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Re-Defining Property And Property Rights In Islamic Law of Contract *

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Abstrak

Maḥall al-'aqd (subject matter) merupakan salah satu perkara penting bagi sesuatu kontrak dalam Islam. Para fuqaha' telah meletak pelbagai syarat bagi mengelak wujudnya gharar dan jahālah. Di antara syarat tersebut ialah; ia dapat dipastikan, bersifat harta dan bernilai. Walaubagaimanapun, isu yang sering dibangkitkan oleh pengamal perbankan dan kewangan Islam ialah; apakah sebenarnya yang membentuk subjek matter yang sah dalam sesuatu kontrak terutamanya apabila aset tersebut tidak dianggap sebagai harta (amwāl) secara konvensionalnya. Aset-aset tersebut termasuklah harta intelek, hak penerimaan, hak konsesi dan lesen, hak future properties dan lain-lain. Isu utama di sini ialah adakah aset-aset tersebut boleh dijualbeli? Oleh kerana kebanyakan instrumen kewangan dalam perbankan dan kewangan Islam berasaskan jual beli atau kontrak pertukaran (mu'āwaḍāh), jadi isu ini perlu diselesaikan. Pada masa sekarang, terdapat dua aliran pemikiran berkaitan dengan isu di atas; satu aliran menerima sebahagian aset tersebut sebagai subjek matter yang sah bagi kontrak pertukaran berasaskan bahawa ianya adalah hak kehartaan (ḥaqq mālī / property

right). Manakala aliran kedua tidak menerima dan mengiktirafnya. Justeru, artikel ini cuba menganalisa kedua-dua aliran pemikiran dan hujah mereka yang akan dilihat dari penulisan fiqh klasik dan kontemporari. Perbincangan ini diharapkan dapat memberi gambaran yang jelas dan mendalam mengenai isu yang dibincangkan.

Introduction

Most of the contracts entered into in Islamic banking and finance are in the category of exchange contracts *(al-mu'āwaḍāt),* which are essentially trading-based. This is quite to the contrary with the activities in conventional banking and finance, which are mainly lending-based activities. When the contracts are exchange contracts, they necessarily entail the exchange of goods, services, or usufruct, for a consideration or price. The most common forms of the contracts of exchange are either buying and selling *(al-bay')* which involves the sale of goods, or leasing *(al-ijārah)* which involves the sale of the usufruct *(manfa'ah).* In both, the subject matter *(maḥall al-'aqd)* is the central focus of the legal effects accruing from the valid conclusion of the contracts.

In Islamic jurisprudence, exchange contracts require more stringent fulfillment of the conditions of the subject matter *(shurūṭ maḥall al-'aqd),* particularly on the conditions of certainty, ascertainability and proprietary value. This is because, exchange contracts involve the exchange of counter values, as opposed to the unilateral contracts of gratuity *(al-tabarru'āt),* which give one-sided benefit to the recipient. In an Islamic contract of exchange, the counter values - goods/usufruct and price/consideration - are the subject matters of the contract. To be valid subject matters of a contract, these counter values need to be properties *(amwāl)* which are certain, valued and beneficial *(mutaqawwam).* This is to ensure that their exchange would give a fair and legal commercial benefit for both sides of the contracting parties. The fairness of the transaction can be ensured by the ability of both parties to appreciate and benefit from the proprietary worth of both counter values in the subject matter and give their consent to the exchange accordingly.

Of late, the range of possible counter values and subject matters has expanded so as to include certain rights, which proprietary value and capacity to be valid subject matters of contracts may still be very much debatable. These possible counter values include mostly abstract rights *(ḥaqq ma'nawī),* such as, the rights to receivables, the rights to future benefits from a concluded contract, and the rights to license and concession. The main issue is, can these rights be traded or sold for a consideration? Can these rights be valid subject matters for an Islamic project-financing contract, which consists mainly of a series of exchange contracts? For example, if a person or com-

pany obtains a license to develop a piece of landed property into an industrial area consisting of factories and other paraphernalia, can the person or company sell the right to others? Alternatively, can the person or company securitize the right in order to get the financing for the project?

The traditional definition of property and proprietary value has not sufficiently addressed these relatively new rights, perhaps because of the novelty of their exchange transactions. Thus, this article seeks to re-define property and property right with special reference to these rights and their validity to be proper subject matters in Islamic contracts of exchange. In doing so, the article analyses the classical and contemporary *fiqh* writings on the issue. Then, the study examines the application and relevance of the *fiqh* interpretations to some of the concepts in modern Islamic banking and finance contracts.

1.0 *Māl* And *Māl Mutaqawwam*

As a general rule, the subject matter in a contract of exchange should be property *(māl)* that is of value *(mutaqawwam)* and is capable of ownership (*milkiyyah*). Thus, it is important for us to analyze the concept of *māl* and *māl mutaqawwam* first, before we try to relate the meaning and concept to right *(ḥaqq)* and property right *(ḥaqq mālī)*.

In the dictionary, definition of *māl* (its plural - *amwāl*) is simple and straight forward, i.e., "whatever you own from all matters".[1] However, the legal definitions given by the jurists to *māl* are various. This is mainly due to their differences in describing the focus of the proprietary aspects of things *(manāṭ māliyyah al-ashyā')*. Some of them say that properties are limited to corporeal matters only *(a'yān)*, whilst others say that they also include usufructs *(manāfi')* and rights *(ḥuqūq)*.

Majority of the classical Ḥanafī jurists were in favour of the first approach towards defining *māl*, i.e., limiting it to corporeal matters only. For example, Ibn 'Abidin defined *māl* as "that which human nature inclines, and can be stored for future needs."[2] In other occasions, he described *māl* as "corporeal matter *('ayn)* that is capable of being controlled and acquired", and "... is limited to corporeal matters (*a'yān*), to the exclusion of usufructs *(manāfi')*".[3] He then elaborated the definition by explaining the proprietary aspect *(māliyyah)* of *māl*, whereby he said, "the proprietary aspect of *māl* is established by the appropriation *(tamawwul)* of the property by people". He further said, "the proprietary aspect of *māl* is also established by its worth or value *(taqawwum)* that allows the lawful enjoyment of the property."[4] Interestingly, Ibn 'Ābidīn recognized that usufructs can be subjects of ownership *(milk)*, yet, they are not *amwal* because they cannot be made specific subjects to dealings and transactions *(taṣarruf)*.[5] In the same line, article 125 of the *Majallah al-Aḥkām al-'Adliyyah*

defines *milk* as "a thing of which man has become the owner, whether it be the things themselves *(a'yān)* or whether it be the use *(manāfi')."* Thus, although a usufruct can be owned according to the Ḥanafīs, it is not property *(māl)* in its own right.

A further study of the *Majallah* gives further insights into the meaning of *māl*. Article 126, for example, defines *māl* as "a thing which naturally is desired by man, and can be stored for times of necessity. It includes movable *(manqūl)* and immovable *(ghayr manqūl)* property." Article 127 further defines *māl mutaqawwam* as having two possible meanings, first, "a thing the benefit of which is permissible by law to enjoy", and second, "property *(māl)* acquired." From the definitions, it can be deduced that *māl* includes anything that is legal, desirable, storable and already acquired.

Relating the concept of *māl* to the subject matter in a contract of exchange, article 363 of the *Majallah* provides that "a thing, which admits the consequences of a sale, is a thing sold, which exists, is capable of delivery, and is *māl mutaqawwim*".[6] The *Majallah* also adopts the Ḥanafīs' view in limiting the subject matter in a sale contract to corporeal matters *(a'yān)* only. For example, article 150 provides that the subject matter of sale *(maḥall al-bay')* is what is known as *al-mabī'*. *Al-mabī'* is defined in article 151 as " a thing fixed and individually perceptible *('ayn)* designated at the sale, and is the principal object of the sale, because the benefit is derived from the things *('ayn)* alone and the price is the means for the mutual exchange of property." *'Ayn* on the other hand is defined in article 159 as "a thing which is fixed and individually perceptible", giving the examples of a horse, a chair, a heap of corn which exists and is present and a sum of money.

The *jumhūr* comprising of the Mālikī, Shāfi'ī and Ḥanbalī schools took the second approach to the definition of *māl*, whereby they considered rights and usufructs as property as long as they are related to property and any assets of value.[7] According to the *jumhūr*'s view, in order to be *māl mutaqawwam*, two essential elements should be present. First, the usufruct of the thing should be legally permissible; and second, it is customarily treated as property or of proprietary value. Almost all contemporary scholars prefer the view of the *jumhūr* in the inclusion of rights and usufructs in the meaning of *māl*.[8] These rights and usufructs can be generally termed as *ḥuqūq māliyyah* and *manāfi' māliyyah*. Thus only a property right *(ḥaqq mālī)*, as opposed to a non-proprietary right *(ḥaqq ghayr mālī)* can be considered as *māl*. Similarly, only a financial usufruct *(manfa'ah māliyyah)* can be considered as *māl*, and not a non-financial usufruct *(manfa'ah ghayr māliyyah)*.

2.0 Ḥaqq and Some of Its Types

Ḥaqq literally means "an established matter that cannot be denied".[9] In *al-Miṣbāh al-Munīr*, *ḥaqq* is literally defined as "the truth, as opposed to falsehood *(al-bāṭil)*".[10] In

legal terminology, *ḥaqq* has been defined in many ways. The classical definitions tend to reflect more on the literal meaning of *ḥaqq* and concentrate on the different facets of its meaning. The definitions are also quite general and open-ended, rather than giving a comprehensive and exhaustive definition of the term. For example, Ibn 'Ābidīn defined *ḥaqq* as "the entitlement of a person to a thing" *(mā yastaḥiqquhu al-rajul).*[11] This definition describes *ḥaqq* as what a person is entitled to, thus, implying some kind of a "right".

The classical jurists also defined *ḥaqq* in the light of the two prevalent classifications of *ḥaqq* into the *ḥaqq* of Allah and the *ḥaqq* of people. In this line, al-Qarāfī[12] defined *ḥaqq* of Allah as His commands and prohibitions; and *ḥaqq* of people as their interests (*maṣāliḥ*). Al-Shāṭibī[13] also took a similar approach where he said that the *ḥaqq* of Allah on His servants are that of total act of worship and obedience, and not associating Him with other deities, whilst the *ḥaqq* of people has been described as whatever that can be construed as reflecting his worldly interests *(maṣāliḥ).*

Contemporary writers tend to have different approaches to their definition of *ḥaqq.* Some writers are biased towards interest *(maṣlaḥah)* in their definition. Others tend to define *ḥaqq* as an established or recognised matter *(shay' thābit).* The rest define *ḥaqq* in term of its exclusive effect on the object of right *(ikhtiṣāṣ).* However, the best approach is actually to combine all the three approaches together and come out with a more comprehensive definition of *ḥaqq.* Thus, *ḥaqq* may be defined as "whatever is established exclusively (in favour of the owner) and to which the law accords control and obligation to realize a specified interest."[14] This definition gives the owner of the *ḥaqq* an exclusive and legal right of control over the object of the right.

Ḥaqq has and can be classified in many categories and types. Kamali,[15] for example, highlights an interesting three-fold division of *ḥaqq* by the jurists; namely: permissible right *(al-ḥaqq al-mubāḥ);* obtainable right *(al-ḥaqq al-thābit);* and confirmed right *(al-ḥaqq al-mu'akkad).*[16] A permissible right gives the owner the right of either to act or not to act, since the law neither commands nor forbids him to do so. For example, is the individual's right to own property. Until the right is exercised, it is considered a liberty. A permissible right will only become a confirmed right after the actual acquisition of the property, for example, by way of purchase, gift or inheritance. Once a right is confirmed, it has the force of law and must be respected by others. An obtainable right is in between the permissible right and the confirmed right and occurs when a person can, but is yet to acquire a confirmed right through the exercise of his unilateral wish. For example, when a person is offered to buy merchandise, an obtainable right is created in his favor. If he accepts the offer by buying the merchandise, the obtainable right is now converted into a confirmed right that can be enforced by the law.

According to Kamali, both permissible and obtainable rights are weak because they cannot be sold, inherited, or made a basis of a claim for compensation *(damān).*[17] On the other hand, a confirmed right entitles the bearer an exclusive advantage that can be inherited and made a basis of a claim for compensation. Kamali however did not clarify whether a confirmed right can be sold for a consideration or not. From the explanation on the three categories of rights and in view of the definitions of right *(ḥaqq)* as given earlier, it seems that the first two categories are not actual 'legal rights' for transaction purposes but rather the pre-cursors to them.[18] The character of a legal right as an exclusive assignment *(ikhtiṣāṣ ḥājiz)* is mostly evident in the third category, i.e., the confirmed right. The element of exclusive assignment may also be present at a much lesser degree in the obtainable right, which is exercisable at the option of the owner of the right. The apparent existence of some of this element *(ikhtiṣāṣ ḥājiz)* in *al-ḥaqq al-thābit* explains the view of the Mālikīs who allowed the inheritance of obtainable rights, such as that of *khiyār al-qabūl* (option of acceptance).

Another way to classify *ḥaqq* is by consideration of its relation to property. In this sense, *ḥaqq* can be classified into first, financial or property right *(ḥaqq mālī)* and second, non-proprietary right *(ḥaqq ghayr mālī).* Some common examples given for *ḥaqq mālī* are *ḥaqq al-dayn* (debt right) and *ḥaq al-milkiyyah* (ownership right). On the other hand, examples of *ḥaqq ghayr mālī* are *ḥaqq al-hadānah* (custodial right) and *ḥaqq al-walī* (guardianship right). As has been pointed out in our discussion on *māl,* only the first category of *ḥaqq,* i.e., the one that relates to property can be classified as *māl.*

3.0 Property Right *(Ḥaqq Mālī)*

Originally, *ḥaqq* as an abstract concept does not enjoy the traditionally exclusive characters of *māl,* such as, physical appropriation and enjoyment. However, when the more abstract concept of *ḥaqq* is being tied up with the more overt concept of *māl,* a more perceivable and tangible concept of property right emerges. Thus, *ḥaqq mālī* or property right represents a kind of merger between the concept of *ḥaqq* and the concept of *māl.* The concept of property right, whilst being abstract, claims certain physical attributes of *māl,* such as, acquirability, transferability and exclusivity.

Ḥaqq mālī has been defined as a right that is related to property, and its object is property or something valued with property (i.e., of proprietary value).[19] The property right also regulates the financial relationship between one person and the other. It is distinct from the other rights because *ḥaqq mālī* is capable of being negotiated *(tanāzul)* and transferred *(intiqāl)* from one person to the other, and is also capable of being the subject matter of a transaction.[20]

Ḥaqq mālī can be further divided into two main types, namely:

a. al-ḥaqq al-mālī al-shakhsī (individual property right); and

b. al-ḥaqq al-mālī al-'aynī (corporeal property right).

Al-ḥaqq al-mālī al-shakhsī refers to the property right that the law accords to an individual over the other, whereby the object of such right is the performance of an act or obligation, or the abstinence from doing an act.[21] Thus, an individual property right presupposes the existence of three main elements, i.e., the owner of the right *(ṣāḥib al-ḥaqq),* the object of the right *(maḥall al-ḥaqq)* and the person obliged under the right *(man 'alayhi al-ḥaqq).*[22]

Al-ḥaqq al-mālī al-'aynī on the other hand refers to the property right that the law accords to an individual over a specific thing or property *(shay' mu'ayyan bi al-dhāt).*[23] Thus, the corporeal property right presupposes only two constituents, i.e., the owner of the right and the object of the right.[24] It should be noted that although both individual property right and corporeal property right have objects of the rights, each is referring to different things. The object of individual property right is the performance of or abstinence from certain acts, whilst, the object of corporeal proprietary right is the property or thing itself.

A good example of *al-ḥaqq al-mālī al-'aynī* is that of *ḥaqq al-milkiyyah* (ownership right). *Ḥaqq al-milkiyyah* has been defined as "an exclusive assignment" *(ikhtiṣāṣ ḥājiz),*[25] whereby, the owner of the property has an exclusive and complete control over the property that he owned. Here, the property right of the owner is accorded and recognized by the law, and this right is in relation to the object itself *('ayn),* which in this case is the property owned *(al-milkiyyah).* This property right is obviously transferable and can be a valid subject matter of a contract of exchange, although the subject matter is generally represented to be the property itself *('ayn),* not the property right or *ḥaqq milkiyyah.* For example, when A sells his house to B, the subject matter is represented as mainly the house (*'ayn*), although in real fact, A is selling also his ownership right (a form of *ḥaqq mālī)* to B.

Another example of *ḥaqq mālī* is the rights of a shareholder in a company, by virtue of his/her ownership of the shares. This property right in the shares is defined as a general/common proprietary right in the assets of the company including real properties, usufructs, rights, money and debts.[26] This is similar to the common proprietary right *(ḥaqq al-milkiyyah al-shā'i'ah)* to inherited property by a number of legal heirs. A careful analysis of *ḥaqq mālī* in shareholding shows that it is again a form of ownership right, though the property owned is more abstract, in the form of shares which represent the actual underlying property in the company. In this case, the sale and transfer of the shares will reflect the exchange of the underlying property. Therefore, all the necessary requirements for the transaction or exchange of the (underlying)

property involved in the common proprietary right should be fulfilled. For example, if the property in the company is in the form of goods: whether they are *ribawī* or non-*ribawī;* or whether the exchange is barter or not. If the property in the company is in the form of money, or even debts, the rules to avoid *ribā al-faḍl* and *ribā al-nasī'ah* in the exchange of money for money will apply. This explains the requirement for stock selection screening to have an appropriate liquid to illiquid assets ratio because liquid assets are regarded as money and if dominant, when traded, must follow the rules for the trading of money. The OIC Fiqh Academy for example, decided that as long as the assets represented by the shares are dominated by real assets, either corporeal or usufructs, as opposed to liquid assets (cash and debts), the shares can be traded;[27] impliedly without triggering the rules against *ribā* and sale of debt for another debt *(bay' al-kālī' bi al-kālī').*[28]

4.0 Tangible Property Right vs Intangible Property Right

An issue that may arise in relation to a corporeal property right *(ḥaqq mālī 'aynī)* is whether its object should always be a material and tangible thing *('ayn maddī),* or, could it also be an abstract and intangible thing *('ayn ma'nawī)* as well?

According to al-'Ibādī, an abstract right can still be considered as a kind of property right, because it is capable of being valued by property and is giving its owner a proprietary value *(qīmah māliyyyah)* capable of being valued by pecuniary or monetary measures.[29] 'Alī al-Khafīf also considered an abstract and intangible property right as a special form of ownership right, i.e., *ḥaqq mālī 'aynī.*[30] Al-Durayni further argues that the object of ownership *(maḥall al-milkiyyah)* may also include abstract rights, and is not necessarily limited to material and tangible things only.[31]

Thus, it can be concluded that *al-ḥaqq al-mālī al-'aynī* also includes abstract and intangible rights. In fact, in the decision by the OIC Fiqh Academy, intellectual property rights have been said to be property rights that are capable of being bought and sold for a consideration, despite of their intangible nature.[32]

The discussion on intangible rights opens the door to other analogous situations. For example, whether other abstract and intangible rights, such as the rights to license and concession enjoy the same position with intellectual property rights. An analysis of the decision according intellectual property right the status of *ḥaqq mālī 'aynī,* that is capable of being a subject mater of exchange contracts, indicates a number of factors that qualify intellectual property right to its current status. The factors for its qualification as *ḥaqq mālī 'aynī* can be summarized as:[33]

- Its nature as a property with special characteristics;
- It has proprietary value according to custom;

- It can be owned exclusively by its owner, i.e., the owner is free to benefit from the property and prevent others from trespassing or interfering with the property.

If we were to compare these factors with the right to license and concession, we may see that the right to license and concession also enjoys the same characteristics, though the degree of its value and exclusiveness may not be as decisive as that of intellectual property rights. The actual proprietary value of a right to license and concession may not be conclusively ascertainable at the initial stages because it depends much on the actual success of the work expected from the license and concession right. The owner of the license and concession may also have some degree of control over the work to be done under the license and concession. But, some degree of uncertainty in the ability of the license and concession owner to deliver the actual work according to description and value of the right may persist throughout the contract. This makes the right to license and concession quite different from intellectual property rights. The uncertainty involved in this kind of rights may make it more difficult to categorize it as *ḥaqq mālī 'aynī*, at par with the intellectual property rights.

5.0 Corporeal Property Right vs Property Right in the Obligation of the Debtor

A more controversial issue pertaining to *ḥaqq mālī* is whether certain abstract property rights *(al-ḥaqq al-mālī al-ma'nawī)* should be regarded as dependent on the corporeal matter *('ayn)*, i.e., a kind of choses in possession; or should it be regarded as a kind of proprietary right established in the liability *(al-ḥaqq al-thābit fī al-dhimmah)*, i.e., a kind of choses in action?

If the abstract proprietary right is dependent upon the corporeal matter, it is arguably an independent asset *('ayn)* and thus, the rule pertaining to the avoidance of *ribā* in the exchange of debts and monies, i.e., that both counter values must be equivalent and the delivery be prompt, may not apply. On the other hand, if the abstract proprietary right is regarded as established in the liability *(fī al-dhimmah)*, it is arguably a form of debt *(dayn)*, hence, the rule of equivalence and promptness in the exchange of debts and monies may apply. Similarly, if the right is considered as a debt, the rule against *bay' al-kālī' bi al-kālī'* should also be observed.

It is thought that an abstract property right may still be attached to a corporeal matter, such as that of intellectual properties and products. Yet, some other abstract proprietary rights may not be clearly attached to a corporeal matter, and are arguably more in the nature of rights *fī al-dhimmah*, such as the rights to future receivables in a contract of sale with deferred payment *(bay' bithaman ājil)*. The issue becomes pertinent in considering the legality of the sale of the right to receivables from sales contracts at a discounting, as it has been practiced, for example in Malaysia, for the creation of some of its Islamic bonds.

In relation to the rights to future receivables arising from a sale contract, there are two main lines of opinion by contemporary scholars. A study of these two lines of opinions shows that the main issue is as to whether the rights are *'aynī* (corporeal) or *fī al-dhimmah* (in the liability). The first view regards the right to receivables as *ḥaqq mālī fī al-dhimmah*, thus, more of a debt *(dayn)* in its nature. This view is the mainstream view, given the support that it receives from classical literature in this regard.

In the classical literature, the issue of rights to receivables as they are perceived in modern times had been discussed in some fairly analogous concepts and situations. One of the analogous concepts discussed by the classical scholars is the concept of an established debt in the liability of the person *(al-dayn al-sābiq al-taqarrur fī al-dhimmah).* Some jurists also use the term *dayn mustaqirr* to represent a similar concept. The normal treatment of this concept is that it is a form of debt *(dayn)* as the name suggests. The debt is not specifically described as *ḥaqq mālī*, though it can be argued to be one form of it. The description of the concept as *dayn* clearly shows the tendency to treat it as a liability *(fī al-dhimmah)* and not an independent corporeal property right in itself *(ḥaqq mālī 'aynī).*

Being a debt or analogous to a debt, implies the treatment of this property right as similar to that of the treatment of money, the exchange of which, is subject to the rules pertaining to avoidance of *ribā al-faḍl* and *ribā al-nasī'ah* in the exchange of *ribawī* items. According to the rule, the right in debt cannot in general be exchanged for another debt, deferred (*bay' al-kālī' bi al-kālī'* or alternatively termed as *bay' al-dayn bi al-dayn*). Thus, in a contract, say to sell a right to receivables from sales, the rules for the sale of debts with money will apply - i.e. the exchange has to be cash/ spot, and if made in the same currency - the exchange should be at par. If the transaction is deferred, this may amount to *bay' al-kālī' bi al-kālī'* which will also be tantamount to *ribā al-nasī'ah.* The amount should also be the same if the purchase price is in the same currency with the original debts in order to avoid the occurrence of *ribā al-faḍl.* The view that the right to receivables in sale contract is *dayn* makes the securitization of the right to receivables almost impossible. The prevalence of this view also explains the objections that some of the Malaysian Islamic bonds receive from the other quarters of the Muslim world.

Another example of an analogous situation where *ḥaqq mālī fī al-dhimmah* in sale contract becomes an issue is what the Ḥanbalīs describe as *bay' al-mawṣūf fī al-dhimmah*, i.e., purchase of an 'abstractly defined good' in the obligation of the seller. For example, the Ḥanbalīs treat manufacture sale *(bay' al-istiṣnā')* as a form of *bay' al-mawṣūf fī al-dhimmah*, with a necessary condition that the buyer must pay in full at once, and is bound by the contract as long as the final product agrees with the contractual description.[34] The condition of spot full payment is essentially to avoid the rule against *bay' al-kālī' bi al-kālī'*. However, due to the practical difficulty in imposing full payment at the time of a manufacture contract, the Ḥanbalīs would alternatively

allow for partial payments or even fully deferred payment using an alternative legal description of the contract. In this case, the contract is not treated as *bay' al-mawṣūf fī al-dhimmah*, but rather, a contract of sale of the raw materials *('ayn)*, actually delivered, with a condition *(sharṭ)* that they be constructed into a building, the payment of which may be deferred and made subject to the final product satisfying the contractual description.[35] The latter contract, thus, amounts to a sale of *'ayn* for *dayn* which is allowed, instead of a sale of *dayn* for *dayn* which is not allowed.

The second line of opinion on the issue of whether the right to receivables in sales contract should be treated as *ḥaqq mālī 'aynī* or *ḥaqq mālī fī al-dhimmah* is that, the right is considered as an independent property right *(ḥaqq mālī)*.[36] The argument given is, since the right to receivable in sale contract is attached to real corporeal asset *('ayn)*, i.e., the goods that form the subject matter of the sale contract, it is not a debt *(dayn)*. The right to receivables seen in this light is therefore an independent form of *ḥaqq mālī* and can be traded like any other property rights.[37] An analysis of the view suggests that the exchange of these types of rights is considered as the exchange of *'ayn* for *'ayn* or *'ayn* for *dayn*, and thus, is not objectionable.

In a similar line, the Ḥanafīs have allowed *bay' al-istiṣnā'*, defining it as a sale of an *'ayn* though one that does not exist yet.[38] Here, the Hanafis treat the property which is yet to be constructed as an *'ayn*, not *dayn* nor *fī al-dhimmah*. Hence, a building to be constructed or partially under construction is already treated as an *'ayn* - a corporeal matter – though in reality it may only be an expectation of a corporeal property to exist in the future. This expectation may be described as a right to a future corporeal property, thus, a corporeal proprietary right *(ḥaqq mālī 'aynī)*. Since this proprietary right is obviously attached to a corporeal property *('ayn)* - though one that is to exist in the future - it is corporeal in nature *('aynī)*. The combination of these characteristics justifies the entity to be that of *ḥaqq mālī 'aynī* which is different from *ḥaqq mālī fī al-dhimmah* because the former is categorically a corporeal matter *('ayn)* and can be exchanged deferred *(dayn)* without triggering the rule against the sale of debt for debt.

From the preceding arguments, it seems that the division between the concepts of *'ayn* and *dayn* have not been decisively drawn. Certain situations that may look like a liability *(fī dhimmah)* can still be argued to be an asset *('ayn)*. These may be regarded as cross-border cases that need reviewing. Other rights in the category may include the right to receivables arising from a leasing contract, as opposed to sales contract. Such rights have been fairly recently approved to be assets *('ayn)*, thus, allowing the securitization of *ijārah* based products. The main reason for categorizing the receivables from leasing contracts as *'ayn*, is the argument that the rental receivables are backed by the real assets that are being leased. Yet, the real difference between leasing-based receivable rights and sale-based receivable rights has to be detailed and clarified to avoid confusion.

6.0 Conclusion

After examining the definition of property and property rights in Islamic law of contract, a number of conclusions can be made.

First, property or *māl* is not only limited to real assets *(a'yān)* but can be extended to usufructs *(manāfi')* and rights *(ḥuqūq)* as well.

Second, when the concept of *māl* is extended to rights, the rights should be property related - *ḥaqq mālī.*

Third, some forms of *ḥaqq mālī* is similar to *māl* and can be transferred and traded as *māl* can.

Fourth, *ḥaqq mālī* is not limited to the attachment to material and tangible assets only *(māl maddī),* but is also extendable to intangible and abstract assets *(māl ma'nawī),* such as intellectual property rights.

Fifth, the inclusion of other new types of intangible and abstract rights into the concept of *ḥaqq mālī* needs further scrutiny to ensure ascertainability of proprietary value and exclusive control over the asset and results, as well as the avoidance of *gharar.*

Sixth, certain property rights may be biased towards liability and debt *(fī dhimmah)* and should be treated with caution to avoid the prohibition of *bay' al-kālī' bi al-kālī',* and the occurrence of *ribā.*

Seventh, certain practices in the trading of property rights should be revised to ensure compliance with the rules on *bay' al-kālī' bi al-kālī'.*

Eighth, the concept of *'ayn* and *dayn* should be revisited to determine some cross-border cases, like the right to receivables from leasing contracts as opposed to sale contracts, as well as the nature of the obligation arising in the manufacture or *istiṣnā'* contracts.

No conclusive answer can be provided to some of the issues raised in the article and it is hoped that further research can be conducted to find solutions to them.

End Notes

* This article is a revised version of a paper with the same title presented at the Fifth Harvard University Forum on Islamic Finance, 6-7 April 2002, held at the Science Center, Harvard University, Cambridge, Massachusetts, USA.

1. Ibn Manẓūr Jamaluddin al-Ansari (d. 711H), *Lisān al-'Arab,* 14/158, Dār al-Miṣriyyah li al-Ta'līf wa al-Tarjamah; and Majd al-Dīn al-Firuzābādi (1987), *Al-Qāmus al-Muḥīt,* Beirut: Mu'assasah al-Risālah, 2nd ed., p. 1368. It is interesting to note that the definition of *māl* here is directly tied up with ownership.

2. Ibn 'Ābidīn (1992), *Ḥāshiah Radd al-Mukhtār 'alā al-Durr al-Mukhtār*, 4/501, Beirut: Dār al-Fikr.
3. *Ibid.*, 5/52; and 2/257 respectively. For other Ḥanafī definitions that restricted *māl* to corporeal matters, see Shams al-Dīn al-Sarakhsī (1989), *Al-Mabsūṭ*, 11/ 78-79, Beirut: Dār al-Fikr; and 'Ala' al-Dīn al-Haskafī (1997), *Al-Durr al-Muntaqā*, as quoted by Mohd Suhaimi Yahya, *Al-Ḥuqūq al-Muqarrarah li al-Fard fī al-Ibtikār*, (unpublished Masters thesis), Cairo University.
4. *Ibid.*, 4/501.
5. *Ibid.*, 5/51.
6. The article further explains that the sale of non-existents, non-deliverables and non-valuable items (not *māl mutaqawwim)* is void.
7. See generally, 'Abd al-Karīm Zaydān (1989), *Al-Madkhal li Dirāsah al-Sharī'ah al Islāmiyyah*, Beirut: Mu'assasah al-Risālah; and 'Alī al-Khafīf (1996), *Al-Milkiyyah fī al-Sharī'ah al-Islāmiyyah*, Cairo: Dār al-Fikr al-Arabī, p. 184-186.
8. There is a long list of such scholars, for example, Al-Durayni, *Ḥaqq al-Ibtikār*, p. 22-39; Al-Zuḥaylī, *Al-Fiqh al-Islāmī wa Adillatuh*, vol. 4, p. 42; and Aḥmad Yūsuf, *Al-Māl fī al-Sharī'ah al Islāmiyyah*, p. 20-21.
9. Nazih Ḥammād, *Mu'jam al-Muṣṭalaḥāt al-Iqtiṣādiyyah fī Lughah al-Fuqahā'*, p. 121.
10. Aḥmad b. Muḥammad b. 'Alī al-Fayyūmī (1987), *Al-Miṣbāḥ al-Munīr,* Beirut: Maktabah Lubnan.
11. Hashim Kamali, "An Analysis of Right *(ḥaqq)* in Islamic Law", *The American Journal of Islamic Social Sciences*, vol. 10, no. 3, Fall 1993, p. 343.
12. *Al-Furūq*, Vol. 1, p. 140.
13. A-Shāṭibī, *Al-Muwafaqat*, vol. 2, p. 315, 317 and 375.
14. This definition has been suggested by Hani Sulayman, *Isqāt al-Ḥuqūq wa Tawrīthuhā fī al-Sharī'ah al-Islāmiyyah*, p. 13.
15. *Ibid.*, p. 350-351.
16. Kamali gives a different translation to the three divisions of rights, i.e., permissive right *(al-ḥaqq al-mūbaḥ),* imperfect right *(al-ḥaqq al-thābit)* and perfect right *(al-ḥaqq al-mu'akkad).*
17. Kamali noted though that the Mālikīs hold that obtainable rights are inheritable.
18. Yet, it is acknowledged that the permissible right and obtainable right may still be relevant as rights in the context of a discussion of general rights, such as that of human rights.
19. 'Alī al-Khafīf, *al-Milkiyyah fī al-Sharī'ah al-Islāmiyyah*, vol. 8, p. 11; and Wahbah al-Zuḥaylī, *al-Fiqh al-Islāmī wa Adillatuh*, vol. 4, p. 18.
20 *Ibid.*
21 'Alī al-Khafīf, *al-Milkiyyah fī al-Sharī'ah al-Islāmiyyah*, vol. 11, p. 12; and al-Zuḥaylī, *al-Fiqh al-Islāmī wa Adillatuh*, vol. 4, p. 19.

22 *Ibid.*

23 *Ibid.*

24 *Ibid.*

25. See for example, Muṣṭafā al-Zarqā', *Al-Madkhal al-Fiqhī*, vol. 1, p. 220; Wahbah al-al-Zuhaylī (1989), *Al-Fiqh al-Islāmī wa Adilatuhu*, Syria: Dār al-Fikr, vol. 5, p. 515.

26. Hussain Hamid Hassan, "Mukawwināt al-ashum wa atharuha 'ala tadawuliha wa dawābiṭ al-qurūḍ wa al-fawā'id fī mu'āmalatihā," in *Al-Baraka Symposium for Islamic Economy*, 25-27 June 2001, Kuala Lumpur, p.6.

27. Decision 5, fourth session, (1988), *Fiqh Academy Journal*, 3: 2161, 2163.

28. The concept of *bay' al-kālī' bi al-kālī'* and its prohibition is taken from the *ḥadīth* narrated on the authority of Ibn 'Umar, indicating the Prophet's prohibition of *bay' al-kālī' bi al-kālī'*; as quoted in Nāzih Ḥammād (1986), *Bay' al-Kālī' bi al-Kālī' fī al-Fiqh al-Islāmī*, Markaz Abḥāth al-Iqtiṣād al-Islāmi, Jāmi'ah al-Malik 'Abd al-Azīz, Jeddah, p. 9. *Bay' al-kālī' bi al-kālī'* has been defined to be the sale of a delayed payment for a delayed payment (*bay' al-nasī'ah bi al-nasī'ah*), or a deferred debt for another deferred debt. See Ḥammād, *ibid.*, p. 13.

29. 'Abd al-Salām Dāwūd Al-'Ibādī, *Baḥth al-Fiqh al-Islāmī wa al-Ḥuqūq al Ma'nawiyyah*, p. 1470.

30. 'Alī al-Khafīf, *al-Milkiyyah fī al-Sharī'ah al-Islāmiyyah*, p. 12.

31. Al-Durayni, *Ḥaqq al-ibtikār*, pp. 42-44.

32. Decision 5, fifth session, (1988), *Fiqh Academy Journal*, 3: 2571.

33. The summary is adapted from the discussion by Aḥmad Fahmī Abū Sunnah on the matter, in *Baḥth Naẓariyyah al-Ḥaqq*, p. 184.

34. See the description of Ḥanbalīs' views on *istiṣnā'* contracts by Vogel and Hayes (1998), *Islamic Law and Finance: Religion, Risk and Return*, Kluwer Law International, Netherlands, at p. 121.

35. *Ibid.*

36. This is generally the view of the Syariah Advisory Council of the Malàysian Securities Commission. It should be noted however, that they normally refer to property right in general term only, i.e., as *ḥaqq mālī*. When the term *ḥaqq mālī* is used, it is meant to be a right to property and therefore is *māl*, and no clear cut differentiation has been made between the right attached to *'ayn* and a right in liability *(fī dhimmah)*.

37. See in general, *Resolution of the Securities Commission Syariah Advisory Council*, (2002), Kuala Lumpur, Malaysia.

38. See the description of Ḥanafīs' views on *istiṣnā'* contracts by Vogel and Hayes (1998), *Islamic Law and Finance: Religion, Risk and Return*, Kluwer Law International, Netherlands, pp. 119-121.