incurs from the rest of the partners and from the absent partner after his appearance, in accordance with their shares in the property".

In case the present partner, repairs the joint indivisible ownership, he or she may not demand the expenses from others. Article 1944 paragraph 2 of CC states that: " In case the repairs are made without permission, the partner who makes the repair may not demand expenses from the other partners".

e) Taking benefit from joint ownership

The general principle for taking benefit from joint ownership is that: all partners may take benefit from joint ownership in proportion to their shares. Article 1935 of CC states in this regard that: "In case the property is owned jointly by two or more persons, everyone has the right to utilize it in proportion to their right, and may exercise possession in it in a manner that the other partner does not sustain any damage…" Therefore, the outcome of the joint

ownership is divided between the partners in proportion to their shares. Similarly, the partners of the joint ownership may also lease the joint ownership and divide the money in proportion to their shares.

g) Exercising right on joint ownership

The CC sets forth three scenarios on exercising right on joint ownership:

1) Exercising right based on agreement of all: if all partners of the joint ownership agree exercise of right on joint ownership such as sale, lease and mortgage, such exercise will be binding on all. Despite this, sometimes the partners may not reach agreement on exercising right on the joint ownership.

2) **Exercising right based on agreement of majority of partners:** Given the above scenario, the CC permits the majority of partners to take a decision on exercising right on joint ownership. Despite this, in order that such a decision is taken by majority of partners, there are two conditions that have to be realized: 1) the first condition is that the partners who own three fourth of the joint ownership should take this decision; and 2) in taking such a decision, the partners must rely on strong reasons such as: indivisibility of joint ownership, need for repair of joint ownership and inability of partners to provide the expenses, impossibility of administration of joint ownership and so on.

In such a case, the CC protects the rights of the minority and in order that their rights are not violated, the CC does not recognize this decision binding, however, the CC considers announcement of this decision orally and in written to the minorities. In case of announcement, each of the partners who are in minorities may object within two months in authorized court. In case of the objection of the partners who are in minorities, the court, make assessment of the causes of the exercise of right on the joint ownership. If the authorized court does not consider these causes logical, it may rule against the decision. Nonetheless, if it considers the decision logical, the court makes assessment whether joint ownership is divisible or not? If yes, it divides the joint ownership and hands over the share of each partner to them and by doing so, the authorized court prevents from decision of the majority.

However, if the authorized court considers that the division of the joint ownership inflicts damage on the partners, it may rule for the decision of the majority of partners. Article 1949 of CC states in these regards that: "Partners who own three fourths of the common property may, after declaring to the other partners, decide on taking possession thereof provided that they do so by reason of old causes. The partner who objects to such a decision may seek recourse to the court within two months after the declaration. The court may, when necessary, rule for or against the possession".

3) Exercise of right by one of the partners individually and restoration of joint share by majority of partners: one of the partners can exercise right on his own share. For example, he or she may sell it to another partner or to third person or donate it. Therefore, if the mentioned occupation is for the interest of the third person (none partner), the partners may object this occupation within thirty days starting from the date at which they get this information and restore the share. Article 1950 paragraphs 1 and 2 of the CC states in this regard that: "(1) A partner in undivided movable property or in all goods may, before division, demand the return of the portion of the undivided property which is sold by the other partner provided that this demand is made within thirty days after becoming aware of the sale,

or when the demand is passed on to the buyer and the seller after the date of sales advertisement. In such case the person who returns the property becomes a substitute of the buyer in all his rights and liabilities provided that he has compensated all his expenses; (2) In case several partners demand the return of the property sold as described in above section each one may demand its return proportionate to his share".

In order to return undivided share, as set forth under above article, there are five conditions which have to realized: 1) one of the partners must have sold the undivided share. Thus, if one of the partners donates or transfers his share to another partners or partners through will, other partners may not demand its return since donation and will are commonly carried out given the personality of the donated and bequeathed and this act is against the return of the undivided share; 2) the object of the sale should be undivided ownership or a share of the undivided ownership; 3) the buyer should be none-partner. Thus, if the buyer is one of the partners, this act may not inflict damage to rights of other partners sine the buyer partner is already, partner of other partners; 3) the return of undivided ownership should be demanded by one the partners since the partners are those who are affected by this sale; and 5) the demand for return should be carried out within thirty days starting from announcement day.

In case of return of the undivided share, the partners or partner who is demanding the return of share will be considered the successor of the buyer. Thus, the partner has to pay the cost of the undivided share to the buyer and gains the share.

h) Paying the compensation in case of exercise of right and waste of joint ownership

As stated above, a partner may not exercise right on share of another partner without his or her permission in a way that inflicts damage to other partner since the share of one partner is considered as trust and in case it is wasted as a result of infringement and fault, he or she has to pay the compensation. Article 1941 of CC states in this regard that: "The share of one of two partners in the possession of the other is considered as trust. When it is perished without fault of the partner, he shall not stand surety". Therefore, in case share of perished due to the fault; namely: infringement and dissipation, he or she has to pay the compensation. Also, as one partner can not exercise right on the share of another partner, he or she may not without permission from another partner give it as trust to another person since this share is considered as trust. Thus, if one partner gives the joint ownership to another person without permission of the other partners and the joint ownership is wasted, the trustee partner has to pay the compensation. Article 1087 of *Mojal-ul- Ahkam* states in this regard that: "the share of one partner is considered as trust to another partner. If one of the partners gives the joint ownership to a third person without permission from another partner as trust without permission of the partner, in case of waste, he or she shall be obliged to pay the compensation". In such situations, the partner without whose permission the joint ownership has been given as trust and has been wasted by the trusted may refer to partner or to trustee.[113]

E) Division of joint ownership

Joint ownership shall not remain joint for always. The partners may turn the joint ownership to separate ownership through sale such as sale of share of joint ownership to another partner or none-partner, or sale of joint ownership to a single person or to a group of persons by all partners; inheritance such as inheritance of share of one partner by another partner or third

[113] For further details on administration, using and exercising right on joint ownership please refer to: Dr. Abdul Razaq Ahmad-ul-sanhori, alwaseet, volume 8, pp 791- 880; and Mohammad Khalid Atasi, commentary on *Mojal-ul- Ahkam*, translated into Dari by: Mowj Samanqani and Abdul Wahed Nahdat Farahi, section 2, companies, pp 1-21.

person or will such as transfer of share by will by one partner to another partner. Even though, these are all means of transfer of joint ownership to separate ownership, however, the major means is division[114]which is discussed below:

a) Definition of division (*taqseem*)

"taqseem" literally means separation of share. The person who is dividing the property is called *"qasem"* (separator); the property which is divided is called *"maqsoom"*; the persons for whose benefit the property is divided is called *"maqsoom loho"* (single form) and *"maqsoom lahom"* (plural form). Article 1114 of *Mojal-ul- Ahkam* states on definition of division that: "division constitutes determining shares i. e. separation of shares through measure, scale such as meter, weight and bushel*"*. Jurists say that: division is determination of share of each partner in joint ownership.[115]

b) Cause of division

The cause of division is demand of one of the partners or all partners in order to benefit from their own ownership in a special manner. Therefore, if the partners do not demand the division, the division may not take place. [116]

d) Kinds of division

Based on *fiqh* division from viewpoint of involvement of partners is divided into compulsory and none-compulsory division.[117]In this regard the CC also derives from *fiqh.* Article 1951 of CC states in this regard that: *"*Division constitutes defining of share in the joint property and delivery of the same to partners , on the basis of the consent of the partners or the ruling of the court". Article 1121 of *Mojal-ul- Ahkam* states on definition of none-compulsory division that: "None-compulsory division is that which is carried out by partners based on consent of partners, or all partners divide the joint ownership among themselves based on their consent".

Whenever the partners do not reach agreement on division of joint agreement and some of them demand the authorized court to divide the joint ownership and the judge of authorized court divides the joint ownership, this division is called judicial division which is also called compulsory division in *fiqh*. Article 1122 of *Mojal-ul- Ahkam* states in this regard that: "judicial division constitutes the division that takes place by authorized court compulsory due to demand of some of the partners".

In filing of claim involving division of joint ownership, the primary court within the local authority of which the immoveable joint ownership is located is considered as competent to deal with the case. Article 1962 of CC states in this regard that: "In claims pertaining to division, the primary court within area of jurisdiction of which the property to be divided is located shall be recognized as competent". Whenever the claim pertaining to division of joint ownership is presented to primary court, the court has to make an assessment whether the joint ownership is dividable without any damage or not? And whether due to division the cost of the joint ownership very much decreases or not? The CC sets forth specific provision on

[114] Dr. Abdul Razaq Ahmad-ul-sanhori, alwaseet, volume 8, pp 803 and 804.

[115] Concerning definition of division please see: Ibn Habuddin, Rad-ul-Mokhtar- ul- Dar- ul- Mokhtar, volume 9, pp 420 and 421; Dr. Waheba Zohelai, al- fiqh- ul- Islami wa adaltoho, volume ٨, pp 4732 and 4733; Al- imam Alahuddin Ibibaker alkasani, Badayeh al sanaya, volume 6, p 462; and Abdul Hameed Mohmood Tahmaz, Al-fiqh-ul- Hanifi fee soab-ul- jaded, volume 5, p 133.

[116] Ibn Habuddin, Rad-ul-Mokhtar- ul- Dar- ul- Mokhtar, volume 9, p 421; Al- imam Alahuddin Ibibaker alkasani, Badayeh al sanaya, volume 6, p 462; and Abdul Hameed Mohmood Tahmaz, Al- fiqh-ul- Hanifi fee soab-ul- jaded, volume 5, p 133.

[117] Dr. Waheba Zohelai, al- fiqh- ul- Islami wa adaltoho, volume 8, p 4738; Wazar-ul- aoqhaf wa-ul- shoon-ul-eslamia, almost-ul-fiqhia, volume 33, p22.

join ownership with possibility of division and joint ownership without possibility of division, which are discussed below:

cc)Divisible joint ownership with decrease of value

If the authorized court finds out that the joint ownership is not dividable at all. For example, the joint ownership is horse, ring and car or the joint ownership is dividable, but with the division will lead to decrease of the cost, for instance, the joint ownership is a multi-story building or agriculture land and if it is divided, this division will lead to decrease of their cost, the authorized court can sell the joint ownership through bidding and subsequently divides the money between the partners in proportion to their shares. Article 1967 of CC states in this regard that: "In case the division of the goods is impossible, or the division thereof results in drastic reduction in price of the goods, the goods shall be sold in accordance with the provisions of the civil procedural law".

ee)divisibility of joint ownership

If the joint ownership is dividable, the primary authorized court has to take measures necessary for division of the joint ownership. For this purpose, the primary authorized court has to pass three periods: 1) division of joint ownership; 2) resolving the claims; an3) Giving the share to each partner:

- **First period- division of joint ownership**

Concerning how to divide the joint ownership, article 1955 of CC states that: "In case the property is divisible, the court may, when one of the partners demands division thereof, assign a number of informed persons for ascertaining the share of each partner and dividing of the shares". The CC authorizes the judge to appoint the persons who have expertise in division of the joint ownership his or her representative so that they divide the joint ownership. Informed persons are those professional persons who have enough knowledge and expertise in specific field (article 4 paragraph 12 of Civil Procedure Code). In this context, informed persons are: surveyor, a worker of land registry, an expert of land improvements, an architect, a civil engineer and a neighbor (article 175 paragraph 2 of the Civil Procedure Code). The experts have to divide the joint ownership into smallest shares. Article 1956 of CC states in this regard that: "The informed persons shall ascertain the shares on the basis of the smallest part even though the division may require the informed person to divide the property into the smallest piece. In case this is impossible they ascertain, and separate the part of each partner". However, if there is no possibility of dividing the joint ownership into small equal shares, the experts have to complete the lack for those partners who do not receive the shares equal to other partners. Article 1960 of CC states in this regard that: "Compensation for the lack of equal parts may be achieved by additional payments on the part of the one who has acquired a larger part".

- **Second period- resolving the disputes**

Article 1964 of CC states on settling disputes that: "The primary court mentioned in article 1963 of this law shall settle disputes arising from ascertaining shares and other disputes arising from division of property which fall in the area of its jurisdiction". It is clearly understood from provision of this article that: the disputes among the partners can be divided into two parts:

1) First category: disputes arising out of division of joint ownership. The examples for such disputes are claim of one the partners that his or her share is not equal with other partner, the property that other partners has provided him because of lack of his or her share, is less and so on.

2) Second category: disputes that are not relating to division of joint ownership such as disputes on the ownership itself such as claim of one of the partners that another person is not his or her partner at all; or the partners cause assault and battery on each other; or one of the partners kill another partner or others and so on. In such cases, the authorized primary court is obliged to stop division of the joint ownership until it resolves the disputes i. e. it should firstly resolve the disputes and then divide the joint ownership. Article 1965 of CC states in this regard that: "Whenever during adjudication of the litigation pertaining to division by the court, other disputes arise; the court shall be obligated to suspend the litigation pertaining to division until the other disputes are finally resolved".

Third period- ordering delivery of share of each partner after resolving the disputes

Concerning providing the share of each partner after settling disputes article 1966 paragraphs 1 and 2 of CC states that: "(1) Where the dispute is settled and the parts are ascertained by consent, the court may order delivery of the ascertained parts to the partners; (2) In case the division does not take place among the partners by consent it shall take place through lot , and the same shall be registered in the court and the ruling shall be issued to delivery of parts to the partners". It is clearly understood from provision of this article that: after settlement other disputes by authorized primary court, the third period which is delivery of shares to partners arrive. Therefore, the authorized court after ascertaining the shares by the informed persons and delivery of lack of shares by those partners whose shares are more than the other partners whose share are less, delivers the shares to partners in accordance with ruffle.[118]

e) Consequence of division

Division is a tool for dissolution of joint ownership. Hence, due to division share of each partner is separated and ascertained and after division each partner is considered independent owner of his or her share and owners do not have any right on shares of others. As a result, ownership of each partner becomes complete ownership and the constraint of the ownership is eliminated and each owner may exercise possessory right on his or her ownership independently such as sale, lease, donation, will and so on.[119]

G) Division of benefits (*mahayat)*

Whatever was stated was on division of essence of ownership. Therefore, division of benefits which called division of *"mahayat"* in *fiqh* and temporary division in law, is subject to separate provisions since sometimes it is possible that benefits of ownership is divided separately which is studied below:

a) Definition of *mahayat*

"mahayat" in *fiqh* is division of benefits. Article 1174 of *Mojal-ul- Ahkam* states in regard with definition of *"mahayat"* that: "*mahayat"* constitutes division of benefits". So, the object of *"mahayat*" is the benefits of joint essence of ownership which can be benefited with the maintenance of its essence.[120]

[118] For further details please refer to: Dr. Abdul Razaq Ahmad-ul-sanhori, alwaseet, volume 8, pp 910- 933.
[119] Dr. Waheba Zohelai, al- fiqh- ul- Islami wa adaltoho, volume8, p 4765.
[120] Dr. Waheba Zohelai, al- fiqh- ul- Islami wa adaltoho, volume8, p 4775; Wazar-ul- aoqhaf wa-ul- shoon-ul-eslamia, almosohat-ul-fiqhia, volume 33, p 429; and Abdul Hameed Mohmood Tahmaz, Al- fiqh-ul- Hanifi fee soab-ul- jaded, volume 5, p 158.

b) Types of *mahayat*

Based the CC *mahayat* is divided into two types: locative *mahayat* and time *mahayat*. Article 1974 of CC states in this regard that: "Benefits may be distributed in time or space, and both can be done either voluntarily or legally". The provision set forth under this article is derived from *fiqh* since *fiqha* (Islamic jurists) basically divide *mahayat* from viewpoint of consent and compulsion into compulsory and consent *mahayat and* from viewpoint of place and time into locative and time *mahayat which* are discussed below:

bb) Division of *mahayat* from viewpoint of consent and compulsion

From viewpoint of consent and compulsion of partners *mahayat* is divided into consent and compulsion *mahayat:*

bbb) Compulsory mahayat

Compulsory *mahayat* is that which is carried out by authorized court based on the request of one of the partners in a way that: the judge divides compulsorily the benefits of the essence of joint ownership periodically for a specific time or divides the benefits of joint ownership through locative benefit among the partners. This sort of division is allowed in accordance with the *Hanafi* jurists. In this regard CC also follows *Hanfi fiqh*. Article 1976 paragraph 2 of CC states in this regard that: " In case one of the partners demands distribution of benefits of undividable property, and the other partners reject this, the benefits shall be distributed by force".

ccc) Consent mahayat

Consent *mahayat* is that in which two persons agree to benefit from joint ownership in pursuance and periodicity of time and place. Such division is allowed in accordance with all *fiqh* jursits.[121]

ddd) Division of *mahayat* from viewpoint of time and place

Division of benefits from viewpoint of time and place is divided into: time and locative *mahayat* which are discussed below:

- Time *mahayat*

Time *mahayat* is that in which each partner uses the benefits of the joint ownership in turn in specific time in proportion to their shares such as agreement of two partners on use of agricultural land for one year, or staying at home in turn for one year, or using a book for one week . In such cases, one of the partners can cultivate the agricultural land for one year and another for the next year; one partner can use the benefit of the house for one year and another partner the next year; or one of the partners study the book for the first week and another on the second. Concerning the definition of time *mahayat* CC also derivers from fiqh. Article1976 paragraph 1 of CC states in this regard that: "Time distribution of benefits is that the partners agree to acquire benefits accruing from all the undivided property alternately, each one for a period commensurate to his portion of the property".

- Locative mahayat

Locative *mahayat* is that in which each partner benefits from a part of the joint onwerhsip in proportion to his or her share. Thus, taking benefit from joint onwerhsip in locative *mahayat*

[121] Dr. Waheba Zohelai, al- fiqh- ul- Islami wa adaltoho, volume8, pp 4777 and 4778; Wazar-ul- aoqhaf wa-ul-shoon-ul-eslamia, almosohat-ul-fiqhia, volume 33, p 451.

is taking place at the same time such as benefit of one partner from one part of the house and another partner from another part.[122]Under the CC the time for locative *mahayat* shoul not be for more than five years. As a result, if based on the agreement of the partners the time of locative *mahayat* is ascertained for more than five years, this period has to be decreased to five years since in locative *mahayat* although the ownership is divided from viewpoint of benefit, however, the ownership is joint from viewpoint of essence and partnership will remain as long as the locative *mahayat* exists. It is why the partners can not agree to locative *mahayat* for more than five years. Accordingly, if the five year period expires, the partners may extend to other five years. Article 1975 of CC states in this regard that: "In distribution of space benefits the partners shall agree that each acquire a specific portion of the benefits of the property which corresponds to his portion in the undivided property, and in turn desist from utilization of remaining portions of their part in the interest of the partners. The period of this agreement may not exceed five years. In case the period is not defined, the agreement holds for one year, and when three months before the expiration of the year the partner does not communicate his dissatisfaction to other partners, the agreement shall be considered to have been extended for the next year. If this distribution continues for a period of fifteen years in this manner the distribution shall be considered final"

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[122] Concerning the time and locative divions please see: Al Imam Alahuddin Ibibaker alkasani, Badayeh al sanaya, volume 6, pp 482 and 483; Dr. Waheba Zohelai, al- fiqh- ul- Islami wa adaltoho, volume8, pp 4777 and 4778; Wazar-ul- aoqhaf wa-ul- shoon-ul-eslamia, almosohat-ul-fiqhia, volume 33, p 451

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