

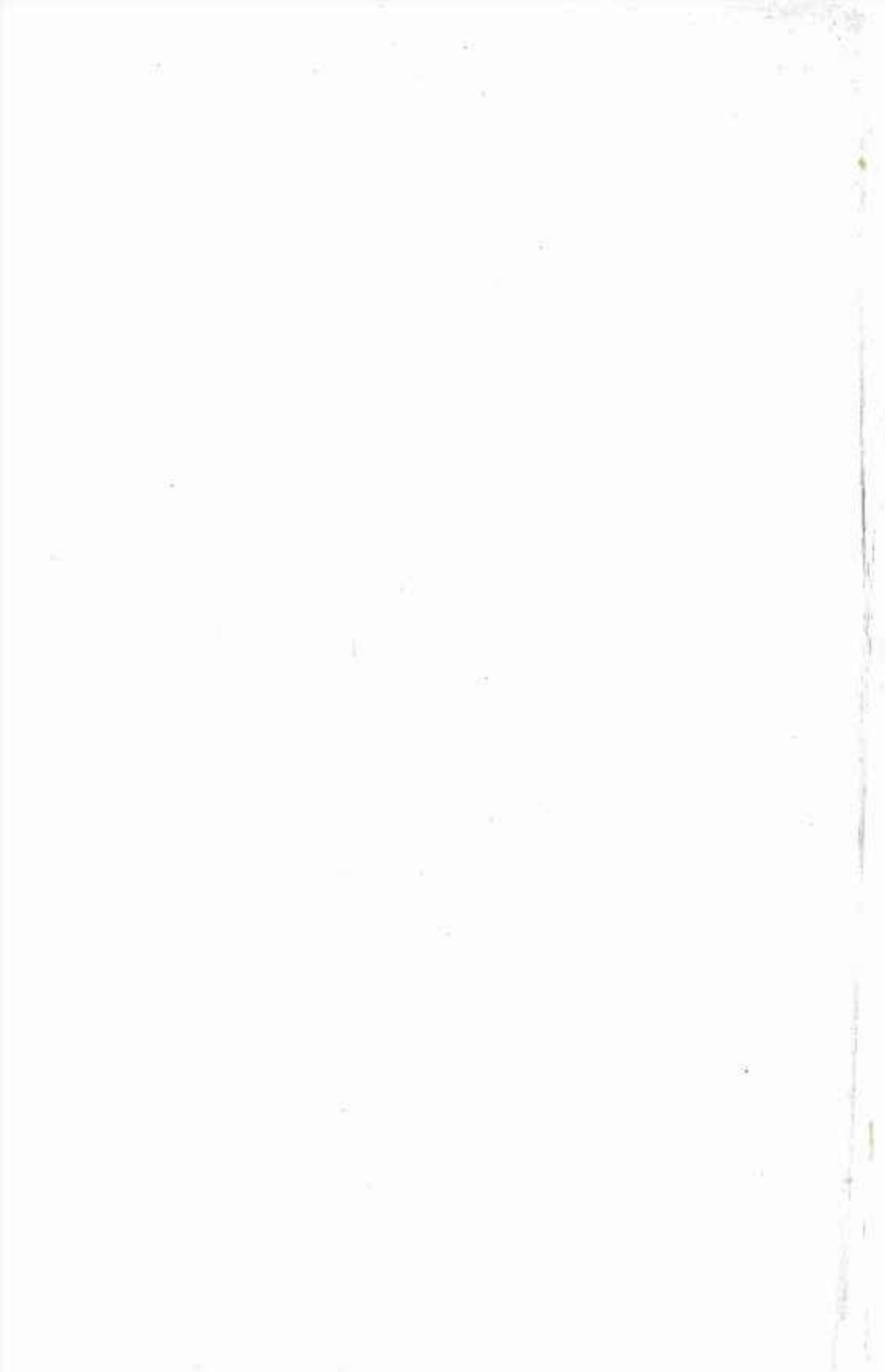
Muḥammad Bāqir aṣ-Ṣadr

# IQTISĀDUNĀ

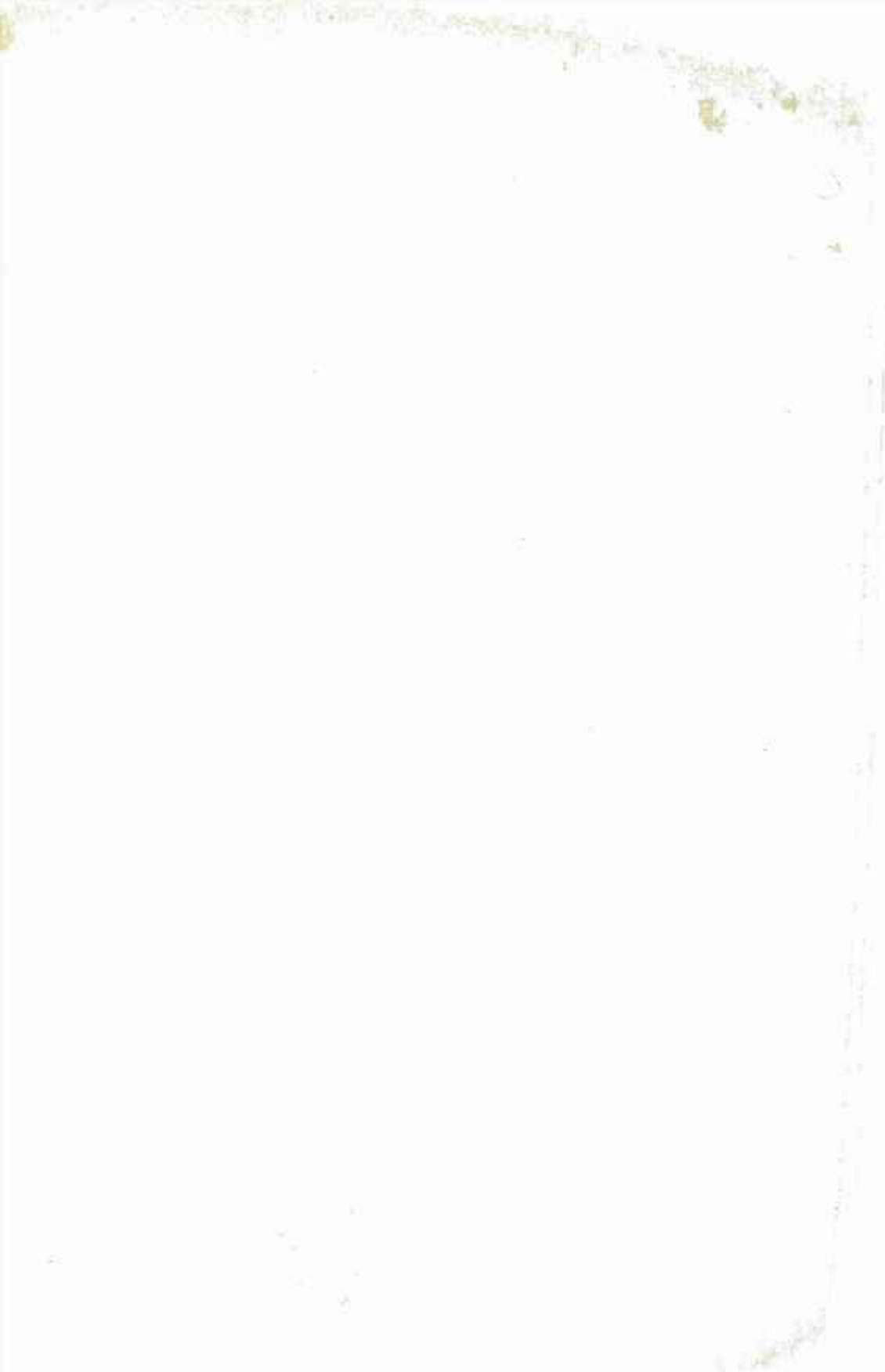
## Our Economics

• Volume Two - Part One



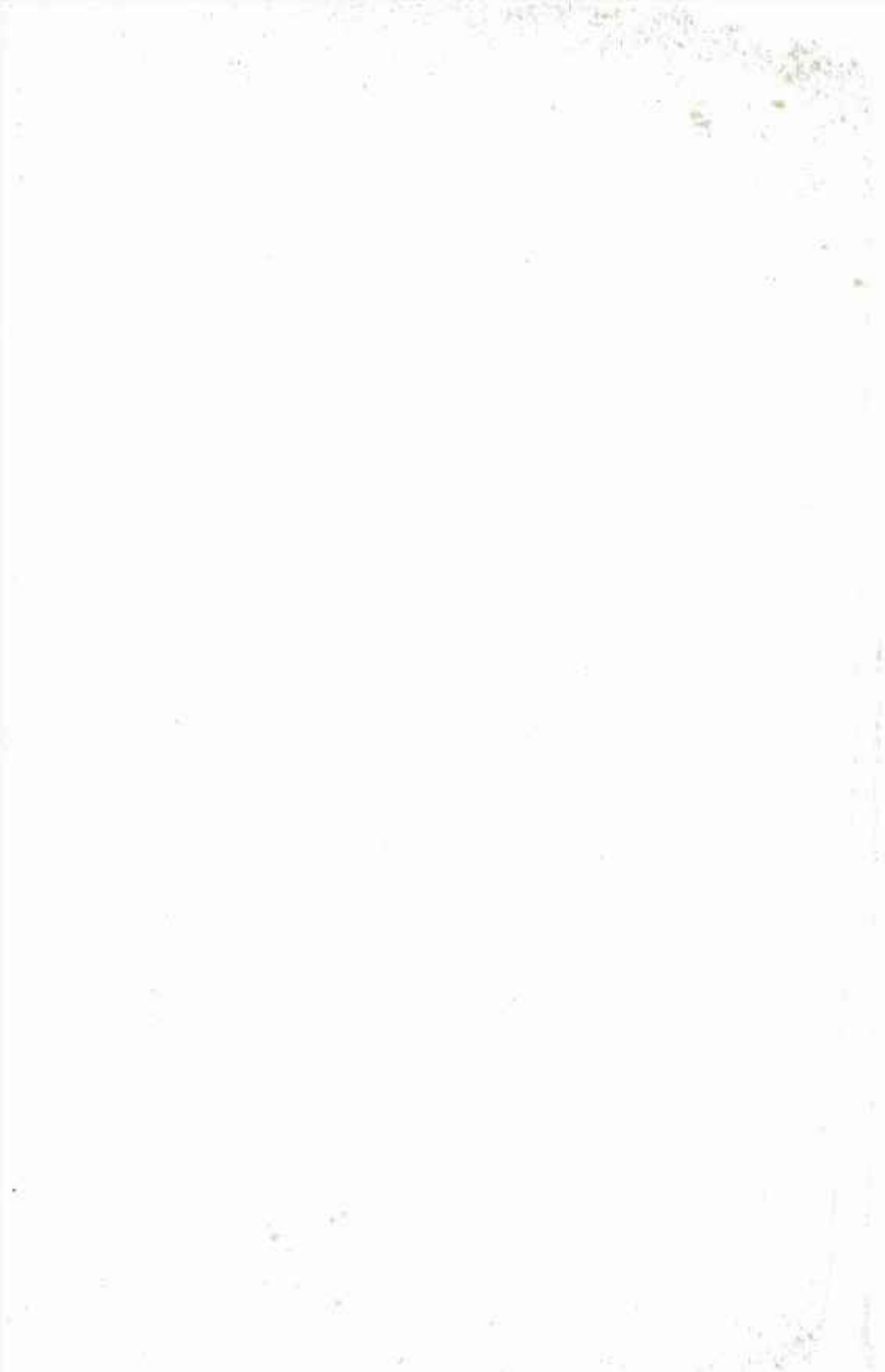












# İQTİSÂDUNÂ

OUR ECONOMICS

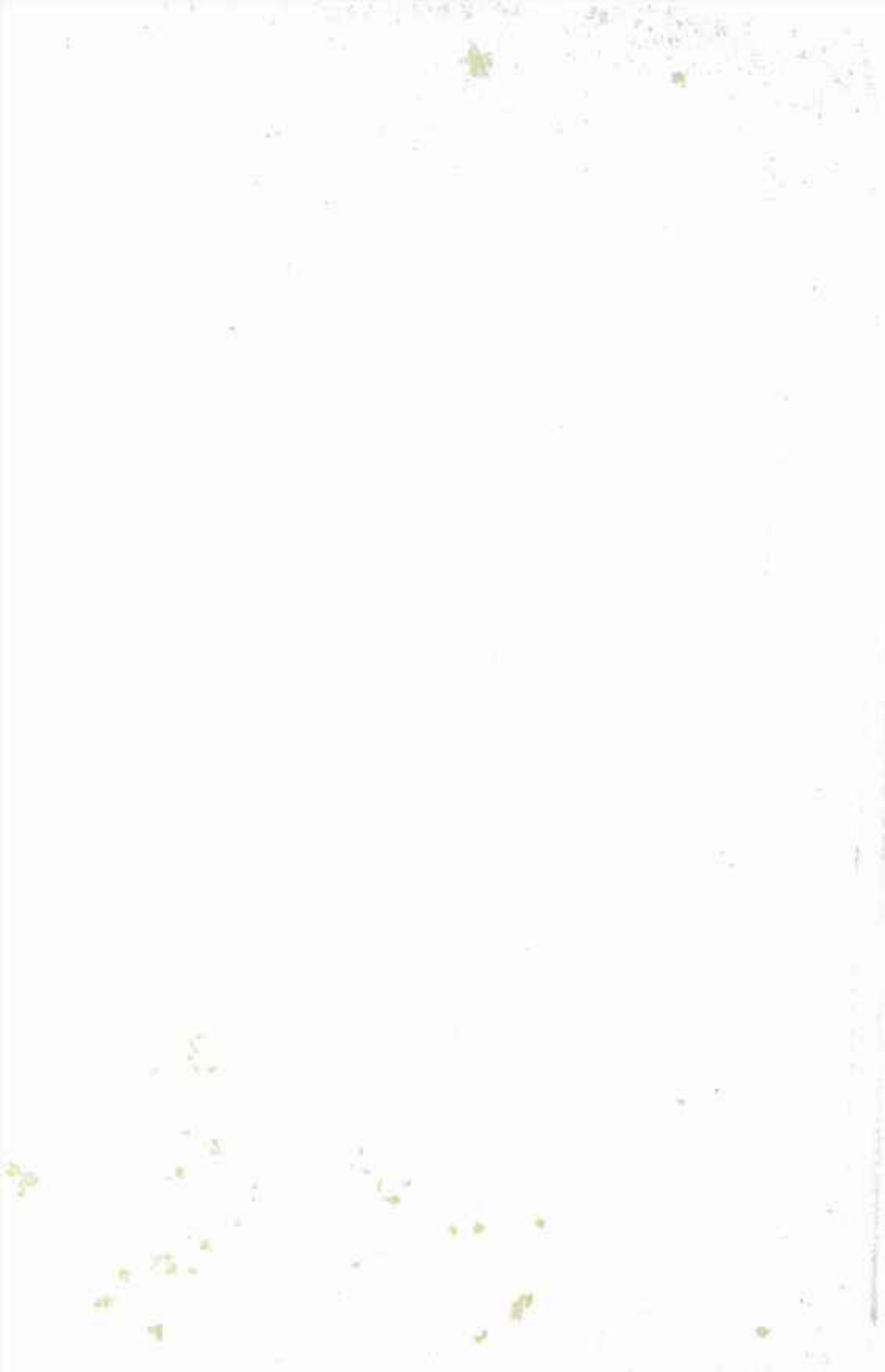
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# اِقْتِصَادُنا

## OUR ECONOMICS

DISCOVERY ATTEMPT ON  
ECONOMIC DOCTRINE IN  
ISLAM

**Muhammad Bāqir aṣ-Ṣadr**

**Volume Two — Part One**

W O F I S  
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*In the Name of Allāh,  
The All-compassionate, The All-merciful*

*Praise belongs to Allāh, the Lord of all being;  
the All-compassionate, the All-merciful;  
the Master of the Day of Judgement;  
Thee only we serve, and to Thee alone we pray  
for succour;*

*Guide us in the straight path;  
the path of those whom Thou hast blessed,  
not of those against whom Thou art wrathful,  
nor of those who are astray.*

\* \* \* \* \*

*O' Allāh! send your blessings to the head of  
your messengers and the last of  
your prophets,  
Muhammad and his pure and cleansed progeny.  
Also send your blessings to all your  
prophets and envoys.*



بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ  
الْحَمْدُ لِلَّهِ رَبِّ الْعَالَمِينَ الرَّحْمَنِ الرَّحِيمِ  
مَالِكِ يَوْمِ الدِّينِ إِيَّاكَ تَعْبُدُ وَإِلَيْكَ تَسْتَعِينُ  
إِهْدِنَا الصِّرَاطَ الْمُسْتَقِيمَ صِرَاطَ الَّذِينَ  
أَنْعَمْتَ عَلَيْهِمْ غَيْرِ الْمَغْضُوبِ عَلَيْهِمْ  
وَلَا الضَّالِّينَ

اللَّهُمَّ صَلِّ عَلَى  
سَيِّدِ رُسُلِكَ وَخَاتَمِ أَنْبِيَائِكَ  
مُحَمَّدٍ وَآلِهِ الطَّاهِرِينَ الطَّاهِرِينَ  
وَصَلِّ عَلَى جَمِيعِ الْأَنْبِيَاءِ وَالرُّسُلِ



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### CHAPTER THREE

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# TRANSLITERATION

<i>Symbol</i>	<i>Transliteration</i>	<i>Symbol</i>	<i>Transliteration</i>
ا	'	ل	l
ب	b	م	m
ت	t	ن	n
ث	th	و	w
ج	j	ه	h
ح	ḥ	ي	y
خ	kh	ة	ah
د	d		
ذ	dh		
ر	r		
ز	z		
س	s		
ش	sh		
ص	ṣ		
ض	ḍ		
ط	ṭ		
ظ	ẓ		
ع	'		
غ	gh		
ف	f		
ق	q		
ك	k		

## Long Vowels

ا	ā
و	ū
ي	ī

## Short Vowels

ا	a
و	u
ي	i





## تصدير

١- العلامة الكبير الحجة ، والفقير المجدد ، والمفكر الاسلامي العبقري السيد محمد باقر الصدر (١٣٥٣ / ١٩٣٥ - ١٤٠٠ / ١٩٨٠) نغمته الله برحمته ، بآثاره التي خلفها للمسلمين عامتهم ومفكريهم ، وبحياته الحافلة بجهوده وجهاده التي قصرتها الأيدي الأثيمة - بكل أسف - لأشهر وأعرف ، وأوسع جانبا ، وأعمق دراسة ، من أن نؤرخه في كلمة قصيرة مقتضبة نقدم بها الترجمة الانجليزية لأثره الشهير (اقتصادنا) .

٢- سبق وأن عرفنا قراءنا الكرام بأهم آثار السيد الصدر في فاتحة الترجمة الانجليزية لكتاب (المرسل . الرسول . الرسالة) واليوم اذ ننشر - بعون الله وتسديده - الترجمة الانجليزية (لاقتصادنا) نجد أنفسنا مضطرين الى أن نلفت انتباه قرائنا الكرام الى ما جاء في مقدمة (اقتصادنا) نفسه ، حيث عرض السيد الصدر في نهايتها نقاطا ستأري من الضروري أن نلاحظ ، وأن نلحظ بعناية تامة .

ولا نزيد على ما قاله المؤلف نفسه رضي الله عنه ، شيئا سوى أن هذه النقاط الست التي وضعها المؤلف أمام عينه حينما ألف الكتاب والتي أكد على قرائه أن يضعوها أمام أعينهم حينما يقرأون الكتاب ويدرسون بحوثه كانت نفس هذه النقاط

مائلة أمام أعيننا حينما أقدمنا على نشر الترجمة الانجليزية للكتاب، ونؤكد على الاهتمام والعناية بها بمثل ما أكد به المؤلف، رحمه الله.

٣- ان الترجمة الانجليزية لكتاب (اقتصادنا) قامت بها مؤسسة (پير محمد ابراهيم) الباكستانية، باقتراح مناه. وبعد أن تمت الترجمة أحالتها البناء ولم يكن عندنا، بادئ الأمر من بواعث الثقة والاطمئنان الى صحة الترجمة وسلامة النقل ما يدعونا الى أن تسارع الى نشرها، فبقيت نسخة الترجمة عندنا الى أن عثرنا على من عهدنا اليه مراجعتها وتلافي ما يراه من نقص فيها، وبعد ذلك عثرنا على نقائص، ولم يكن ذلك عن طريق المراجعة المستوعبة، وكان من حسن الحظ أن وجدنا من يفقه اللغتين العربية والانجليزية، وله اختصاص بالدراسات الاقتصادية فقرأ الترجمة الانجليزية وقارنها بالنص العربي، وتلافي ما أمكنه تلافيه من نقائص وأخطاء كل ذلك حسب اجتهاده ورأيه.

وهنا وجدنا أنفسنا قد وصلنا إلى مرحلة كانت نهاية الشوط لما نملكه من امكانيات وما نقدر عليه من جهد وسعي، وبذلك يصح منا أن نسعى، بعون الله، إلى نشر الترجمة ولا يصح أن يوصف عملنا بأنه مجازفة كان التريث خيرا منه. ومع كل هذا فإننا نفتتح صدورنا لأي نقد وملاحظة يردنا، ونرحب بأي اقتراح يعود الى تحسين عملنا، ونأمل أن نتلافى ما نجده من نواقص وأخطاء فيما نستقبله، بتوفيق الله سبحانه.

ونرجو الله سبحانه أن يجعل في الترجمة الانجليزية لهذا الكتاب كل خير وبركة، وأن يعم به النفع، كما صنع بأصله العربي وأن يجعل عملنا خالصا لوجهه الكريم، أنه نعم المولى ونعم النصير.

المؤسسة العالمية للخدمات الاسلامية  
(لجنة التأليف والترجمة والنشر)

طهران — ايران

١٤٠١/١١/٢٧

١٩٨١/٩/٢٦

## PUBLISHER'S FOREWORD

1. The great Islamic scholar, regenerating jurist and thinker of genius, al-'Allāmah as-Sayyid Muḥammad Bâqir aṣ-Ṣadr (1353/1935 – 1400/1980) may Allāh encompass him with His Mercy, because of the works which he bequeathed to the Muslims, both the ordinary and the educated among them, and because of his life, which was filled with effort and striving, and which was cut short at the hands of criminals, he is too famous and well-known for us to give his biography in this brief preface which we are giving to the English translation of his celebrated book, *Iqtisādunā*, the Islamic System of Economics.

2. In the preface to the English translation of *The Revealer*, *The Messenger*, *The Message* we have introduced the works of as-Sayyid aṣ-Ṣadr to our respected readers. And now that we are publishing the English translation of *Iqtisādunā* we find ourselves compelled to turn the attention of our readers to the preface of *Iqtisādunā* itself, where as-Sayyid aṣ-Ṣadr has mentioned six points which he deemed necessary for the readers to observe, and that also carefully.

We do not wish to say anything more than what the author has mentioned himself, except that these six points, which he introduced while writing the book and emphasized to his readers to keep in their mind while reading the book and studying its

## PUBLISHER'S FOREWORD

discussions, the same six points were in our mind also when we decided to publish its English translation. And we emphasize, alongwith the author, the careful observation of these points.

3. The English translation of *Iqtisādunā* was prepared by the Peermahomed Ebrahim Trust of Pakistan at our instigation. After completing the translation it was submitted to us, but at that time we did not have the means to be sure and satisfied about its authenticity. So it remained with us until we found the person who could check and make up the defects in the translation. Then again just by the way we were confronted with some defects, and fortunately we found a person who was familiar with both the Arabic and English languages with qualifications in economical studies. He compared the translation with Arabic version and corrected, according to his own views, as much as he could.

At this point we reached the utmost stage of our abilities and facilities for correction of the translation, and so we deemed it right to publish it, by the help of Allāh; and thus it cannot be said that our efforts were reckless and it would have been better to delay the publication. After all these efforts we shall gladly accept any criticism or observation, and welcome any suggestion to improve our work. We hope to correct the defects and mistakes with which we may be confronted in future.

We ask Allāh, the Glorified, to bless the English translation of this book and to generalize its benefit as He did for the original Arabic version. And may He accept our work sincerely for His Holy Self. He is the best Master and the best Helper.

WORLD ORGANIZATION FOR ISLAMIC SERVICES  
(Board of Writing, Translation and Publication)

27/11/1401

26/9/1981

Tehran — Iran.



## INTRODUCTION TO THE SECOND VOLUME

This book is the third in the series which we have begun with the book *Falsafatunā* (Our Philosophy) and forms the second part of the book *Iqtisadunā* (Our Economy). It comprises of an attempt to discover Islamic Economic Doctrine in the light of the enactments of the laws of Islam and their implications, connected with the economic fields.

For this reason the attempt will explain two processes one of which is established on the other.

First: The process of collecting of a number of the enactments of the sacred laws and their implication which can throw light on the process of discovering of the doctrine.

Second: The process of giving a unified theoretical interpretation of these enactments and their implications in order to bring out their doctrinal contents of Islamic economics.

While the present book bears the burden of the second process, the first process is chosen to play its function in the selection of those laws and legal enactments, which may help in the success of the second process, but without laying down the condition that the laws chosen thereby be such as are adopted personally from juristic point of view. So the precepts which this book presents are not all of them such as I juristically

## INTRODUCTION

adopt, rather there are precepts which I do not adopt in despite of their share in the important discussions and the great attention they have received in the addendum of this book.

It is, therefore incumbent upon me to make this point quite clear and to mention the sources from which I have drawn precepts concerning lands, mining, water and such like things, lest when I make mention of or lay emphasis on any of the laws given in the book, it may be taken to mean that I hold them and/or I adopt them juristically. I leave off giving details in respect of this point as also the reasons which made me taking that position in the book concerning the first process, in the first chapter of this book.

In this connection mention may be made of the three following sources as the basis of all the laws and legal enactments presented in this book.

i) The juristic opinions of our pious scholars. The great portion of the laws whereby light is sought by this book in the process of discovery are mostly drawn from this source inasmuch as almost everyone of these laws does not miss one or more jurist who adopt and give formal legal opinion concerning them.

ii) The juristic opinions which the writer adopt and in whose validity the writer believes.

iii) Juristic view points, admissible on the technical side in the field of investigations though we may not adopt the conclusions arising therefrom juristically for reasons which sometimes prevent the investigator from adopting the conclusion arising from his investigation or from the probability of the existence of intellectual evidences.

There are technical terms which I have employed in this book. I have defined these terms on page 59 (vol. i, pt. 1) which must be observed and in the light of them, the discussions in respect of private-property 'state property', 'public property'

## INTRODUCTION

and public permissibility may be understood.

The book is confined as you will see, in conformity with its plan and method to the exposition of the laws which are connected with process of the discovery of the economic doctrine and which enter into the building up of its superstructure.

It is for this reason that a number of the laws of property, their transcription and their development have not been expounded in the book as not required for the process of the discovery. On account of this it becomes incumbent upon us to expound them by studying and explaining, with God's permitting, at the future occasion.

Likewise a number of the juridic opinions and points of views, which we present in the discussions of the book, are not expounded in the book itself in accordance with the scientific style of discussion — although there being the need of it — which is our desire for the easy grasp of the discussions, and the uniformity of their style and manner. For this reason, we have chosen to study these opinions juridically, in scientific form in the addendum we have appended to the book. Therein we have employed the styles and method of interpretation special to the juristic research; this full comprehension of which in all its bearings is not possible for anyone except the specialists in the science of jurisprudence.

In the end, I hope this modest attempt which has been made in the book will set a going numerous investigations on a wider scale and lead to achievement of greater success in the discovery of the economic doctrine of Islam and to the seeking of inspiration from the sacred laws of Islam, their great secrets in all the fields of life.

Muhammad Bâqir aş-Şadr

an-Najaf al-Ashraf  
IRAQ





# Volume Two

## Part One



## **CHAPTER ONE**

### **OPERATIONAL DISCOVERY OF ECONOMIC DOCTRINE**



## ECONOMIC DOCTRINE AND ISLAM

It would be better before everything else, as long as we attempt the study of a definite economic doctrine, to agree at the very beginning about what exact sense we mean by the term, 'doctrine' in order to clarify, at the outset of our approach, the guide posts to the goal and the nature of the contents, which any discussion of the economic doctrine should make explicit and delimit. **So then what does the term doctrine mean? What is the differentia between the doctrine of economic and the science of economics? Which are the fields that are treated doctrinally?**

It is on the basis of the answer to these questions which determine the guide-posts to the economic doctrine in a general way, that we shall fix the nature of the inquiry which we shall pursue in respect of the Islamic economic doctrine.

In this connection, we may recall to mind what we have said about the sense of the terms, 'doctrine' and 'science' in a

former discussion.\* Therein it was given that "The economic doctrine is an expression of the way which the society prefers to follow in its economic life and in the solution of its practical problems; and the science of economics, is the science which gives the explanation of the economic life, its economic events and its economic phenomena and the linking of those events and phenomena with the general causes and factors which rule therein.

This measure of distinction even though it indicates an essential differentia, between them, is not yet sufficient when we try to discover the doctrine itself definitely or to form a determinate idea about it. However we have made use of this basic distinction to make it easy for the reader to become acquainted with the nature of the Islamic economics which we are studying and to enable him to perceive in the light of this distinction, **that the Islamic economic is a doctrine and not a science**, for it is the way which Islam prefers to follow in the pursuit of its economic life, and not an interpretation with which Islam expounds the events of economic life and the laws which govern them.

For the realization of this purpose and for the emphasis on the doctrinal stamp (nature) of the Islamic economics it is sufficient for us to say in respect of the doctrine, that it is a system, and in respect of the science that it is an interpretation in order to know that Islamic economic is a doctrine and not a science.

Well, but now it becomes necessary to know that the economic doctrine is much more than this in order to enable us to mark out, in the light of our sense of the term, the fields in which it operates and then to search for everything Islam is connected with it.

---

\* See vol. 1, pt. 1, of *Iqtisādunâ*. Foreword by the author pp. 4 - 5.

## OPERATIONAL DISCOVERY OF ECONOMIC DOCTRINE

Then, in which field the economic doctrine operates? How far its range extends? What is the general characteristic we find in every doctrinal economic idea, so as to make that characteristic a hall-mark of those doctrinal thoughts in Islam, which we may try to combine and draw up in one single bunch?

All these questions demand that we give a definite concept to the doctrine, as distinct from science, which is capable of giving answer to all these questions. And in this connection, it will not be sufficient to say that the doctrine is simply a way.

\* \* \* \* \*

There are those who consider the scope of the doctrine being restricted to the distribution of only wealth, and has nothing to do with production for the scientific laws rule over the process of production, for instance, the process of the production of wheat or textile and of the level of human acquaintance with the elements of production, their characteristics and their forces; and the process of the production of wheat or textile does not become different with the difference in the nature of the economic doctrines.

Hence the economic science is a science of the laws of production, and the economic doctrine is the art of the distribution of wealth. As such every investigation which has to do with production, and its improvement, invention of the means of production and their improvement, is a subject matter of the science of economics. It is of universal nature, by which nations do not differ in respect of it on account of difference between them as to their social principles and concepts, nor is it the appropriation of one principle with exclusion to another. And every investigation which explains about wealth, its ownership or its disposal, is a subject matter of doctrinal investigation, it constitutes a part of the economic system and not of the science



of economic, nor is connected with it, but it linked with one of the outlooks of life which different doctrines have adopted such as capitalist, communist or Islam.

However, a great error is involved in making this division between the science and the doctrine — the science of economics and the economic doctrine — on the basis that the sphere which each one of them pursues is different from the sphere of the other, for it leads to the regarding of the doctrinal characteristic and scientific characteristic, as two results of the specific studied sphere, so that if the inquiry is about production then it is a scientific inquiry and if it is about distribution then it is a doctrinal inquiry, while the fact is that the science and doctrine differ from each other as to the method and the goal of the inquiry, not as to their subject matter and the sphere. The doctrinal inquiry remains doctrinal and preserves its doctrinal stamp so long as it keeps to its particular method and aim even when it takes up production itself, likewise the science does not lose its (deals with) scientific nature, when it talks about distribution, and studies it with the method and the goal which are appropriate to the science.

It is on account of this that we find that the idea of central planning of production which facilitates the state to exercise the right of the authority of administrating and supervising production is one of the most important doctrinal theories which are regarded as constituent factors by some of the socialist doctrines or systems, or doctrines and systems with a leaning toward socialism not withstanding the fact that we know the planning of production and the permission of it to the higher body, like the state for the exercise of this planning of production does not mean that body's ownership of the means of production nor is it connected with the problem of the distribution of the means of production among the individuals.

The idea of centralization of production, then, is a doctrinal



## OPERATIONAL DISCOVERY OF ECONOMIC DOCTRINE

thought, connected with the economic doctrine, and not a subject matter of a scientific inquiry rather, although it deals with production and not with distribution.

On the contrary, we may find many thoughts which deal with cases of distribution are included in the science of economics, in spite of their connection with distribution. For instance, when Ricardo, declares that the share of the labourer from the produced wealth which represents in respect of which they earn as wages, does not increase under any circumstance in amount from what is sufficient for the sustenance of living . . . , he was not meaning by it to affirm anything doctrinal, nor was he laying it down as rule for the state to prescribe a system for the payment of wages, like the system of private property and economic freedom, but was only trying to explain the reality in which the labourers live and the inevitable result of this reality not withstanding the state's non-adoption of the imposing of a maximum limit of wages and its belief in the economic freedom in its capacity as a capitalist state.

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Doctrine and Science both enter into everyone of these spheres and study the (problems of) production and distributional together. However, this should not lead us to make no distinction between them or make confusion between the scientific and doctrinal nature in the economic research, a thing favoured by those who were convinced of the non-existence of the economic system in Islam when it was not possible for them to discriminate positively between science and doctrine. They thought that a statement about the existence of the economic system in Islam would be exposed to the charge of claiming that Islam was ahead of western thinkers in the scientific creation of the political economy. They also thought that a statement as to the existence

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of the Islamic economy will mean that we shall find within Islam an economic thought and scientific discussion in respect of the laws of economic life such as, production and distribution, like those we find in the discussions of Adam Smith and Ricardo, and many such other leading political economists. And since we do not find in Islam such kind of that discussions, then the Islamic economy is nothing but a myth and a mere figment of the imagination.

However these people would give up this conviction of theirs as to the non-existence of the Islamic economics, if they would clearly grasp the difference between the economic doctrine and economic science, or political economy, as it is named, and would know that Islamic economy is a doctrine and not a science.

The economic doctrine consists of every basic rule of economic life connected with the ideology of (social justice). And the science (of economics), consists of every theory which explains the reality of economic life apart from a prefixed ideology or an ideal of justice.

So then it is the ideology of justice which is the dividing line between ideology and science, and the hall-mark demarcation by which doctrinal ideas are distinguished from the scientific theories, because the ideology of justice itself is neither a scientific nor a tangible thing, capable of being measured and observed or of being subjected to experimental test by scientific means. Justice is only a moral esteemation and a moral valuation. So when you want to know the scope of justice in respect of the system of private property or to pass judgement in respect of the institution of interest on which banking is based as to whether it is just or unjust you do not take recourse to those very scientific ways and measurements which you make use of when you want to take measurement of (the degree of) the atmospheric heat or to inquire about the boiling point of a

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definite liquid, for the heat and vaporization are physical phenomena capable of being subjected to scientific perception but as for the estimation of justice you resort to ethical values and higher ideals which are outside of the bounds of material measurement.

Therefore, justice by itself is not a scientific idea; so, when it combines with an idea, it imprints it with doctrinal stamp and makes it distinct from scientific thinking. Hence the principle of private property economic freedom, abolishment of the interest or nationalisation of the means of production, all these are included in the doctrine because they are connected with the idea of the justice. As for the law of the deminishing return and the law of demand and supply or the iron law of wages, all these are the scientific laws, for they have nothing to do with these evaluation of those economic phenomena. The law of the deminishing return cannot decree that this diminishing return is just or unjust. It only reveals it as permanent objective fact. Likewise the law of supply and demand cannot justify the rise in price due to shortage of supply or increase of demand on the basis of a definite conception of justice. It only shows the reciprocal objective relation between the price and the quantity of supply and demand in the sense of its being a certain inevitable manifestation of capitalist market. The same is the matter in respect of the iron law of wages. It expounds in respect of the positive reality which makes the labourers receiving always nothing more than the bare sustenance wages irrespective as to whether the meagerness of the labourers' share in the distribution coincides with justice or not. The fact then is that all scientific laws do not rest on the ideology of justice; they rest only on the deduction from the reality and observation of various kinds of its numerous manifestations. Contrary to this is the case with the doctrinal laws, which are always embodied in a definite ideology of justice.



Yet this clear cut division between doctrinal inquiry and scientific inquiry does not prevent (preclude) the doctrine from assuming the scientific frame of inquiry at sometimes. Just as in the case of the laws of supply and demand or that of the iron law of wages, such cases of these laws do scientifically confirm and are applied to the reality which they are explaining — in capitalist society in accordance with the doctrinal capitalism — for these are scientific laws within a definite doctrinal framework and not scientific nor are they valid in the other framework as we elaborately explained in earlier discussion in this book.<sup>1</sup>

By our mere putting up of this clear cut line of demarcation between the economic doctrine and the science of economics, we come to know that our saying there exists economic doctrine in Islam, does not mean that Islam investigates for the law of supply and demand or determines the extent of the effect of the increase or demunition of the supplies or demands on the free market. Instead Islam inquires about the providing of freedom to the market and calls for it and for the safeguarding and preserving of it, or of supervising the market and putting restriction on (curtailing) its freedom in conformity with the concept of justice adopted by it.

Similarly Islam does not investigate (the question of) the relation between the to-and-from action between profit and interest or between the movement of the usurious capital and commerce, nor about the factors which lead to the increase of profit or the demunition of it but it rectifies profit and interest itself and passes its judgment in respect of usurious or commercial investment as conform with its conceptions of justice. Equally, Islam does not investigate about the phenomenon of diminishing return of production or their causes, but it inquires whether

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1. *The Scientific Laws of the Capitalist Economics are of Doctrinal Framework*, pp. 237/244.

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legal and justice to keep the production under the supervision of a higher central body.

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From all of these, we learn that it is the functional duty of the doctrine of economies to solve the problems of economic life linked with its conceptions of the ideology and its ideal of justice. And when we add to this the fact that the two expressions, *ḥalāl* (the lawful) and *ḥarām* (the unlawful) in Islam are embodied in the values and the ideal in which Islam believes. Then it is but natural that it may lead us to the conviction as to the existence of the Islamic doctrinal economics; for the matter of *ḥalāl* and *ḥarām* in Islam extends to all of the human activities and all kinds of behaviour: the behaviour of the ruler and the ruled (subject), the behaviour of the buyer and seller, the behaviour of the employer and the employee, the behaviour of the worker and the jobless, for every unit of these behaviour is either, *ḥalāl* or *ḥarām* (lawful or unlawful) and consequently either just or unjust. Because when Islam contains a text prohibiting affirmatively or negatively on a specific action then that act is *ḥarām*, if otherwise then it is *ḥalāl*.

Now if every kind of activity in economic life is subject to being a matter of the *ḥalāl* or *ḥarām* as this matter is interpreted in term of values and ideal, the right of inquiry in respect of Islam calls upon us to the thought as to the selection and determination of the economic doctrine, which the matter of *ḥalāl* and *ḥarām* expresses in terms of their values, ideals and conceptions.

### Relation Between the (Economic) Doctrine and the (Civil) Law:

Just as we have learnt that the economic doctrine is

different from the science of economic, so also we should know the difference between the economic doctrine and the civil law. The economic doctrine is a collection of the basic theories which treat of the problems of economic life, and the civil law is the legislative enactments which regulate the details of pecuniary monetary relations between individuals and their personal and substantive (real aim) rights. On this basis the economic doctrine (system) of a society cannot be the same as the civil law of that state, for the capitalism qua the economic doctrine (system) of the many states of the world is not the very (system of the) civil laws of those states. It is on account of this that two states, in consequence of their different trends, Germanic or Roman, for instance, differ from each other as to their respective civil laws, indespite of the oneness of their economic doctrine (system) those civil laws do not form a part of the capitalist doctrine (system). The civil laws of the capitalist state by which contracts of barter (nongayezud) (hire) or lending are regulated for instance, do not form a part of the capitalism in the sense of its being an economic doctrine (system), these civil laws were offered in the sense of their being the capitalist significance of the economic doctrine that would involve confusion and ambiguity between the basic theories and the legal details, between the doctrine and the law, that is to say, between the basic theories of capitalism in respect of the freedom of ownership, freedom of disposal as well as freedom of investment, and the laws on which rest these capitalist principles of freedom.

It would be, therefore, a mistake for the investigator of Islamic economy to offer a collection of Islamic ordinances (rules of laws) which are on the plane of the civil law according to the understanding of the time, and present them in conformity with their legal and juridical texts (misusing mass) as the Islamic doctrine (system) of economy as some of the Muslim writers do when they attempt a study the economic doctrine (system)



in Islam and they speak of a collection of the laws of Islam by which it regulates the property rights (*huqūqu 'l-māliyyah*) and business transactors (*mu'āmalāt*) like the Islamic law in respect of sale, lease (hire) partnership, adulteration, gambling, deceit and so on. Indeed these people are like one who wants to study and determine the economic doctrine (system) of the society in England for instance; but instead of trying to show the capitalism, (its fundamental principles in respect of the ownership of property disposal and investment [frustrification] of it and the concepts and values these fundamental principles represent) contents himself with the study of the civil law of that country and whatsoever, of the rules and regulations which are connected with it.

But while we lay emphasis on the need of making separation between the theoretical nature of the economic doctrine (system) and the civil law we do not thereby cut-off the relation holding between them, on the contrary we, at the same time, lay emphasis on the strong tie of relationship which firmly binds the economic doctrine (system) and the civil law together, in the sense of their being the component parts of one compact organic compound whole.

(As a matter of fact) the economic doctrine (system) with its theories and fundamental rules form the foundation of the upper structure namely the law (civil). However, the fact of the economic doctrine's (system's) being a theoretical foundation of law does not deprive it of its being a doctrine (system) when it, in its turn, becomes an upper structure resting on a foundation inasmuch as the entire theoretical edifice of the society is reared-up on a common (general) theoretical base, and draws together several stories some of them resting on the other (in such a manner) that the preceding story is considered the base and foundation of the story built upon it. The economic doctrine (system) and the (civil) law are two such theoretical structures.

The (civil) law is the upper story of the two, and takes shapes in conformity with the (economic) doctrine (system) and is determined in the light of the theories and conceptions which that doctrine (system) of economic represents.

Let us, for the sake of clarification of this (point) take an example, from the free capitalist doctrine (system) of economics and its connections (affinites) with the civil laws in their theoretical and actual field in order that it may embody for us the connection holding between the (economic) doctrine (system) and the (civil) law and the extent to which the law is affected by the doctrine theoretically and actually.

Then it will be from the sphere of personal rights of the civil law that we will be able to understand the effect of the (economic) doctrine on it (the civil law) when we would learn that the theory of obligation — and it is the corner-stone of civil law — has received its theoretical contents of thought from the nature of the capitalist economic (system) during the interval at which the capitalist thoughts of economic freedom were ranging and the principle of free economy held sway over the general thoughts. Then the appearance of the principal of the power of will over the theory of obligation was the result of that. The theory of obligation bears the doctrinal stamp of capitalism since it lays stress — following from capitalism's belief in freedom and its individualist trend — upon the fact that it is the private (personal) will of the individual which alone (by itself) is the source of all the personal obligations and rights, and refuses to believe in the existence of any individuals having any right over another individual or of society's over individual which does not conceal behind it the individual's free will proof in accordance with which an individual admits as the proof of such a right over him out of his free and full willingness.

It is clear that a person's refusal of the acknowledgement of a right of an individual which the (person) himself does not



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cause to proceed from himself out of his full and free will cannot but mean the faithful translation of the ideal signification of the capitalist doctrine — the doctrine of economic freedom — from the economic doctrinal field to the legal field. Because of this we find that when the theory of obligation is founded on another doctrine (system) of economics, it differs from this and in such a case the role of the will becomes weak in a far greater measure.

Some of the evidences of the translation of the theories of the capitalistic economic doctrine to the details of legislative enactment on the legal plane are the permission of the civil law founded on the capitalist basis of its institutions for the contracts of sale, credit or hire, for the sale of a ready quantity of wheat against a higher quantity to be made over at a later date, or giving of goods on credit at a certain percentage, or of capitalist hiring of labourers employed for the extracting of petrol by the means it owns, in order to own that petrol. The law when it permits all these, it, in fact, only receives justifications for this permission from the capitalist theories of the (economic) doctrine on which the law rests. The same thing we find in the field of the substantive (real) rights of the civil law: the right of property, and it is the main substantive (real) right. The law regulates this right in accordance with the general standpoint which the economic doctrine (system) takes up, in respect of the distribution of wealth. The doctrinal (system of) capitalism when it believes in the freedom of the ownership (of property) and looks to (the ownership of) property as a sacred right, it imposed upon the upper story of its capitalist structure (edifice) to permit the individuals to own (property rights in) mines in keeping with the (principle of the) freedom of property and to give priority to the consideration of the interest of the individual as to the benefit of the property he owns over any other consideration and that it should not deny or prevent the individual from making use of his property in a way he fancies or it meets his sweat-pleasure,

irrespective of whatsoever, its effect be on others as long as the (ownership of) property and freedom are the natural rights of the individual and not a social function an individual exercises within the society.

When the age of the economic freedom began to decline and the sense of private property underwent a change, there appeared the civil laws which denied the ownership of some kinds species of wealth and natural tracts (as his private property) and did not permit him to abuse his right as to the free and investment or the enjoyment of the property or goods owned by him.

All this brings to light and makes explicit the relation of interdependence holding between the civil law and the (economic) doctrine (system) to such a degree that it makes it possible of becoming acquainted with the economic doctrine (system) and its original feature by way of the civil law, so a person for whom it was not feasible to have direct acquaintance with economic doctrine (system) of any country, can take recourse to the civil law of that country – not as the economic doctrine (system) of that country – for the economic doctrine (system) is different from (its) civil law – but in the sense that it is the super-structure of the (economic) doctrine (system) and the upper story which reflects the content of the (economic) doctrine (system) and its general characteristics. In that case it would be possible for him in the light of a study of the civil law of that country to know easily the country's being capitalist or socialist, may not only this but even the degree to which the country behaves in capitalism or socialism.

### Summary :

So far we have already discussed on the difference between economic doctrine and science of economic, in general, and the difference between economic doctrine and civil law. From this

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discussion we could derive that it is wrong to talk about Islamic economic doctrine as a science of economic or as a collection of agreements at the level of civil law which set up the rules of dealings and alike.

Besides, we have also learnt the nature of relation between the doctrine and the law; and in the proceeding chapters we shall see the great effect of this relation, God willing.

Since we have now realized the existence of economic doctrine in Islam being different from the science of economic; and made distinction between the doctrine and law by understanding the kind of relation between them, we should now discuss about our future work on Islamic economic in this book and scrutinize its particulars and their main points. We should also explain our practical method based on our previous study of the doctrine, in general, and the difference between science and law based on the kind of relation which ties up civil law to doctrine.

### The Process of Discovery and the Process of Creation:

The research work we shall carry on in our study of the Islamic economic doctrine (system) differs from the research work the leading exponents of the other economic doctrines (system) have carried out. The inquirer of the Islamic (economic) doctrine (system) feels that his stand point is basically distinctive from the stand point of any other seeker of economic doctrine (system) from among those who have carried on research work in respect of the economic doctrine and have given the world different doctrines (systems) of economy like capitalism and communism.

The Islamic (economic) thinker is (finds himself) before a completely formed and finished (system of) economics and he is called upon to the disarment of it in its real aspect, the



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determination of its general frame-work the disclosure of its basic rules of thought (which govern it) the overcoming as far as possible of the density of the accumulations of times and the long distances of historical intervals, the presentation of its original features, the intensive suggestions of untrust worthy experiments carried to make them conform with Islam, and the freeing of them from the frame-work of non-Islamic cultures which rule over the understanding of things in accordance with their nature and trends of thinking.

To endeavour to get over all these difficulties and to overpass them to reach at an Islamic economic doctrine is the business of the Islamic (economic) thinker.

On this basis it can be said that the process we shall pursue is a process of discovery. Contrary to this it is the case with the thinkers who advocate the (economic) doctrine (system) of capitalism and communism, for they pursue the process of creation or invention.

Each of the processes, the process of discovery and the process of creation (invention) has its characteristics and distinctions which are reflected in the inquiry which the Islamic discoverers and the capitalist and the communist inventors carry on.

And the most important of these characteristics and the distinction are the determination of the manner of the conduct of the procedure and its generalization.

In the case of the process of the creation (invention) of the economic doctrine (system) and when the building up of a complete theoretical structure of society is meant, thought takes regular succession and its natural cause succession and performs the work of formulating, in a direct way, the general theories of the economic doctrine (system). Then it makes them the basis for the secondary inquiries and for the formation of the superstructure of laws which rest upon the economic doc-

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trine (system) and are considered as the upper story in relation to it, like the civil law which we earlier learnt is dependent upon it and is founded on its basis.

However, in the process of the discovery of the economic doctrine, reverse is the course of the procedure and the work of going about it and that is when we are in front of the discovery of the economic doctrine we do not have in our possession an explicit picture of it (the doctrine) or any aspect of it or a definite shape (of the doctrine) before its being formed as when we do not know as to whether the doctrine holds the principles of the common property or in the private property or when we do not know about the doctrine's theoretical basis of the private property, whether it is, want need or work or freedom?

Under this circumstance, so long as we do not have in our possession a definite text by a formulator of the doctrine (system) that means to discover it, to disperse the obscurity which encompasses the doctrine (system). There is no alternative but to make search for another method to employ it for the discovery of the doctrine or for the opening up of some of its dark parts.

This method we can determine in the light of the relation of interdependence holding between the (economic) doctrine (system) and the (civil) law a relation which we have explained earlier for as long as the civil law is the upper story *vis-à-vis* (economic) doctrine (system) and receives it direction from it is possible to discover the (economic) doctrine (system) by way of the civil law when we know the civil law which rests on that unknown (economic) doctrine (system). Hence it is necessary for the process of discovery to make search for the scattered radiations of the (economic) doctrine in the exterior sphere, that is from its superstructure and from such traces (traditions) of it as are reflected within it in the different fields so as to arrive by way of these radiations and traces (traditions) at the formation of a definite estimation of the kind of the thoughts

and theories about the economic doctrine which lie hidden behind these appearances.

By this it prescribes for the process of discovery to follow a course reverse to the course which the process of creation follows for the process of discovery proceeds from the upper-story to the base of it, and sets about it by collecting all the traces and stringing them together, to the obtaining of in a definite way the shape form of the economic doctrine instead of setting-out from the formation of the doctrine to the forking of it in branches.

This will be wholly our standpoint in respect of the process which we shall pursue for the discovery of the Islamic (system of) economics or more correctly a greater part of it because while it is possible to adduce some aspects of the Islamic economics, directly from texts, yet there are some fundamental theories and ideas, it is not easy to reach by direct texts and the reaching to them can be determined only indirectly that is on the basis of the upper story of the Islamic edifice and on guidance from the laws by which Islam regulate the matter of contracts and rights.

So we proceed from the upper story and descend gradually to the story which preceeds it because we are carrying on the process of discovery. As for those who are carrying on the process of creation and are trying to build-up the structure (of economic) and not the discovery of it, they ascend from the first story to the second, since they are carrying-out the process of creation and the construction of the structure, and the second story does not occur in the process of constructure except afterwards.

In this way, our standpoint from the very beginning differs from the standpoint of these fore-runners of the capitalist and doctrine (system) of economy, nay not only from these but even from those of the leading fore-runners of the capitalist and socialist doctrines (system) of economy who are engaged in



study of the discovery and the determination of their economic doctrines (system) inasmuch as it is within the range of possibility of their reaching in direct way. These economic doctrines, conformably to the general forms of them heralded by the leading fore-runners. Our acquaintance, for instance, with the economic doctrine (system) of Adam Smith does not depend upon our study of his thoughts in the sphere of the civil law or the method it chooses to follow in regulating the (civil) obligations and rights rather than that we can combine the initiation of the study of it with his doctrinal thought in the economic sphere. The case is contrary to this when we wish to seek to know many of the contents of the economic doctrine in which Islam believes, for as long as we are not able to find the definite shape of that in the Islamic sources, as we find it in the case of Adam Smith, we will be compelled, *ipso-facto*, to the pursuing of traces of it and the discovering of the economic doctrine in an indirect manner by way of the land marks of it as are reflected in the upper structures of the Islamic edifice.

This is what makes the process of discovery which the Islamic thinker pursues to appear, sometimes, in an inverted shape. It rather appears that it makes no distinction between the economic doctrine and the civil law when it tries to present Islamic ordinances on the civil law level and when it intends to study the economic doctrine in Islam. However it will indeed be right in doing so as long as it tries to present those ordinances as the upper structure of the (economic) doctrines capable of yielding of its discovery not in the sense that these themselves are the Islamic economic doctrine and theories

## The Financial System as the Civil Law:

In this connection it is necessary that we adjoin the financial system, too, with the civil law as one of the superstructure of the



economic doctrine which reflects its features and takes shape according to its requirements; and just as it is possible for the process of the discovery to avail of the radiation of the reflected doctrine of economic on the civil law so it is likewise possible to avail of the similar doctrinal radiations in respect of the financial system.

When we want to site an example of this effect of the economic doctrine on the financial system qua a superstructure of it, we can find such an example in the relationship of the economic doctrine with the general financial system, as we earlier did to try to understand, of the connection which holds between the economic doctrine and the civil law by determining the relationship of the capitalist doctrine and the civil law by determining the relationship of the capitalist doctrine (system of economics) with the general financial system. One of the manifestations of the relationship between the capitalist system of economy and the general system of civil law is the effect of the thought of domain. By domain is meant those goods which are the properties of the state such as lands, forests, mines which the state possesses and yield revenue to it just as the lands, forests and factories yield several of the profit to the private owners who own them. The domain is considered in the financial system as one of the main source of revenue of the state. The idea of domain became weak and the range of the state, owned projects narrowed down, and almost disappeared from the financial system of the state under the influence of the principle of economic freedom when the capitalist doctrine (system of economy) held its despatic sway and the idea of the capitalist doctrine (system) became the dominant force. One of the requirements of which is consideration of the safeguarding of the economic freedom was the non-interference of the state in the productive activity, except in small laundaries which were incapable of being operated upon by individual activity

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on account of this it was but natural that the capitalist state rely for its general finance upon the taxes and such other sources of revenue. Then again the domain recommended its existence, as an important source of state-revenue and widened its range after the appearance of the trends of communism towards leadership and the decline of the principle of economic freedom from the general economic thinking.

One of the evidences of the bond of relationship between the economic doctrine and the general financial system, is, that the revenues of the state differ in their functions conformably to the kind of the doctrinal economic ideas by which they are affected, for during the interval when the idea of the economic doctrine with its idea of economic freedom was dominant, the basic function of the revenue was to cover expenses of the state as an apparatus for the maintenance of the peace and the defence of the country. When the communist ideas began to invade the field of economic doctrine (system) there came to revenues a more momentous undertaking that is the undertaking for the curing of the unfair distribution of wealth for the removal of disparity of social states between classes and the establishment of social justice. The state was not disposed to remain content with the collection of the revenue or the taxes to the extent it would cover its expenses as a machinery for the maintenance of the peace at home and the defence of the country but widened them to the extent they would cover the expenses for the discharging of the new undertaking it had prescribed for itself.

These evidences furnish the proof as to the general revenue of the society being adopted conformably to the fundamental principle of the economic doctrine just in the same way as the civil law is adopted a matter which makes out of it an observation post for the process of discovery as an upper story from which the discoverer commands the view of the preceeding story that is to say the economic doctrine.

### Summing up and Deductions:

On the basis of what has been stated before it becomes necessary that we may include a number of Islamic Ordinances and legal enactments, which may be construed as the superstructure of the economic doctrine, within the orbit of the process of discovery of the economic doctrine even if they be not wholly included in the core of the doctrine itself.

For the sake of this, the discussion in this book will contain many of the ordinances in respect of *mu'āmalāt* (pecuniary and personal relations) and rights which regulate the pecuniary relations between individuals just as it will contain some of the ordinances of the sacred law for the regulation of the financial relations between the state and nation, and the determination of the state's sources of revenue and its policy in respect of the disbursement of these revenues, inasmuch as this book is not a book only for the presentation of the Islamic economic doctrine but it is a book which attempts to pursue the process of this doctrine and to determine for this process its *modus operandi*, course subject matter and its results.

For this purpose we shall pick up and arrange, in order such of the ordinances of Islam in respect of the *mu'āmalāt* (pecuniary transactions between individuals) rights and taxes as may be counted the superstructure of the economic doctrine and throw light on it in the process of discovery. As for the ordinances which have no share in throwing such a light on it, will be excluded from the sphere of this inquiry.

We shall mention by way of example the matter of interest, (deceit) the tax of equilibrium and the tax of religious war. Now Islam has prohibited interest in the pecuniary transaction, just as it has prohibited deceit. But the unlawfulness of the interest and the prohibition of lending or borrowing against interest has a share in the process of discovery inasmuch as it is



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a component part of the superstructure of the theory of the distribution of the wealth produced and as such reveals the general basic rule for the distribution of wealth in Islam, which shall be taken up in the discussion about (the question of) distribution after (the question of) the production. As for the matter of the unlawfulness of deceit (cheating), it does not come alone within the doctrinal frame of the economic. Hence all countries, though differing in their systems of economy agree on this. Similarly in the case likewise in the matter of the tax of its unlawfulness equilibrium and the tax for war (*jihād* crusade). Now the tax of equilibrium which Islam imposes by law for the maintenance of the equilibrium like *zakāt*, for example, enters into (has a part in) the process of discovery but not so the tax of war (crusade) which Islam enjoins for financing the army of the *mujāhidīn* (the crusaders) for it is a part of the mission of the Islamic state and not of economic doctrine (system) of Islam.

### The Process of Synthesis Between the Laws (Ordinances):

When we take up the collection of the prescriptions of Islam which regulate *mu'āmalāt* and the rights and obligations (of the individual members of the community) let us pass on from it to what lies deeper (in it) to the fundamentals rules which give shape to the economic doctrine (system) in Islam. (In this connection) it is necessary that we do not content ourselves with the presenting and the scrutinizing of each one of those rules (ordinances) in a manner as if each one of them was independent and isolated from those of the others. The method of isolation or individuation in respect of the discussion of each one of these ordinances only harmonizes (runs concurrent) with the discussion (of them) on the level of the civil law in respect of the ordinances of the sacred law. The level allows the pres-

entation of the details independent (free from) of each other. Because a study (examination) of the ordinances (rules) of the sacred law does not on the civil level make a survey (trace) the elaborated spheres of those ordinances (rules of the sacred law). It only undertakes to present the ordinance of Islam which regulates the transaction contrast of sale, of lease, of loan or of partnership, for instance and after this, it is not responsible for bringing about a synthesis between these ordinances which leads (points) to a general rule, but when our study of these ordinances and the presentation of them will form a part of the process of discovery, the mere presentation of the details of them will be of no avail to us even though many of the propent of Islamic economic system are content to carry their search to this extent (only) say rather we would say there is no way out for us but to achieve synthesis between these details, that is, we should study each and everyone of them as component parts of a whole and as an aspect of the well bounded together composite general shape, so as to arrive from this at the discovery of the general rule which emanates from within a whole or from a composite whole, and which is suitable for the elucidation or justification of it. As for the method of isolation and the view of individuation, we will not be able to attain the discovery by it.

The suppression of interest in the contract of loan (or credit) legal sanction for the earning resulting from the means of production in a contract of lease, denying the lease to become the owner of the physical material (land, mine, etc.) he has acquired by lease-contract, all these ordinances (laws) must be studied — after the assurance of their legal validity — carry out by and bring about the synthesis, between them so as to make it feasible for us to draw out from it the fundamental law of Islam in respect of the distribution of the wealth produced, which distinguishes the stand point of Islam in respect of the distribution of (earned) wealth from the stand point of the communist

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doctrine which sets up the distribution of the produced wealth on the basis of work only and from the stand point of the capitalist doctrine which establishes the distribution of it on the basis of the elements, the material and human, which jointly take part in the creation of the produced wealth.

### The Conceptions of Share in the Process:

We can put the conception which form an important part of Islamic tradition in the same class with the prescripts of law which help towards the discovery of the Islamic economic doctrine.

By conception we mean every view or concept which explains a cosmic or social or legislature fact. The doctrinal belief of Islam about the relation of the Universe with Allāh, the Supreme and its connection with Him expresses a definite conception of Islam in respect of the universe.<sup>1</sup>

The Islamic doctrinal belief that human society has passed from (the instinctive and natural stage to) the stage of reason and reflection ruled, expresses the Islamic concept of human society.<sup>2</sup> The Islamic doctrinal belief that the ownership of goods and property is not the personal right of man but devolves upon him by virtue of the process of his appointment to the vicegerency of God reflects the specific Islamic concept about a definite legislation the establishment of the institution of private property, according to the Islamic conception the goods and property are the goods and property of Allāh in their entirety and God appoints sometimes individuals as His vice-

1. Unto Allāh belongs whatsoever is in the heavens and the earth. Allāh encompasses everything. (Qur'ān, 4:126)
2. Mankind were one community and Allāh sent unto them prophets and bearers of good. (Qur'ān, 2:213). Mankind were but one community then they differed (Qur'ān, 10:19)



gerents for the management of the goods and property. The conception expresses by this that man's right to property is a right which he holds by virtue of a legislative act which appoints him to the vicegerency of God in respect of it, (that is he holds it as trust from God ).

Then, the conceptions have different angles of views, and Islamic concepts for the interpretation of the universe and/or its phenomena or the society and its connections or any of the established precepts of law and it is on account of this that they are not included in the precepts in direct form. But not withstanding this a portion of these conceptions that is the portion connected with the economic life and its phenomena or with the established legal precepts of Islam will be of use to us in our endeavours of search for the economic doctrine of Islam.

In order to make explicit the part which this portion of conception play in the way of determining the land marks of the economic doctrine of Islam, we should forestall the results which the following discussions will record a little later and borrow from the two conceptions which enter into the process of the discovery of the economic doctrine of Islam, the subject matter of the study of this book.

The first of these two conceptions is the Islamic conception about property according to which Allâh the Supreme appointed a group of people as His vicegerent (trustee) over the natural goods and wealth and created from legislature enactment of private proprietorship *modus operandi* within which an individual can realize the demands (mandates) of the vicegerency as to the increase of the goods and property (*mâl*) entrusted to him, the protection of them and dispensation of them to the interest and welfare of man, so, the ownership is an operation an individual carries out on account of the society and on his own account within the society.

The other conception, borrowed in advance by us from the



future discussion is the view of Islam concerning exchange as one of the phenomena of economic life. According to it, the exchange by its original nature constitutes a branch of production and for when a merchant sells the products of another person he thereby shares in the process of production. Production is always a production of utility and service not a production of matter. Material or substance, cannot be created a new for the commodity produced and the preparation of it for the delivery of it to the hands of consumers, realize a new rather a commodity has no utility *vis-à-vis* the consumers without this preparation of it. Every tendency of exchange, which time distances it far from its true occurrence and renders it an intrusive operation meant only for the beneficiary and results in the lengthening of the distance between the commodity and its consumers, is an anomalous tendency differing from the nature of the function of the exchange.

Let us defer the Islamic understanding of these two conceptions and its elucidation more elaborately to its place in this book and make a presentation of it as much as it positively necessary to explain the part they play in the process of the discovery of the Islamic economic doctrine, even though it will involve us a little in repetition of it.

So we can fully comprehend and determine in the light of the pattern of these two Islamic conceptions, the role which the likes of these conceptions play in the field of inquiry and the process of the discovery.

Then these are some of the conceptions which play their part in casting their rays on some of the precepts the Islamic civil rules and regulations make easy the task of understanding of them from legal texts in which they are given as well as of gaining mastery over the obstacles which stand in the way of it. The first of these conceptions is the conception about the institution of private property, we have mentioned a while ago. It disposes

the mentality and makes it ready to accept the texts of Islamic law which restrict the right of the owner to his property in correspondence with the demands of general good and interest of the society. The ownership of a property according to this conception is a social function which the legislator entrust to an individual so that he may share in the carrying out the burden of *khilāfah* (vicegerency) on the earth with which Allāh has honoured man and not a personal right not admitting specification, nor exception (an inalienable right). Hence it is natural that the right of holding property be subordinate to the demands and obligation of this *khilāfah*. It is easy in the light of this to accept the texts restricting the power and authority of an owner over the property he holds and sanctioning the seizure of it at sometimes from the hand of its owner texts of Islamic law about the land, which say that it should be taken from the hand of him who has and holds it and be given over to someone else, make it fails to cultivate it fruitfully or to give proper case to the tendency of it in keeping with the demands of his vicegerency.

Many Muslim scholars of Islamic law, however, are in two mind about accepting these texts of Islamic law since these texts violate the sanctity of its institution of private property. It is, however, obvious that these scholars had but looked at those texts with the eye-glass of Islamic conception about the institution of private property, they would not found it difficult to accept them and respond to idea and spirit which underlies them.

By this we know that the Islamic conception in the economic field, assume the form of an ideal from their adoption is necessary so as to give a complete and definite shape to the law legislating text of Islamic traditions within it and to make them easily understandable. We find that some of those legislation texts have precisely adhered to this sense. They have given this conception or this frame, by way of preface in giving the rule of

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Islamic law. It is mentioned in the tradition in the case of the land and the man's ownership of it; "The land belongs to Allâh, the Supreme. He has handed over to His servants (men) to hold it in trust. So he who leaves it lying idle and uncultivated for three consecutive years without any reason, it should be taken from him and be given to someone else". From this we see that the tradition has taken the help of a definite conception about the ownership of the land and the role of the individual in respect of it by which it explains the rule for the seizure of the land from the hand of its owner and justifies such a seizure.

Some Islamic conceptions set up the creation of a rule of filling the lacuna (gap in the law of Islam) supported on their basis which gives the ruler the right to fill it. For example, the Islamic conception concerning exchange, mentioned before by way. The conception is good for being a basis for the state using, in the fields of regulating the exchange so as to prevent within the limits of its capabilities, every attempt at separating the exchange of goods from the production of them and the making exchange a process for lengthening the passage between the commodity and its consumer instead of rendering it a process of procuring the commodity and bringing it within (easy) reach of its consumers.

So, the Islamic conception play either the role of casting rays on the general legislature texts or the rôle of providing the state with a species of economic legislation by which the belt of lacuna which may be found therein should be filled up.

### **The Belt of Lacuna in the Economic Legislation:**

When we make mention of the belt of lacuna in the economic legislation, we must give great importance to it during our operation of the process for the discovery of the economic doctrine for the lacuna represents a side of the Islamic economic



doctrine. In fact, the Islamic economic doctrine consists of two sides, one side which is filled on the part of (formerly by) Islam in a completed form admitting of no change or modification. And the other side which forms the belt of lacuna, the business of the filling of which Islam left to the ruler (*waliyyu 'l-amr*) or the ruling authorities to be filled in accordance with the demands of the general aims and objects of Islamic economics and the expediency of the requirement of every age.

Now when we speak of the belt of lacuna we mean by it as related to the Islamic legislation and its legislation texts and not as it is related to the practical situation in which the community of Islam lived during the period of the Prophet. That lacuna the great Prophet filled to as the aim of the Islamic law in the field of economics demanded in the light of the conditions and the circumstances in which the then Islamic society lived. However, it was not that when the Prophet set out to fill this lacuna, he did it his capacity as a prophet, the promulgator of divine law, invariably fixed and established for every place and time. As to render this particular filling as the mode of action of the Prophet in filling up that lacuna-interpretive of patterns of permanent legislation, but filled it in his capacity or a ruling authority (*waliyyu 'l-amr*) charged on behalf of Islam with the duty of filling up the belt of lacuna in the existing law, in accordance with the expediency of conditions and circumstances.

From this we wish to extract the following results firstly that the foundation of the Islamic economic doctrine cannot be accomplished without the inclusion of the belt of the lacuna in its search and the estimation of the possibilities of this lacuna as well as the extent to which it is possible for the process of filling it to share with belt which was filled on behalf of the *shari'ah* in the early days of Islam for the realization of the aims of Islamic economics.

But if we neglect to do so it would near the apportioning

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of the possibilities of Islamic economic with a view to its statistic elements not with a view to its dynamic elements. Secondly, the species of the legislation which the prophet affected to fill the lacuna, were not injunctions of permanent nature. The Prophet did not issue them in his capacity, as the promulgator of the permanently established injunctions (which admit no alteration, change or modification) but in the sense of his being a ruler and guardian of the Muslims. Then as such they cannot be considered a permanent part of the economic doctrine of Islam yet they throw light, to a great extent, on the operation of filling up of the lacuna which must be carried out every time according to the expediency of the circumstances and makes easy the understanding of the fundamental aims and objects to which the Prophet adopted his economic policy, a thing which always will help filling up of the belt of the lacuna in the light of these aims.

Thirdly: The economic doctrine of Islam on this basis is completely bound up with the system of rule in the field of practice when these would not be found a ruler or a ruling machinery enjoying same qualifications which the Prophet enjoyed in his capacity as a ruler, and not in his capacity as a Prophet, there will be little chance of the lacuna in the economic doctrine (system) being filled in accordance with the circumstances with what Islamic aims enjoin and consequently the adopting the economic doctrine (system) to a course so that we may reap its fruits and realize its aims would not be possible.

It is obvious that as long as this book talks of the economic doctrine, it is no part of its business to bulk about the system of government in Islam and the kind of person or the governing authority who will be suitable to succeed the Prophet to his legally to the office of his authority (*wilāyah*) or to his qualifications as a ruler and not as a Prophet, nor about the conditions which must be fulfilled in the case of such an individual or

authority. All these are extraneous to the discussions of this topic so far the purpose of the discussion of this book we will assure, a legitimate ruler, allowed by Islam as having forthwith the qualifications of the Prophet in his capacity as a (temporal) ruler and avoid it in the way of making possible the talk about the Islamic economic doctrine a belt of lacuna existing therein as well as the visualization of what of aims it can realize and promote its fruits.

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But why was a belt of lacuna was in the Islamic economic doctrine unfilled from the very beginning on behalf of Islam with the permanent enjoyments (ruler of law) and what is that thought which justifies the existence of this belt (region) in the economic doctrine and the leaving the matter of filling it to the ruler? And subsequently what are the limits of the belt of lacuna in the light of the indications of Islamic jurisprudence? Answer to all these, we will, God willing, make in our coming discussions.

### The Process (Operation) of *Ijtihād* and the Subjectivity:

We have so far learnt that the fund we possess for the process of the discovery of the economics doctrine (system) of Islam is its legal rules and its conceptions. Now the time has come for us to say a word about the method by which we can acquire those legal rules (*aḥkām*) and conception and the danger with which that method is best. When it is by way of the Islamic rules and conceptions that we can discuss the economic doctrine it is natural that we may seek the answer to the question how can we acquire these rules of law and conceptions themselves.

And the answer to this question would be this: We will



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meet these rules and conception face to face and directly on the Islamic text which comprise of a definite Islamic legislation or a definite Islamic point of view. So all that we shall have to do is to obtain texts of the Qur'ānic verses and the *sunan* (sayings or tradition) about the sayings and practices of the Prophet, so as to gather up a number of such Islamic *ahkām* (rules or law) and conception by which we can reach at the end of the general economic doctrinal theories.

Nevertheless it is not so swept as that of collecting merely the texts but more is required to be done for the texts more often do not display their legal or conceptional contents the legal rule or conception in such a completely explicit and definite manner as to admit of no (chance of) doubt from any direction on the contrary in many a case the content is suppressed or they reveal diverse and ill-arranged contents under these circumstances the understanding of the text and the discovery of the definitive content of the text because a complicated (complex) process of *ijtihād* (independent legal opinion, examine of human reason to ascertain the rule of *sharī'ah* law) and not an act of plain common sense. We will not attempt in this field to point out to the nature of this process, its juristic principle norms (rules) and modes all that is extraneous to the present subject we want only to state in the light of it, the matter of fact about the economic doctrine (system) and to caution against the dangers which may be fall in the cover of the carrying out of the process of discovery.

As far the fact of the matter it is this: The form of the economic doctrine which we will create since it depends upon the Islamic (economic) rules and Islamic (economic) conceptions and inasmuch as these rules and conceptions depend upon a form of result of a particular *ijtihād* in the understanding of the text which comprise these rules and conception and the method of arranging these text and bringing them together,



will be a reflection of a definite *ijtihād* it cannot be decided with a finality that the form is an actual form of Islamic economic doctrine (system) since error in *ijtihād* is possible so on account of that it is possible that different *mujtahid* (one who exercises *ijtihād* that is consensus and independent nature of opinion and judgement) might present different forms of Islamic economic doctrine (system) in accordance with their diverse *ijtihād*. All these forms will be considered as forms of Islamic economic doctrine (system) because they represent exercise of the process of *ijtihād* allowed and acknowledged by Islam and patterns and norms (rules) of which it has formed. In this way as long as being a product of a legally valid *ijtihād*, they will be deemed Islamic forms irrespective of the extent of their conformity to the reality of the economic doctrine of Islam forms irrespective of the extent of their conformity to the reality of economic doctrine (system) of Islam.

This is the fact of the matter. As far the danger arising on the basis of the *ijtihād* for apprehension of the *ahkām* (rules of law, regulations or ordinances) and conceptions from the (legislative) texts of the Qur'ān and *sunnah* (the practices of the Prophet) with which the process of the discovery of the economic doctrine (system) is best is that of the subjective (personal) element (factor) creeping into the process of *ijtihād* because, the more the conditions of the objective approach in the process of the discovery are fulfilled, and the further it is from bearing the mark of subjective contribution the more precisely accurate and more successful will be the realization of the aim; and but if the exercise of the *ijtihād* adds to his work of apprehension of the text something of his personal subjective element or shares in the contribution to it in the understanding of the text during the course of his process of discovery the inquiry will lose thereby its objective integrity and the discovery its mark of genuineness. (Let mark of genuine

discovery.)

The danger will be intensified and aggravated when great distances of historical and factual distances divide the person of the exerciser of the *ijtihād* and the texts on which he exercises his *ijtihād* and when those texts will be in connection with the treatment of matters actually existing in the life of the exerciser of the *ijtihād* and confronting him as an actual reality altogether different from the methods of those texts in the treatment of those matters, like the texts connected with the social sides of human life. On this account the danger of subjectivity from the exercise of *ijtihād* in case of the process of the discovery of the Islamic economic doctrine will be greater than the process of the exercise of the process of *ijtihād* in the case of other individual rules like the directive as to the purification of the state of a bird or the prohibition as to weeping during the *ṣalāt* (Islamic prayer) or the obligation of the disobedient as to *tawbah* (repentance, turning to God). So on account of the importance of the danger of subjectivity in the exercise of *ijtihād* in the process of the discovery of the Islamic economic doctrine, it is incumbent upon us to clarify this point and to delimit the sources of the danger. In this connection we can mention four following factors as the main sources of it.

- a) Justification of the existing reality.
- b) Incorporation of the text in a definite framework.
- c) Separation of the legal (*sharī'ah*) evidence (ground from its conditions and circumstances.
- d) Adoption of a definite point of view before-hand towards the texts.

#### A- Justification of the Existing Reality :

The process of justifying the reality is an attempt on the

part of the exerciser of the *ijtihād* to develop and put up a particular construction upon a text to which he is driven intentionally or unintentionally to justify a *fāsid* (defective) reality in which he is living. He considers it as an inescapable necessity of the existing reality confronting him as some other Muslim thinkers have done, and like them he has succumbed to the existential social reality in which he is living and has tried to adapt the *naṣṣ* (text) to the reality in which he is living rather than think of charging the reality on the basis of the *naṣṣ* (text). He has interpreted the grounds of the unlawfulness of usury and profit and so derived therefrom the conclusion which fits in with the *fāsid* reality. It is this "Islam allows interest (on loan) provided it is not doubled and redoubled; (a compound interest). Islam prohibits it only when it reaches an unseemly amount (exceeds the reasonable limit) as is stated in the holy verse: *O you who believe devour not usury doubled and redoubled. Observe your duty to (fear) Allāh that you may be successful* (Qur'ān, 3:130). And the reasonable limits are the limits which the interpreter finds in the living reality of his life and his society. In fact it is the existential reality of his life which prevents him from comprehending the object of the verse which is not aimed to the object of permitting the charging of profit on loan, which did not double and redouble but to draw the attention of the usurer to the horrible consequences resulting from the usury, when it reduces the debtor to the object conditions of being burdened with leader debt to the accumulation of the usurious profit and the continual abnormal increase of the (leaden) usurious principal, accompanied by the mounting usury of the debtor to his final collapse (destruction). Had this interpreter intended to live sincerely up to the spirit and teaching of the Holy Qur'ān away and free from (the influence of) the promptings of the reality of his social life and its delusions, he would have read and understood from the



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dictum of Allāh the Supreme: . . . *and if you turn back (repent) then you shall have the principals. You shall not wrong and you shall not be wronged* (Qur'ān, 2:279). That it was not a war against a certain kind of usury common in the age of ignorance, which multiplies the debt doubtly and redoubtly but a question of an economic doctrine (system) having a particular view as to the capital which determines the justification of its increase and puts a stop to every increase howsoever slight it be apart from the justification just as it lay down in requiry of the lender to be content with his principal, neither he shall wrong nor he shall be wronged.

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### B- Incorporation of the Text in a Definite Framework :

As for the incorporation of the text in a definite framework it is the study of the text in a non-Islamic framework, and this framework may have or may not have emerged from an existing social reality. The exerciser of the *ijtihad* tries to understand the text within that definite framework, and when he finds it does not go well (tick) with it he puts it aside and passes by it to other texts which fit in within this framework or at least does not clash with it.

We have already seen how the texts which curtail the power of an owner of which permit, sometimes, the seizure of it, were set aside and other texts were preferred simply because those texts do not agree with the intellectual framework which upholds the sanctity of the private property to such a degree as to put it above all other considerations.

A jurist commenting upon the text which states that the land which the owner of it does not cultivate (be taken away from him by the *waliyyu 'l-amr* or the administrator) and to be

given to another to be cultivated on behalf of the community, has written that it had better be not acted upon, since it is contrary to the principles and grounds of reason and by grounds of reason he means the thoughts which affirm the sanctity of the private property in spite of the fact that this sanctity and its degree should have been derived from the law (*sharī'ah*). But when it is established beforehand and in a form that makes it possible for it to have its own way is understanding a legislative text well that is what is the meaning of making a deduction in a borrowed framework. If that were not so then which is that rational argument about the sanctity of the private property in such a degree as to prevent the accepting of the afore-mentioned legislative text. Is private property anything more than a relationship subsisting between the individual and the property? And the social relationship is merely taken for granted and a legal ordained by the society or any other law given for the realizing of a definite purpose? As such it enters neither in the province of purely rational nor that of empirico-rational inquiry.

Many an exerciser of *ijtihād* we find in a field like this as to the unlawfulness of the seizure of a property (land and estate) inferring from a mode of interpretive reasoning that usurpation is intellectually an abhorrent (odious) act. But this mode of reasoning is inept for usurpation is a seizure of a property without right (an unauthorized act) and it is law which determines, whether this seizure is rightful or otherwise so we should derive it from it without imposing upon it a preconceived notion and if it is decided that the seizure is without right (unauthorized), then it is a usurpation and if a persons' right to (its) seizure is assumed, the seizure would not be a usurpation and consequently not an abhorrent act.

Another *faqīh* (jurist) using an interpretative mode of reasoning in respect of the legislation of private property in land has written "Requirement calls for it and accentuates the need



for it. As man is not like beasts but is by nature a civil animal, he must have an abode to take shelter in, and a place exclusively belonging to him to live in. So unless it (private property) were made legal, it would impose a great hardships nay rather, an unbearable burden."

Of course, we all of us admit that there exists the institution of private property in Islam, specially in respect of land, but the thing which we do not admit, however, that the Islamic legal ruling draws upon the idea of private property from its historical roots, as it happens to be the case with this jurist whose intellectual horizon and his conceptions of the past, the present and the future do not extend beyond the orbits of history in which the institution of private property has existed. He finds behind every appropriation in the history of the life of man, an image of the private property which justifies and explains it, so much so that he has become unable to distinguish between the reality and the image (shadow) (of it) and has taken to believing that as long as men requires appropriation of a resident he may take shelter in, — in term of his sense of it, is required that he should own a private property so that it may belong to him exclusively and in which he may take shelter. Had this exerciser of the *ijtihad*, been able to distinguish between a man's having a residence belonging to him and his possessing that residence as a private property of his own, he would not have been deceived by the historical implications of these two things and it would have been possible for him to have perceived with clarity that it is the preventing a man from having a house belonging to him exclusively and not the non-bestowal of the private ownership of that house which would be a burden beyond his capacity to bear. For the students in a university town or individuals in a communist society each one of them has a residence to himself in which he dwells without his possessing it as his own private property.

Thus we find that our *faqîh* (jurist) has derived unintentionally, from grandeur and history of the private property, and those things which inspire in him the idea of humanity's need for it, a framework for his juristic-thinking.

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Among the intellectual frameworks which play effective role in the process of the understanding of the text there is the framework of language such as when the basic word in the text is loaded with history, that is, its meaning has extended from and evaluated during the course of the passage of time. In such a case it will be natural for the exerciser of the *ijtihād* to be readily led excusably to the understanding of the word in its existing present sense, and not in its remote historical sense. It is possible that the word may have acquired this sense quite recently and as a result of a new doctrine or of a growing civilization. On account of this an extreme precaution is necessary in determining the meaning of the word as not to let its being incorporated in the recent linguistic framework, which did not exist at the time when the word was coined.

The operation of the social conditioning of the word 'proprietorship' may have happened to share in misleading the exerciser of the *ijtihād* from the correct understanding of the text, for even when the word may have retained its original sense in spite of the passage of time, it becomes, in the course of definite social dressings of its sense associated with a particular idea or practice conditioned to that idea or practice so much so that at times the psychological sense of the word on the basis of the process of conditionings which result from a definite social formation exceeds the bound of the word's original linguistic sense of at least the linguistic contribution of the word may have become amalgamated with the psychologically

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conditioned contribution of it which in fact is a result of the social formation in which the exerciser of the *ijtihād* lives more than its being an outcome of the word itself. Take, for example, the word socialism. The word has become, during the present day socialist doctrines of socialism, which are the living experience of the contemporary man conditioned to a mass of thoughts, values and practices and this mass forms to a certain extent an important part of its present day social sense even though on the purely linguistic level it bears nothing of these senses from this mass.

Likewise is the case of the word 'subject'. The history of feudalism has urged it with a great sequel and has conditioned it with the feudal behaviour of the land-lord towards the serfs who cultivate for him his land. So when we come across the word 'Socialism' or texts which contain the word 'Socialism' or the word 'Subject' like the text which states that the people are co-shares in 'water', 'fire', and 'grass' or the text which states that "the lord (*walī*) has a right over the subject" we face the danger of responding to the social conditionings of these words and give to it the social meaning which exists far removed from the climate of the text instead of giving it the linguistic meaning which it indicates.

### C- Separation of the Legal (*shart'ah*) Evidence (ground) from its Condition and Circumstances

Separation of the legal ground from its conditions and circumstances in an operation of the extension of the legal ground without objective justification.

This operation is often perpetrated on a particular kind of legal grounds and these grounds are those to which the jurist apply the name '*at-taqrīr*'. In view of the fact that this kind of grounds effect greatly the process of *ijtihād* performed in



respect of the precepts and conceptions which are connected with the economic doctrine. It is necessary that we bring to light the danger which threatens this ground as a result of its separation from its conditions and circumstances.

Let us first explain the meaning of the term *at-taqrîr*; *at-taqrîr* is one of the expressions of the holy practice (*as-sunnatu 'sh-sharî'ah*). It means the silence of the Prophet or Imâm as in regard of a definite action which takes place in the presence of him or which comes to his ear — a silence which reveals his (*at-taqrîr*) tacit consent (approval) of it and its validity in Islam.

*at-Taqrîr* is of two kinds because at one time it will constitute a *taqrîr* for a definite action, which an individual carries out such as when one drinks beer in front (in the presence) of the Prophet and the Prophet keeps silence. This silence on the part of the Prophet reveals the permission of the drinking of it in Islam. At another time it will constitute a *taqrîr* for a common action, frequently carried at by the people in their usual life. Such as when we learn from the usual practice of the people, during the (Islamic) legislative age of extracting mineral riches from the bowels of the earth and owing of it on the ground of their having extracted these riches. The silence and non-objection of the *sharî'ah* to this usual practice will be considered a (consent) *taqrîr* in respect of that practice and will constitute a ground of Islam's sanction to individuals to extract from the bowels of the earth its mineral riches and to own them. It is to this that the name *al-'urfu 'l-'âm* or *sûratu 'l-'uqlâiyyah* (common usage, or practice of the common people) is applied in juridical discussion. Recourse to it, in fact reveals *sharî'ah* agreement with a practice common contemporaneously with the age of legislation by way of the non-occurrence of prohibition against it from the *sharî'ah*; for if the *sharî'ah* did not agree with that practice which was contemporaneous with it, it would have forbidden that



practice. So the absence of the *shari'ah*'s prohibition against it constitutes its permissibility.

This mode of reasoning depends upon a number of things: Firstly, the contemporaneous existence of that practice with the age of Islamic legislation should be established with historical certainty; for it were found that the practice obtained at later date than its being contemporaneous with the age of legislation then the silence of *shari'ah* in respect of it would not constitute *shari'ah*'s approval of it. It will reveal *shari'ah*'s approval of it only if this practice existed contemporaneously with the age of legislation. Secondly: The absence of the issuance of prohibition by the *shari'ah* against that practice should be established with certainty absence of its prohibition would not be deemed sufficient until the investigator establishes the absence of the issuance of the prohibition in respect of that practice otherwise he will have no right to declare Islam's sanction of that practice, since it is probable the *shari'ah* might have prohibited it. Thirdly: All the objectively satisfied circumstances and conditions should have been obtained by a personal observation since it is possible that some of these circumstances and conditions may have affected the sanction of that practice and the non-prohibition of it. And when we have drawn up and methodically arranged with scrupulous exactness all the circumstances and conditions which surround that practice which existed contemporaneously with the age of legislation, it will be possible for us to discover from *shari'ah*'s silence, *shari'ah*'s permission of that practice when found within those circumstances which we have drawn up and arranged with scrupulous exactness.

Now in the light of this explanation we will be able to understand how a personal subjective element creeps into this ground exemplifying the separation of the practice from its circumstances and conditions.

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This separation takes two forms. Sometimes the exerciser of the *ijtihâd* finds himself living in a society in which a definite economic order prevails. He so clearly perceives the practice, its origin and deep rootedness as to become oblivious to, the factors which helped the practice coming into existence and temporal circumstances and conditions which contributed to the preparation of the ground for its coming into existence. He therefore is led to think this practice to be deep rooted in the past and to have come down historically from the Islamic law making age while in fact it is born out of a definite recent conditions and circumstances or at least it has possibly come into existence in that way. Let us mention by way of an example, the capitalist products in respect of the works and mining industries. The reality of the day of this is crammed up with these kind of production which is exemplified by the hired labourer extracting the mineral materials like salt and oil (petroleum, from the bowels of the earth) and the capitalist paying them wages, and considering himself on account of this the owner of the material extracted . . . The hire-contract, this takes place between the capitalist and the labourers now appears so natural in its aforementioned contents and results as to make it possible for a large number of people to image that this kind of contract coincides with old times that is, it is as old as the men's discovery of the mines and his seeking to avail of them. They therefore hold on the basis of it that this kind of hire contract existed during the Islamic legislative age. It is quite natural from this for the idea to result using it as an argument for the validity of this hire kind of contract and the capitalist ownership of the extracted material on the ground of *at-taqrîr*. It may be said that the *sharî'ah's* silence and its not interdicting of this kind of hire contract constitutes a ground of Islam's permission of it.

We do not want to say anything in respect of this hire-con-

tract and its requisites from the juristic point of view, nor about the dicta of the jurists, who entertain doubt as to its legal soundness in Islam or its requisites. We will examine the ruling of the law (*al-hukmu 'sh-shar'i*) in respect of this kind of hire-contract and its requisites with elaborate details at some future time, and will present all the arguments which it is possible to cite as authoritative grounds for and against it. Here we only want to examine the deduction of that hire-contract on the ground of *at-taqrîr* in order to bring out to light the fact of the divorcement of the practice from its conditions and circumstances. Now those who infer on the ground of *at-taqrîr* the legal validity and soundness of that (kind) of hire-contract and its requisites, did not live in the Islamic legislative age, so as to be certain of the prevalence of this kind of hire-contract in that age. They witnessed its prevalence only in their actual life and the climate in which they lived. Its being firmly rooted in the ruling social system and order in which they lived, led them to the belief that it was a general phenomenon extending down historically from the Islamic legislative age. It is this what we mean by the separation of a practice from its conditions and circumstances without an objective justification. If that were not so, do we truly possess a ground to say that this kind of hire-contract did exist and was widely prevalent in the Islamic law-making age? And to those, who are sure of its existence in that age, know that that kind of hire-contract is the regular expression of capitalist production and that it was not found historically on a wider scale in or in widespread regions — especially in industrial field except at a later date?

However this statement does not mean the positive assertion of the denial of the existence of the capitalist production of the mineral materials in the Islamic legislative age — the practice of their extraction by hired labour — nor does it mean an advancement of a ground of it but merely expresses a doubt in respect



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of this being the case, and that is to say that how a definite phenomenon becomes so deep-seated and appears so natural as to lead to the conviction of its deep rootedness in the past and its chronicity simply because of its being rooted in the living reality without the complete satisfaction of the logical grounds of its historical antiquity.

This is the first form of the abstractive process – the separation of the living practice from its actual conditions and circumstances and its historical extension to the Islamic law making age.

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As for the other form of the abstractive process, it is that which takes place whenever we study a practice co-eval with the Islamic legislative age and try to discover Islam's sanction of it on the ground of *sharī'ah*'s silence in respect of it. Under this circumstance the exerciser of *ijtihād* is likely to fall into the error of abstraction whenever he separates that practice co-eval with the Islamic legislative age from its circumstances, isolating the factors which may have a part in its permissibility and generalises it with the dictum that this practice is sound and valid in Islam under all circumstances whilst in order for the inference on the ground of *at-taqrīr* be objective, it is necessary that we include into our reckoning all the circumstances which may be likely to affect Islam's standpoint in respect of that practice for when some of those circumstances and conditions change, the inference on the ground of *at-taqrīr* becomes inept. For example, when you are told that the drinking beer in Islam is lawful, on the ground that such a one when he fell ill during the time of the Prophet drank beer and the Prophet did not forbid his doing so. You can say this in reply to it that this ground of *at-taqrīr* singly by itself is not a sufficient ground for



the permission of Islam to every individual to drink beer even when he is sound in health for it is possible that in case of some diseases, drinking of beer may be allowable exceptionally, so then, it is a mistake to isolate a practice even with the Islamic legislative age, from its conditions and circumstances and to generalise the legal ruling in respect of every analogous practice without justification, even if it differs in respect of the circumstances by reason of which the legal ruling will differ. Nay, we should rather take ocular consideration all the individual circumstances and social aspects which surround the practice existing in the legislative age.

## D- Adoption of a Definite Point of View

### Before-hand Towards the Texts :

By adopting of a definite point of view we mean, investigators own disposition towards the case. The disposition greatly affects the understanding of the texts. In order to clarify the idea of view-point we may suppose two persons studying the texts, one of whom is disposed towards discovering the social side and whatever is connected with the state in respect of the Islamic precepts and Islamic concepts, whilst the other is drawn by his own disposition towards discovering the precepts which are connected with the particular practice of the individuals. These two persons, although they directly deal with the self-same texts will derive different results out of them and each one of them will reach results which would be more in keeping with his own disposition and his particular point of view and he is likely to remain blind towards those outstanding Islamic aspects, before his eyes towards which he is not himself disposed.

The effect of this ones own disposition which the subjectivity of the exerciser of the *ijtihad* imposes and not the

objectivity of the discussion, is not confined to the concealing of some of the outstanding legislative land marks from his view but at times it leads him astray in the understanding of the legal texts and to the error in the deduction of the legal rule from them. This happens to be the case when the exerciser of the *ijtihâd* wants to impose his personal (subjective) point of view which he has already adopted. In such a case he will not succeed in reaching correct explanation of them.

Instances of this are numerous in jurisprudence. The prohibition of the Prophet about surplus water and pasture is one of the most obvious instance of the extent of the process of deduction from a texts being affected by the disposition of the exerciser of the *ijtihâd*. It is stated in the tradition that the Prophet passed judgement for the inhabitants of Medina concerning (the use of well water for) date-palm that no one was allowed to deprive others of the surplus water; and he passed judgement for the desert dwellers forbidding them the withhold of the surplus water or sell of the surplus pasture. This interdiction of the Prophet forbidding the withhold of the surplus water and pasture may be construed as *sharī'ah*'s general rule fixed for all the times, and places like the prohibition against gambling and drinking, just as it can be construed as a definite legal measure which the Prophet took in his capacity as a *waliyyu 'l-amr* (ruler) responsible for the welfare of his Muslim subject within the limits of his authority and qualification as a ruler. As such it will not be an absolutely binding general law of Islamic *sharī'ah* but an ordinance connected with its circumstances and experience as assessed by a ruler.

The subject of the discussion in regard to this text of the tradition of the Prophet imposes upon the investigator the duty of including both these suppositions and the determining of either of them in the light of the text or similar texts.

As for those who adopt beforehand their personal disposi-

tion towards a text, they take it upon themselves from the very beginning to find in every text the general rule of the Islamic law and to look always *vis-à-vis* the texts to the Prophet in his capacity of an instrument for the promulgation of the general laws of Islam and to overlook his positive role in his capacity of a ruler. As such they will explain the aforementioned text on the basis of its being a general rule (binding for all times and places)<sup>1</sup>.

This specific point of view does not spring from the text itself but results from the mental habit as to (his) image of the Prophet and his definite idea thinking about him. It is to this that attitude to which the exerciser of the *ijtihād* is led having been accustomed always to look to the Prophet in his capacity as the promulgator of his prophetic mission he is blinded to the Prophet's other identity of the ruler and consequently he is blinded to what this identity itself represents in respect of different texts.

#### An Occasional Need of the Subjectivity:

In the end we must point out to the one scope within which the subjective side is allowed when attempting the formulation of the definitive general idea in respect of the economics of Islam. It is the scope of the choice of the form purposed to be adopted for the economics of Islam out of a collecting of those forming which represent legitimate juristic *ijtihāds*. We have been already told that the discovery of the Islamic economic

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1. They deduce on the basis of this that the prohibition is not an interdictory prohibition (*nahy tahrīm*) but a reprehensive prohibition (*nahy karāhah*) for they consider it improbable that the owner of the well is prevented from earning profit from his well-water for every time and in every place.



doctrine is accomplished through the process of *ijtihād* as to the construction of the meaning of the texts their symmetrical combination and the reconciliation of their implications into one bunch. We have learnt that *ijtihāds* differ and vary in kind subject to the difference of the *mujtahids* in their understanding the meanings of the texts in their manner of dealing with the contradictions which may appear between some of the texts and in the general rules and patterns of the juristic thinking they may adopt. So also we have learnt that the *ijtihād* enjoys a legal status and an Islamic stamp as long as it pursues its function, depicts its form and delimits its land-marks within the frame-work of the Holy Book and the *sunnah* of the Holy Prophet and in accordance with the conditions not allowed to be by-passed.

From this results the augmentation of our stock in respect of the Islamic economics and the presence of the multifarious of its forms all of them *shar'ī* all of them Islamic. It is in such a case that we can choose in every scope the most effective and the strongest of the ingredients we may find in that form for the treatment of the problems of the (socio-economic) life and the realization of the highest of goals of Islam. This is the scope of the personal choice in which the investigator is the master of his freedom and opinion, but he is free only in his capacity as a discoverer. Nevertheless this subjectivity will no more be an option, nor an innovation for it makes give him freedom limited to the orbit of different *ijtihāds* and not a complete freedom.

As it is the author of this book who made use of this personal scope (subjective scope of choice) in his investigations herein before and will make use of it in his investigations herein after as alluded to by him in the foreword of the author's *ijtihād* deductions in matter of juristic law (vide the foreword by the author vol. I, pt. 1, p. xlv). For not all the precepts the author has



presented in this book adopted or sought guidance from, are the outcome of his *ijtihād*. In fact, on the contrary, in some matters he has presented precepts which do not agree with his *ijtihād* as long as they express other *ijtihād*'s deductions in matter of juristic law view points bearing the Islamic character and the *shar'ī* stamp.

In this connection I would like to state emphatically that the use of this subjective scope and the bestowal of the right of the choice to practise within the general framework of the *ijtihād* in respect of the common law of Islam (*sharī'ah*) constitutes a necessary condition on the technical side for the process of the discovery of this book is engaged in attempting and not merely a permitted thing or a kind of easy going and lazy aversion to the bearing of the burdens of rigours of the task of the *ijtihād* in respect of the precepts of Islamic law inasmuch as under certain circumstances the discovery of the Islamic theory and the fundamental doctrinal principles concerning the science of economy at one (welded into one whole) comprehensively completely, consonantly, homogeneously with their upper structure and their legislative particulars and their juristic ramifications, is impossible except on the basis of the subjective scope of choice.

The author says this as a result of the personal experience he had lived through during the period of his preparing this book. Perhaps it is necessary to make it quite clear here in order to show one of the difficulties I had mostly to undergo in my search in respect of economics of Islam and the manner in which I overcome it by the use of the above stated personal (subjective) scope (of choice) which gave me the right of its use.

It is agreed on all hands among the present day Muslims that the portion of the precepts of the law of Islam which has been kept preserved with its clarity, its need and its character of finality, notwithstanding these long centuries which separate

us from the (early) law making age of Islam, is very small. Surely from among the body of the precepts we find in the juristic book, those of the class which enjoys the quality of absolute finality does not exceed five per cent.

Why is it so clear? The precepts of Islam are derived from the Holy Book and the *sunnah* of the Holy Prophet i.e. from the legal text. If so, for the soundness everyone of these texts with the exception of the Qur'anic texts and a small body of the texts of the *sunan* (pl. of *sunnah*) established by *tawâtur* i.e. continuity. We have to rely upon the transmission of one of its transmitters or the *muḥaddithîn* (traditionists). Now howsoever carefully we may scrutinize the account about the transmitter and the extent of his trustworthiness and faithfulness as to his transmission, as long as we are made acquainted about the extent of the integrity and the faithfulness of the transmitters historically and not in a direct manner and so long as there is a likelihood that the faithful transmitter, being fallible, may have misconstrued the text and transmitted it to us obliquely especially in circumstances in which the text reach our hands only after going around of passing through the hand of a number of transmitters, each transmitter, in his turn handing it down to the next till it reached us at the end of the long journey, we cannot be sure of the soundness of the text in an absolutely decisive manner. But even when we have made ourselves sure of the soundness of the text and of its having originated from the Prophet or Imâm. Yet we cannot comprehend the same except the way we are living today and are unable to assimilate its atmosphere and conditions and to penetrate its milieu which can throw light on it. On setting out the text with other legislative text to reconcile it with them, too, we are likely to make mistake in our mode of reconciliation and give preference to this or that text while that text may be sounder than it – nay even there might be existing an exception in yet another

text and the exception may not have reach our ears, or we might have paid no heed to it during the course of our *ijtihād* and so may have adopted the former text ignoring the text containing the exception which explains it and particularises it.

From this it follows that *ijtihād* which is a complex and complicated process. Doubts and misgivings confront it on every side. Whatever conclusion might have been arrived by it, the opinion of the *mujtahid* who draws it plays the part of a deciding factor in it. As such its soundness in fact cannot be invariably settled inasmuch as it is probable that the *mujtahid* may have made a mistake in reaching its conclusion on account of the unsoundness of the text. In fact, even though it may have appeared sound to him, or on account of his misconstruction of the meaning of the text or on account of the error in the way of his reconciliation of it with all (the rest of) the texts or on account of his non-inclusion of some of the texts having significant bearings on the subject matter, his having omitted them or some other texts corroded by ages.

This does not mean, in fact, that the process of *ijtihād* is invalid or disallowed. Indeed in spite of the fact that it is hedged in by doubts and misgivings, Islam has allowed its practice and has fixed for the *mujtahid* the extent of the limit to which he can rely upon his presumptive opinion within the rules formally expounded in by the science of the principles of law *uṣūlu 'l-fiqh* — jurisprudence. And there is no blame if he relies upon his opinion within permitted limits whether he be right or wrong.

In the light of this it is cogent and expected to find with every *mujtahid* a collection of errors and contrary to the reality of Islamic legislation though of course he cannot help it. So also it is cogent for the reality of Islamic legislation to be apportioned hither and thither in the body of the questions which (juristic matters) treats them due to difference of opinion among *muj-*



*tahids* as this *mujtahid* may be wrong in a matter and right in another, and the other *mujtahid*, vice versa.

In the presence of this fact, the pursuant comes into possession of the process of the discovery only when he proceeds in his discovery from the precepts established by a specific presumptive *ijtihād* in order to go beyond them to what is profounder and more comprehensive to the Islamic theories and the Islamic doctrine of economic.

But it is incumbent upon us to pose a question. Would the *ijtihād* of every *mujtahid* — the precepts he has gathered up and collected in a body — necessarily reflect to us a perfect economic doctrine and bases consolidated and consonant with the structure of those precepts and their nature?

Our reply to this question would be in the negative for the *ijtihād* on which the deduction of those precepts is based, is exposed to terror. As long as such is the case, it is likely for the *ijtihād* of a *mujtahid* to add a foreign element to the Islamic reality. It is likely that a *mujtahid* may have been mistaken in his deduction or may have failed to find an Islamic legislative element having not succeeded to have lighted upon it and the texts he was pursuing or the body of the precepts to which his *ijtihād* has led, may have become contradictory for this or that reason. It becomes difficult in such a case to attain to a perfect conceptual balance to unify them or to a comprehensive doctrinal explanation consolidating them all together into one whole unit.

It is on account of this that we should make a distinction between the Islamic legislative reality which the Prophet had enunciated and the form of it as depicted by a particular *mujtahid* through his pursuance of the texts. However we believe that the reality of Islamic legislation in the fields of economics is neither produced extempore nor is born of views separated and isolated from each other, on the contrary the Islamic reality



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in these fields is built upon a unified base and common balance of conceptions. It emerges from the theories and generalities of Islam in the affairs of economic life.

It is our belief in this which makes us consider the precepts as the upper structure which should be crossed over to what is profounder and more comprehensive and step down it to the bases on which it is built up and which expresses their generalities in their elaborated details and ramifications without contradiction or protrusion. Were it not for our faith in that the precepts of the *sharī'ah* are built upon unified fundamental principles there would have been no justifiable reason for the pursuance of the process of a discovery of the economic doctrine.

All this is true as concerns the Islamic legislative reality, but concerning this or that of the *ijtihāds* of the *mujtahidīn* it is not necessary that the precepts which that *ijtihād* has formulated reflect a complete economic doctrine or a comprehensive theoretical basis of it as long as it is possible to add a foreign element or miss a genuine element on account of the *mujtahid's* mistake.

And a single mistake in respect of the body of the precepts is sure to lead to the turning of the truths in the process of the discovery upside down and subsequently to the impossibility of attaining to the economic doctrine by way of those precepts.

It is because of this that the pursuer of the process of the discovery of the economic doctrine is faced with a trying ordeal. It is the ordeal between his capacity as a discoverer of the economic doctrine and his capacity as a *mujtahid* deducing the *aḥkām* (the prescription of the laws). This would be the case when we take it for granted that the body of the *ijtihād* to which he is led by his personal *ijtihād*, is unable to discover the economic doctrine. The pursuer under this circumstances, in his capacity as a *mujtahid* concerned with the deducing of those *aḥkām*, is driven by the nature of his *ijtihād* to the choice of

the *ahkâm* to which his *ijtihâd* has led in order to set out therefrom to his discovery of the economic doctrine.

But in his capacity as a discoverer of the doctrine (of the economics) it is incumbent upon him to choose well-combined body of the *ahkâm*, harmonious in its directions and its theoretical significances to be able to discover the doctrine on its basis. But when he does not come across such a well combined body of the *ahkâm* to which his personal *ijtihâd* has led, he finds himself obliged to choose another point of departure appropriate for the process of discovery.

Let us give a more clearly concrete form to the difficulty in the following example.

A *mujtahid* observed the texts to connect ownership of natural raw materials (wealths) with work and labour and to disavow their appropriation in any other way except work or labour. He found a single exception to these texts in a text avowing in some of the contexts: appropriation in another way than work.

To, this *mujtahid*, the deductions of the texts and their contributions — according to him — will reveal a quandary of a lack of coordination. And the source of this lack of coordination is the existence of the text of the exception. But for the (excepting) text, he would have been able to discover on the basis of the body of the other texts; that the ownership in Islam is established on the basis of work. Faced with such a quandary — in such a predicament what is the *mujtahid* to do, how is he to get over this contradiction between his two capacities, his capacity as a *mujtahid* concerned . . . the precepts of the Islamic law and in his capacity as a discoverer?

The *mujtahid* who is faced with this contradiction has to put up with two usual explanations for disturbance and the lack of combination between *ahkâm* to which his *ijtihâd* leads him.

One of these two explanations is: that a certain text he pursued for constance the text of the exception we have supposed by way of an illustration is unsound notwithstanding the fact of its satisfying the conditions which any but in which they are satisfied is enjoined by Islam to be complied with. The unsoundness of some of the texts introduces a foreign element in the body of the *ahkām* combined together by his *ijtihād*. It subsequently leads to the repugnance between those *ahkām* at the theoretical level and in the process of the discovery.

The other explanation is that repugnance tangibly felt between the constiments of the collection is superficial. It has only resulted from the pursuer's feeling of inability to find the secret of the unity between those constituents and their joint (common) theoretical explanation.

Here the position of the *mujtahid* in his capacity as one who infers the precept of the law of Islam is distinct from his position (stand-point) in his capacity as one pursuing the process of discovery of the economic doctrine in Islam. He in his capacity of one drawing the *ahkām*, cannot forgo his particular act according to the *ahkām* to which his *ijtihād* directs him even though these *ahkām* appear to be mentally repugnant at the theoretical level so long as it is likely this repugnance arises from his inability to get at the nestling place of their secret or their doctrinal basis. But his adherence to these *ahkām* does not mean their finality. On the contrary they are the deduction of his presumptive opinion (*ẓann*) so long as they are established on his presumptive *ijtihād* which justifies their adoption in despite of the possibility of error.

But when the jurist wishes to step over the domain of the jurist precepts, to the domain of jurist theories, and to pursue the process of the discovery of the economic doctrine in Islam, the nature of the process prescribes for him the kind of precepts he should start from and makes it imperative for the point of



departure to be a collection of well combined and mutually consistent precepts. If he is able to find such a collection from the precepts his *ijtihād* draws together and to set out from it on the process of the discovery for the construction of the general basis of the Islamic economic, without undergoing the painful experience of contradiction or repugnance between the constituents of this collection, it will afford him a valuable opportunity to unite his person in his capacity as one drawing the *aḥkām* of *sharī'ah* with his person in his capacity as a discoverer of the theories.

But if he is not so fortunate as to have this opportunity afforded to him by it and if his *ijtihād* does not manage the business of helping him to a proper point of departure that in no way will affect his resolution to carry out the process or his faith in that a general will coordinated theoretical explanation of Islamic reality is possible and the only course upon the pursuer to follow in that case is to seek help from the precepts to which the *ijtihād* of *mujtahids* other than him are led. For in every *ijtihād* there is a collection of precept which differs to a great extent from the collections which consist of other *ijtihāds*. It would not be logical to expect the discovery of the doctrine of economic from behind each and every one of these collections. We believe in only the doctrine of Islamic economy established on the basis of the existing *aḥkām* of the *sharī'ah*, contained in these collections. So in case of the repugnance between the constituents of a collection, which the *ijtihād* of the pursuer has adopted, it is a duty imposed upon him in respect of the process of the discovery to remove the disturbing elements which lead to contradiction and replace them with such deductions and precepts from other *ijtihāds* as are more consistent with and more facilitating the process of discovery and to formulate a collection formed from various *ijtihāds* satisfying the need of the consistency in order to set out from it and come out at the



end with the discovery of the conceptual balance that collection formed from the *ahkām* of *sharī'ah*.

The least that can be said in respect of this collection is this: that it will be in its entirety the truest and the veriest picture of the Islamic legislative reality and the possibility of its verity is not more far fetched than the possibility of the verity of any of the other picture with which the surface of the juristic *ijtihād* soil is replete; over and above this it bears its legal *sharī'ah* justification since it expresses the licit Islamic *ijtihāds* all of which revolve within the orbit of the Book and *sunnah* of the Prophet. On account of this it is possible for the Islamic society to choose it in the field of applied practice from among many of the *ijtihād* forms of the *sharī'ah* one of which must be chosen.

This is all that can be achieved by the process of the discovery of the Islamic economics, when the personal *ijtihād* of the pursuer of it is unable to formulate an appropriate point of departure for the purpose. However, this is all that we at the most need in this connection. But what more do we need after we discover an economic doctrine which enjoys no less a share than any other of the *ijtihād's* pictures of the veriest and most precise and exact possibility of a picture of it and in which all the justificatory factors of its connection with Islam are satisfied in the same of its being ascribed to a sufficient number of the some *mujtahids* and carrying with it the Islamic sanction of its practical application to the Islamic life.

### **Delusion of the Applied Existing Reality :**

The economic doctrine of Islam entered in the life of the Muslim society in the age of prophethood and existed at the applied level of practice of the existing reality of the economic relations which obtained among the Muslims of those days.

On account of this it becomes possible for us during our pursuit of the process of the discovery of the Islamic economy, to study and make search of it at the applied level just as it is possible for us to study and make search of it on the theoretical level; inasmuch as the applied practice defines the features and characteristics of the Islamic economic so just as the texts of theory define them in the fields of *sharī'ah*.

However the legislative texts of theory are more capable of forming a picture of the doctrine than the applied existing reality inasmuch as the application of the legislative texts to a definite condition is not likely to be able to reflect a fat (great) content of that text nor is it likely to be able to visualize its complete social significance. The afflatus of applied practice and its conceptual contribution of the theory differs from the contribution of the texts themselves. This difference arises from the delusion of the practice for the senses of the pursuer of the process of discovery resulting from the practices being linked with specific objective conditions.

An instance of this delusion would be sufficient. To the pursuer (*mujtahid*) who intends to seek to know the nature of the Islamic economics from the practice (of it during the early period of Islam) the practice will reveal that the Islamic economics is capitalist (in nature), believes in the economic freedom and opens up a wide field in front of the private property and individual activity. This is what was held by some of the Muslim in all its explicitness, when the individual members of the society which lived in the experimental age of the Islamic economic appeared to them as having a freehand, and experiencing no let or hindrance or any constrain or compulsion in the economic doings, enjoying the right of private ownership of any of the natural wealths it was possible for them to get possession of and the right of their investment of these wealth or their disposal of them. Capitalism is nothing more than this unrestrained

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freedom which the members of the early Islamic society were pursuing in their economic life.

Some of them add to it that to graft the Islamic economy upon non-capitalists constituents and to say that Islam is socialist in its economics or carries socialistic (communist) seeds within, it is not a fair thing to do on the part of the *mujtahid* in his capacity as a *mujtahid*. In doing so he is joining the procession of new thought which has begun to frown upon capitalism and to reject it and is preaching to develop Islam in a form made palatable in the measures of the new thought.

I neither deny that the individuals of the society in the age of prophethood carried on pursuing free activity and possessed economic freedom to a considerable extent. Nor do I deny that it reflected a capitalist face of Islamic economy, but this face which we sense when we look at some of the aspects of practice, we do not at all sense when we look at them during the study of the theory on the theoretical level.

It is true that the individual who lived in the age of prophethood seems to us to be enjoying a great deal of freedom, which the pursuer of the *ijtihad* may at times be not able to distinguish from the freedoms of the capitalism, but this imaginary fancy is dissipated and fritters away when we turn practice to theory as to the legislative texts.

This discrepancy between the practice and theory notwithstanding the fact that both of them express one of the alternative form of the other, was lying concealed in the conditions in which the man of the age of applied practice was living and the kind of power and ability he was possessing. The theoretical significance of the non-capitalism were hidden in the field of applied practice to a certain extent, in the degree to which man's power and ability over nature were weak. It shows its non-capitalist content conjointly and becomes especially manifest in the field of its genuine practice in Islam in the degree these



powers increase and the abilities become capacious for whenever man's ability expended and his means to gain control over nature became, variegated, more spacious fields opened up before him for the wider operation, appropriation and exploitation of the natural resources the more manifest they became, the more explicit became the contradiction between the Islamic theory of economics and the capitalist theory of economics and its non-capitalist significance comes to light in the solutions formulated by Islam to meet the new problems coming into existence *vis-à-vis* the growing hold of man over nature.

Man of the age of applied practice, for instance, used to go to the salt-mine, or mine of some other thing, and extract as much of the mineral material as he wished without any probability from the theory which was prevalent or any objection therefrom, to his appropriation of that material as his private property. So what can this phenomenon reveal thereby in the field of practice when it is separated from the study of the juristic and legislative text in a general way? It can reveal only the rule of the economic freedom in the society to a degree in which it will resemble capitalist form of freedom as to the possession and of the property and its frictification.

However, when we look at the theory through the text, we will find it will reveal a feeling contrary to the feeling that, the phenomenon in the field of applied practice will reveal for the theory forbids the private possession of the salt or naptha mines, and does not give permission of the extraction of these material more than what individuals need of them. This is an explicitly clear contradiction of the capitalism which is affiliated to the principle of the institution of private property and opens up and ampler room for the acquisition of the sources of the natural mineral wealths and their capitalistic exploitation, with the intention of additional profit. So can anyone apply to an economic system which neither admit of the freedom of the



possession of the mines of the salt and naphtha (petroleum products) nor of their increased extraction to the inconvenience of the others, and the depriving them of the right of their enjoying the usufruct from these mines — yes can anyone apply to this system of economics the name of capitalist economics? Or can it give rise in our heart the feeling of its being a kind of capitalist doctrine of economic like the feeling which it give rise in the heart of those who made an approach to it through its applied practice?

In that case it behoves us to know that man of the age of applied practice, of freedom in the field of work and exploitation, — even the deriving for instance of the profit from the salt and petroleum mines, on account of the fact that he was not mostly able by the force of natural circumstances, and the low level of this means and their primitiveness, exploit it then outside the permissible limits on the part of the theory. He was not able, for instance, to extract from the mine huge quantities — like the huge quantities which are extracted nowadays for he was not equipped against nature as the man of our days are equipped. So he did not come in conflict in reality of his life, with the limit which was set to the quantity which it was permissible to extract for the simple reason that whenever he wished to extract, he was not able to extract with the primitive instruments at the utmost of his power a quantity which would be lessened to his disadvantage in other sharing with him the benefits of the mine. However, theory shows its effect vaciferantly and reflects its contradiction with the capitalist thinking when the man's power rises up, his capacity of carrying inroads upon nature grows and it becomes possible for a small number of men to work up and exploit the whole of the mine, and find a field in the well connected on the whole and open world-markets for a great profits.

Likewise also we see altogether like this in the theory

which does not permit an individual to take into his private possession, the natural wealths and raw materials like the wood of the forest except what he can hold or produce by his own labour directly. The men of the age of applied practice could not have had an explicitly clear sense of this theory so long as the work in that age was in a general way carried out on the basis of the exercise of direct labour and under its force. But when it becomes possible to extract and obtain a huge quantity from the mines, by reason of instruments and machinery of extraction, and the possession of a quantity of cash sufficient to defray the wages of the employed labourers, when all this is completed the ability of that individual becomes natural (it becomes within the reach of the ability of that individual) to rely upon employed labour to extract and acquire possession of the raw material from the natural sources. This is what actually took place in the living reality when the employed labour and capitalist production became the basis of the extraction and the acquisition of that material. It is only then that the contradiction between the Islamic economic theory and the capitalist economic theories become manifest itself in a glaringly clear manner and it will appear to every pursuer unless he were blind, that the theory of economic is not of capitalist nature, else which is that capitalist theory which would war with the capitalist mode of the acquisition of the natural wealths.

Thus it is that we find the man of the age of capitalists production who possesses instruments for cutting a huge quantity of forest wood and has in his keeping cash to induce the unemployed labour to work with him and to employ these instruments for the cutting of the wood and who is found to have at his command ample means of transporting these quantities to the selling houses and the markets waiting for it to consume up all of it.

If this man, were to live the Islamic life, he would become

aware of the extent of the contradiction between Islamic economic theory as to the principle of economic freedom and the capitalist theory of economic freedom when he will see that the Islamic theory would not sanction a capitalist project of cutting of wood of the forest and to sell it at high price.

So the Islamic theory of economics does not manifest the whole of its face during the age of its applied practice it existed in and the man of the age of the applied practice did not take in the whole of its face in the problems he met with and the economic operation he was carrying out. Its complete face shows itself only through the texts in their definitive general categories (shapes).

However those who hold the belief that Islam is capitalist and believes in the economic freedom, have some excuse for holding this belief. They have obtained the inspiration of their feeling from the study of the man of the age of the applied practice and from the degree of the freedom that man experienced. But this feeling is delusory-misleading for the afflatus of practice cannot be substitute for the contribution from the legislative and juristic texts and those reveal a non-capitalist content.

In fact, the firm belief in the existence of the non-capitalist content of the theory of economics in Islam in the light of what we have stated is not the outcome of development nor a grafting nor a new personal contribution to the theory as those who believe that the Islamic economics is capitalistic say, they who charge the tendency towards interpretation of Islamic economics with non-capitalism and say about it that it is a hypocrite's trend trying to introduce a foreign element in Islam, by way of insincere adulatory commendation to advance the cause of the new thought dominion on a (to death) capitalism for its doctrine of private property and economic freedom.

We possess historical proof for the repudiation of this



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charge and the confirmation of the sincerity of the tendency of the interpretations of Islamic economics with non-capitalism and this proof is the juristic and legislative texts which we find from the old resources the history of which goes back to hundreds of years before the modern world and the recent socialism came into existence with all of their doctrines and nations and ideologies.

But when we bring to clear light the non-capitalist face of Islamic economy which has been presented in this book, and affirm a clear line of demarcation between it and the economic doctrine of capitalism, we do not mean thereby to confer upon Islamic economy the stamp of socialism and include it in the prome (matures) of socialist doctrines as the opposition of the capitalism inasmuch as the opposition of the polarization existing between capitalism and socialism admits the postulation of a third pole in this opposition and permits especially the Islamic economics to occupy this central position of the third pole when it is proved to be qualified for this polarization in the contest of the opposition by virtue of its characteristic features and domination. The opposition permits the admission of a third pole in the field only because socialism is not merely the negation of capitalism so that in order to be socialism, it will suffice to deny capitalism, but also it is a positive doctrine. It has its own ideas, conceptions and theories and it is not that these ideas, conceptions and theories be right when capitalism is false. Nor it is necessary for Islam to be capitalist if it is not socialist, for Islamic economic is not in its roots in its independence and in the objectivity of its search, such, that when we pursue the process of its discovery, we can confine our process within the orbit of the specific opposition between the capitalism and socialism, and incorporate Islamic economic in either of these two poles so that we can describe it as socialistic if it is not capitalistic and describe it as capitalistic if it is not



socialistic.

The originality of Islamic economics will become illuminatively clear in the following discussion and its opposition to socialism as to its attitude towards its private property and the sanctity of property and its admission within the limit of its being drawn from general theory — of the legality of the earnings without labour from the private holding of a certain source of production, while socialism does not consider as lawful any earning derived from private holding of a source of production without directly putting in of labour. This in fact is the contradiction between the Islamic theory and socialist theory of economics and it is only from this starting point that all the manifestations of contradictions spring between them. This will become more and more clear as we will set to work out in detail.



## CHAPTER TWO

### THE THEORY OF DISTRIBUTION BEFORE PRODUCTION

#### 1 - THE LEGAL PRECEPTS (*AḤKĀM*)





## THE LEGAL PRECEPTS (*AḤKĀM*)

### Distribution of (Public) Wealth on Two Stages:<sup>1</sup>

The distribution of the wealth is accomplished at two stages. One of them is, the distribution of the material sources of production; and the other is, the distribution of productive wealth.

The sources of production are; land, raw materials, tools and machinery requisite for the production of heterogenous goods and commodity for all these take part in the agricultural or industrial production or in the production of both.

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1. In this section we will use several technical terms. It is therefore necessary to define them at the very beginnings.

a. **The principle of diverse forms of ownership:** It is an Islamic principle of ownership. The principle believes it in three of its forms. Private-ownership, state-ownership and public-ownership.

b. **State-ownership:** It imports the right of taking possession of the property belonging to the divine function (office) of the Islamic state which the Prophet or the Imām exercises, such as his taking possession of the mines according to some juristic texts.

As for the productive wealth it is the commodity (capital goods and fixed assets) effected by the natural human work with results from the process of combining those material sources of production.

Hence there is the primary wealth. It is the sources of production. And the secondary wealth, it is the commodity and the (capital) goods man succeeds in effecting by way of employing these sources.

The talk concerning distribution should comprehend both these wealths, the mother wealth and daughter wealth, i.e. the sources of production and the productive goods.

Evidently the distribution of basic sources of production precedes the process of production itself, for the men carry out only the productive activity in correspondence with the method

c. **Public-ownership:** It imports the right of taking possession of a particular property belonging to the people or nation as a whole.

d. **Ownership of the *ummah* (nation):** It is a kind of public-ownership and imports the right of ownership belonging to the entire Islamic nation in respect of a property or its historical extension such as the ownership of Islamic nation in respect of a property acquired by conquest in religious war (*jihād*).

e. **People's ownership:** It is also a species of public-ownership. We will apply this term to every property which an individual is not permitted to take exclusive possession of, and own it as his private property, while all people are permitted its usufruct that is to avail or make use of it to their own purpose and derive benefit from it. Any property which is of this nature we will apply to it the term (a property under) the common ownership of the people. The term "the common ownership of the people" is applied in the parlance of this book to import a negative thing and that is not giving the permission to an individual or a specific side portion to take exclusive possession of the property; and a positive thing: it is, the permission of its usufruct to all of the people in respect of seas and natural streams.

f. **Common-ownership:** We will apply the term common-ownership to what contains together both of the fields: field of state-ownership and the

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or way in which the society distributes the sources of production. Hence the sources of production before production. As for the distribution of the productive wealth, it is connected with the process of production and depends upon it, for it handles the products from which results the production.

However, when the capitalist economists study the problems of distribution with the capitalist frame-work (mould) do not look at the entire wealth of the society and its sources of production, but study (the problems) of the distribution of the produced wealth only, that is the national revenue and not the entire national wealth, and by national revenue they mean, the entire capital goods and produced services, or in more explicit words, the cash value of the entire produced wealth produced during the course of the year, for instance. Therefore, a discussion

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fields of the two preceding public-ownerships, contrast to what expresses the contrast to the private-ownership.

**g. Private-ownership:** We mean by it when we apply it in this the appropriation of an individual or a limited orbit of the portion of a definite property and an appropriation which gives him principally the right of deprive any person other than himself from the enjoyment of its usufruct in any shape or form unless there existed a need or an exceptional circumstance, like the man fetching a load of wood from the forest or a quantity of water he draws with his hand from the river.

**h. Private-right:** We mean by it when we will apply it in this discussion a degree of the individual's appropriation of the property. It differs from the degree in which the ownership express. Its appropriation in its analytical and legislative sense. Ownership is a direct appropriation of the property. The right is an appropriation, a resultant of another appropriation and subject to it for its continuance and on the legal side ownership of a property gives the owner of the property the right to deprive another person the enjoyment of the usufruct from his property while the private right does not lead to this result. Others can enjoy the usufruct of the property in the manner and form as regulated by the *shari'ah*.



of the distribution in the political economy is the discussion of a distribution of this cash value among the factors participating in the production of it and specify the share of each factor such as the share of capital, of the land, of the sponsor and of the labourer . . . in the shape of interest, revenue, profit and wages.

On account of this it is natural that the discussions of production precede the discussion of distribution, so long as it means the distribution of the cash value of the productive goods among the factors and the sources of the production . . . On this basis, we find the (capitalist) political economy considers the production the first of the subject matters of discussion, so it studies the problem of the production first and then takes up the study of the problems of distribution.

Islam, however, treats the problems of distribution on a wider and more comprehensive scale for it does not confine itself to the dealing with the distribution of the productive wealth and to sheer clear of the deeper side of it, I mean, the distribution of the sources of the production as the doctrinal capitalism (the applied capitalist system of economy) has done when it abandoned the sources of the production forever to the control and authority of the strongest under the motto of economic freedom (the doctrine of laissez-faire) which serves the interest of the strongest and prepares the way for the monopolist exploitation of nature and whatsoever of the material resources it contains and their utilities. On the contrary, Islam interfered in a positive manner in the distribution of nature and whatsoever of the natural resources contained therein, and divided them into a number of categories, every category had

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i. *Public property free to all (Ibāḥatu 'l-'āmmah)*: It is a legal precept in accordance with which an individual is allowed to enjoy the usufruct of the property and to take it in his possession as his exclusively private property. The property in respect of which it is proved that this term can be applied to it is termed public property free to all like the birds in the air and the fish in the sea.



the stamp mark of its distribution, such as private-ownership or public-ownership or state ownership or a public property free to all (*ibāḥatu 'l-‘āmmah*). It formulated for it a code of rules, likewise it formulated in line with it rules on the basis of which the distribution of the produced wealth is to be carried out.

On account of this the distribution became the starting point or first stage in the Islamic system of economy instead of production as is done in the traditional political economy for the very distribution of the sources takes place before the operation of the production and every organization which is connected with the operation of production itself is reduced to the second stage.

We shall now begin with determining the position or standpoint Islam takes from the distribution of the basic sources — the distribution of the natural wealth it contains.

### **The Original Source of Production:**

But before we begin with details according to which the distribution of the basic sources is effected, it is necessary that we specify these sources.

Now in the political economy the sources of production mentioned as a rule are:-

- i. Nature.
- ii. Capital.
- iii. Labour and it includes the organization by which an organizer sets up to execute the project (plan).

But when we discuss about the distribution of the sources of production and the form of their ownership in Islam we must eliminate two sources from our discourse. These are capital and labour.

As for capital, it is a produced wealth and not an original

source of production for every finished goods materialized by human labour and gives its share in producing afresh more wealth. Now the machinery which produces textile goods is not a pure natural wealth but only a natural material given shape to by human labour in a previous process of production. We are at present only discussing about the details which regulate the distribution before production, that is, the distribution of the wealth which is a gift of God to human society before it has set out to carry out its productive economic activity and productive work on it. Now as long as capital is begotten of a previous act of production, its distribution will be included in the discussion of the produced wealth such as the commodity of consumption and the commodity of production.

As for labour, it is an abstract and an immaterial element not a material factor so as to be included in the orbit of public or private proprietorship.

On this basis nature alone from among the other sources could be at present the subject matter of our study for it represents a material ingredient which is prior to production.

#### **Difference of Doctrinal Stand-points Concerning Distribution of the Natural Sources of Wealth:**

Islam differs from capitalism and marxism in the particulars and the details in its handling of the matter of the distribution of natural sources of wealth.

Capitalism connect the ownership of the natural sources of wealth and the way of their distribution with the individuals of the society and the energy and strength and abilities and skill they expand, within the orbit of the ample economic freedom allowed to all of them, in the way of acquiring the largest possible share from those sources. Thus it permits every individual to take into his possession exclusively what luck

helps him to take what good fortune enables him to succeed in obtaining out of the riches of nature and himself.

As for marxism it sees in accordance with its general methodology of the interpretation of history that the ownership of the sources of production is directly connected with the dominant form of production so it is every form of production that determines at its historical stage – the mode of distribution of the material sources of production and the class of individuals who should own them. This mode of production remains in continuation until history enters another stage and production begins to assume new form. This new form of production is unable to make headway with the preceding system of distribution. That system blocks its way to growth and development till the old system of distribution is torn to pieces after a bitter conflict with the old system of distribution and a new form of distribution of the sources of production cover into existence realises the necessary of social conditions for the new production which help to growth on development on the basis of the sources of production which is in accordance with the service of production since it is always established on the needs of its growth and evolutions.

So at the historical stage of agricultural production the form of production necessarily imposes the establishment of distribution of the sources of production on the feudal basis while the historical stage of technological industrial production imposed redistribution domare of the distribution on the basis of capitalist ownership of all the sources of production and at a definite stage of the growth of the technological industrial production the substitution of the capitalist class by the proletariat class and the reshifting of the distribution on this basis become inevitable.

But Islam does not agree with capitalism about its concept of distribution before production nor with marxism. It does not believe in the capitalist concept of unfettered economic freedom



(laissez-faire) as we have come across in the discussion with capitalism.<sup>1</sup> Likewise it does not agree as to the inevitable connection which marxism sets up between ownership of the sources of production and the prevailing form of production as we observed in our discussion about our economic system, its chief land mark.<sup>2</sup> It therefore limits the free ownership by the individual as regards the sources of production and separates the distribution of those sources from the forms of production because the problem in the eyes of Islam is not a problem of the instrument (means) of production demanding a system of distribution favourable to the course of its progress and growth so that distribution changes every time the need of production requires change a new and its growth depends upon new distribution. But it is a human problem Man has needs and desires, which should be satisfied in a form which protects his humanity and develops it. Man remains a man with his needs and his desires whether he tills the land with his hands or employ electric or steam power of that purpose. Therefore, the distribution of the sources for production is required to be effected in such a shape or form which will guarantee the satisfaction of these wants and desires within a human frame which enables man to give growth to his existence and his humanity in accordance with that common frame.

Every man – especially in his capacity as a private person has needs, wants and desires which needs must be satisfied. Islam has facilitated individuals to satisfy these needs by way of the institution of private ownership which Islam has established and has formulated its grounds and conditions.

When relations between men are established and the society comes into existence, there would be general needs of this society, too. Islam has guaranteed the gratification of these

1. *Iqtisādunā* (Engl. transl.), vol. 1, pt. 2, pp. 3 – 47.

2. *ibid.*, pp. 110 onwards.



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needs and wants of the society by its institution of common ownership of certain of the sources of production.

Many individuals are not able to satisfy their wants by way of private ownership, these people will suffer severe distress being deprived of the satisfaction of their wants, general social equilibrium will be disturbed thereby. Here Islam sets up a third form of the institution of ownership — state-ownership so that the head of the state (*waliyyu 'l-amr*) may maintain the equilibrium.

In this way the distribution of the natural sources of production are effected by dividing these sources into fields of private-ownership, public or common ownership and state-ownership.

### Natural Sources of Production:

We can divide the sources of production in the realm of Islam (Islamic economics) into several categories:-

i) The land: It is the most important of the natural wealths without which it is well-nigh impossible for man to carry on any kind or nature of production.

ii) The primary substances contained in the dry land (mineral wealths) such as coal, sulphur, petrol, gold, iron etc.

iii) Natural streams, one of the essential conditions of man's material life, which plays an important part in the agricultural productions and communications.

iv) The remaining of the natural wealths: They consist of the contents of the sea extracted therefrom by diving or in some other way, like pearls, and corals, and the natural wealths which live on the surface of the earth such as animals and vegetables, wealths widespread in the atmosphere such as birds and oxygen, or natural sources, hidden in the sides of the earth, like water-falls.

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which conceals within them electric energy which can be transmitted through wires to any points and such other stocks of natural wealth.

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## LAND

*Shari'ah* has categorized the lands which were annexed to the *Dāru 'l-Islām* (abode of Islam) into three forms of ownership.

In respect of one kind of these lands it has decreed the form of public-ownership, in respect of another kind of them the form of state-ownership and for the third kind of them it has sanctioned the form of private ownership.

The *shari'ah* in these legislative of it, ties the form of the ownership with the occasion of these land's coming into the possession of Islam and the circumstances which ruled over it when it became Islamic land. The nature of ownership of land in Iraq differs from the nature of ownership in Indonesia because these countries differ as to the manner in which they were annexed to and became the territories of *Dāru 'l-Islām*. Likewise in Iraq itself its lands differed with each other in regard of the class of ownership on account of the situation prevailing over this or that (of its) land at the time when Iraq inaugurated its Islamic life.

In order to penetrate into the circumstances we will divide the Islamic lands into classes or categories and then speak about each one of the classes and about the nature of its ownership.

## I. THE LAND WHICH BECAME ISLAMIC BY CONQUEST

The land which became Islamic by conquest is that land which fell to the *Dâru 'l-Islâm* as a result of the *jihâd* in the cause of Islamic mission such as the land of Iraq, Egypt, Iran, Syria and many other component parts of the Islamic world.

The circumstances of all these lands was not identically the same at the time of their Islamic conquest. There existed in them some land which were already tilled land in the tilling of which earnest human endeavours were embodied expended for the purpose or rewarding the land fruitful for tillage or for some other purpose of human utility. There were some lands which on the day of the conquest, were naturally cultivated without any direct intervention on the part of man like woodland thickets teeming with trees and which received their richness from nature and not from men. There were also lands which were left as neglected lands towards which neither the human hand of tilling was extended upto the period of the conquest nor the rearing hand of nature. Hence in the customary juristic parlance they were called dead lands.

So these were the three kinds of lands differing in their circumstances according to the time of their ingress into Islamic history. Islam has ordained public ownership in respect of some these kinds and state-ownership in respect of some of other kinds as we shall see.

### A. LAND CULTIVATED BY HUMAN HAND AT THE TIME OF THE CONQUEST

If the land at the time of its connection a part of the history of Islam was the land cultivated by human hand, and was in the possession of man and within the orbit of his fructification of its then that was a common property of the whole of the Muslim



community of the then generation of the Muslims and all the future generations of the Muslims, that is, it is the Muslim community, with its historical prolongation each general of Muslim at every period of history which is the owner of it without any discrimination between one Muslim and another and an individual is disallowed by Islamic law to acquire the right of inalienable permanent proprietorship and take it into his possession as his private property.

The great research scholar Najafī has quoted in his *al-Jawāhir* from a number of juristic resource-books such as *Ghunya*, *al-Khilāf* and *at-Tadhkirah* that there is a consensus of opinion among the Imāmiyyah jurists about this ruling. They are of one accord about the application of the principle of public-ownership to the land which was a cultivated land at the time of its conquest by Islam. Likewise al-Māwardī quotes from Imām Mālik the saying that the conquered land shall be a trust property for the Muslim from the day it is conquered without there being any need for the *waliyyu 'l-amr* (the head of the Muslim state) to conduct the text of trust in respect of it. This is another meaning of the term common-ownership of the nation.

## Proofs and Demonstrations of the Public-Ownership:

The texts of Canon Law — *sharī'ah* — and their application are quite explicit about the establishment of the principle of public-ownership in respect of this kind of land as is evident from the following reports of traditions:

1- In a tradition from al-Ḥalabī it is stated that he asked Imām Ja'afar ibn Muḥammad as-Ṣādiq (a.s.) about the *as-Sawād* (black) land (i.e. Iraq) "What is its status?" The Imām replied "It belongs to the entire generation of Muslims of today and to the Muslims who will enter the fold of Islam after to this day and those not yet born".

2- In a tradition from Abū Rabī' ash-Shāmī, (it is stated) that Imām Ja'far (a.s.) said "Do not purchase the land of as-Sawād (Iraq) for it is *fay'*\* for the Muslims."

The term *ardu 's-sawād* in the usage of that time, was used to describe a component part of the land of Iraq which the Muslims had conquered in the Holy War (*jihād*). But the Muslims applied this term to the Iraqi land only because when they emerged from their land in the Island of Arabia by carrying the standard of their divine mission to the world and arrived in Iraq the greenery and verdure of the fields and trees of Iraq appeared to them verging on darkness they termed it *as-sawād* for they are used to combine both the term *al-khadrāh* (green) verdure and *as-sawād*.

3- In report of the tradition by Ḥammād: That Imām Mūsā ibn Ja'far (a.s.) said the land which is taken by force is a trust property left in the hand of one who cultivates and revives it and *kharāj* (land tax) is levied upon those who hold these lands according to their capacity.

By this is meant that the head of the state left the lands which were conquered by force (of arms) in the hand of those individuals of the Muslim society who cultivate it and raise crop upon it and demand from them land tax in respect of land because of the land being a public property of the Islamic nation as a whole. When the tillers of the land derive its usufruct by raising crop on it they must pay to the nation the price of the benefit they derive thereby. It is this price or rent to which term the term *kharāj* is applied in the above stated tradition.

4- It is stated in a tradition: That Abū Bardah asked Imām

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\* Here the meaning of the word "*fay'*" is that Allāh has granted the land (as-Sawād) to all Muslims. Therefore, all have right on this land and no one, as an individual, can take possession of the same. (ed)

Ja'far (a.s.) about the purchasing of a taxed land. The Imām (a.s.) replied "But who will sell the land while it is the land of Muslims (property of the entire Islamic community)".

*Arḍu 'l-kharāj* (taxed land) is a juristic term in respect of the land we are talking about for the land which is acquired by conquest and is a tilled land i.e. it is already a land on which crop is being raised when it is acquired; is the land on which *kharāj* is levied as stated in the earlier tradition we have come by and is on that account termed a taxed-land.

5- In a tradition reported by Aḥmad ibn Muḥammad ibn Abī Naṣr, from Imām 'Alī ibn Mūsā ar-Riḍā (a.s.) in which he explained the kinds of land and the Islamic ordinances in respect of them says that "Whatever is taken by sword, that belongs to the Imām to give (guarantee) it to anyone he deems fit."

6- In the book *Tārīkhu 'l-futūḥi 'l-Islamiyyah* it is stated that the Second Caliph was sought for the distribution of the conquered land among the soldiers of war of the Islamic army, on the basis of the principle of private ownership, he consulted the companions of the Prophet. 'Alī (a.s.) advised against it on the basis of that principle. Ma'ādh ibn Jabal said: "If you distribute it will place great revenue in the hands of the nation. Then they will die and will be thus eliminated and the revenue will become the property of a single man or a single woman. Then will come a people who will take their place joining the fold of Islam, but they will find nothing. So decide this matter taking into consideration the fact of making ample-provision for the last as for the first." So he decided it to be the public property. "See what the soldiers have brought to you from among animals and unareable property distribute the same among the Muslims who were present, and leave out the land (streams) to their respective possessors, so that these be the gift of all Muslims. If we distribute these among those present then there will be nothing left for those who come after them, i.e. the succeeding



generations." So 'Umar wrote to Sa'd ibn Abî Waqqâs: "I have received your letter in which you wrote that people are asking you to distribute the spoils of the war and what Allâh has granted them by way of *fay'*. I order you to see what the army urge upon from as the what of the spoils they have brought in, to distribute among the Muslims who have been present in the war only moveable property (lit. *kara'* = horses, weapons, etc. and *mâl* moveable property) and leave the rivers and lands for the *'ummâl* those who work on them so that these be as gifts to the Muslims. If we distribute these among those who are living present nothing will be left for those who will come after them."

A part of jurists explaining the measures of the Second Caliph hold the opinion saying the *sawâd* (fertile) land belongs to its owners as has been stated in the book *Kitâbu 'l-amwâl* by Abû 'Ubaydah that when he returned the land to them, it became theirs by giving them permanent proprietary right in the land and the right of *kharâj* accruing from it was assigned to the Muslims — so the public ownership (of the land) was connected with the *kharâj* accruing from the land and not with the permanent proprietary right in the land.

Some of the contemporary Muslims who have accepted this explanation say that this is nationalizing of the *kharâj* and not the land.

But the fact that the measures were taken by 'Umar on the basis of the belief in the principle of public ownership and his application to it the right of the permanent proprietorship in the land is quite clear and that his leaving the land in the hands of those who hold it in their possession, was not an acknowledgement and recognition, on his part, of their right to it as their exclusive private property. He gave it to them by a contract of lease (*muzâra'ah*) or hire (*ijârah*) so as to utilize (lit. work) the land for productive purpose and enjoy its usufructs



in consideration of the *kharāj* to be paid by them (lit. they offer).

The proof of it is what is of an anecdote a mentioned in the book *Kitābu 'l-amwāl* by Abū 'Ubaydah that 'Utbah ibn Farqad purchased a land on the bank of the river Euphrates. He proposed to start the preparation of land for cultivation. He mentioned this fact to 'Umar. Thereupon 'Umar inquired of him from whom he had purchased it. His reply to it was that he had purchased it from its owner. So when the *muhājirs* and *anṣār* assembled before 'Umar, 'Umar asked 'Utbah if he had purchased anything from these people. 'Utbah replied in the negative and 'Umar then ordered him to return it to the person from whom he had purchased it and to take back his money from that person.

7- There is a tradition from Abū 'Awn ath-Thaqafī mentioned in the *Kitābu 'l-amwāl* that he said that a villager embraced Islam during the rule of 'Alī (a.s.). The Imām thereupon stood up and said "As for you there is no *jizyah* on you and as for your land it now belongs to us".

8- It is stated in *al-Bukhārī* on the authority of 'Abdullah that the Prophet gave the Jews the land of Khaybar to work on the land and cultivate it. They had the half of what they raised on it. This tradition in spite of the presence of other traditions in conflict with it enunciates that the Prophet had applied that principle of public ownership to the land of Khaybar as a land conquered in *jihād*, for, had the Prophet distributed the land specifically among the warriors who took part or were present at the battle, under the principle of private ownership instead of applying the principle of public ownership he would not have entered into a lease-contract for its cultivation with the Jews in his capacity as a head of the state. Therefore, his having entered in such a contract in his capacity as the head of the state indicates the matter of its disposal was entrusted to the state and not to

the individuals who had acquired it by way of the booty of war.

Some Muslim thinkers state that the event of dealing with the conquered land of Khaybar in this way furnishes a decisive proof of the fact that the state has the right to take into its possession the goods and properties of the individuals — a matter which establishes the validity of nationalization in Islam for the general rule is that *fay'* should be distributed among the warriors present at the battle. Therefore to reserve it for the state instead of its distribution among those entitled to have it vests in the state the right to lay its hand on the rights and claims of its people when it thinks doing so is needed in the best interest and the happiness of the people as a whole so it is valid for the state to have the right of nationalizing private properties.

But the fact is that the states reservation to itself of the conquered lands, and its non-distribution among the warriors was not an application of the principle of nationalization but an application of the principle of public-ownership. Private ownership was not made a law in respect of the conquered land. The law giver had formulated a principle for the distribution of the *fay'* as private property in respect of only the moveables. Therefore the public-ownership of the conquered land bore the original stamp-mark of Islamic legislation and not the subsidiary stamp-mark of nationalization and legislation after private-ownership in respect of it was established.

Anyway most of the text which we have cited go to establish, that the possession of the proprietary rights of the conquered land — that is the very land property itself was the property of the whole of the Muslim nation and the Imâm being the head of the state was to manage and look after it and to demand a specific tax from those who enjoyed its usufruct to be paid to him by the tillers of it as lease money,

in consideration of the usufruct derived by them from its utilization and was the *ummah* which was the owner of the tax and so long as it possessed the proprietary rights therein it was but natural that it owns its usufruct as well as the tax levied on it.

## A Disputation of the Proofs of Private-Ownership :

There are among the Islamic research scholars some who are inclined to the view of subjecting the land conquered by force to the principle of the distribution of the land among the warriors who were present at the battle on the basis of private-ownership in the same way as all other spoils of war are distributed among them.

These people rely juristically on two things, one of them is the verse of *ghanimah* (booty) and the other the reported practice of the Prophet in the distribution of the booty of Khaybar.

As for the verse of *ghanimah* is what Allāh the Supreme says in the *Sūrah al-Anfāl*:

*Know that the fifth of what you have conquered in the battle belongs to Allāh, His Prophet, the kinsmen, the orphans, the needy and the traveller if you believe in Allāh . . . (8:41)*

In the opinion of these people this from its obvious meaning demands that one-fifth portion of the spoils of war was to be set apart and subsequently the rest of it was to be distributed among the warriors present in the battle, without any difference as to land and the moveables of the booty. But the fact is that at the most the holy verse indicates is only the obligation of the taking one-fifth part out of the *ghanimah* (booty) as a duty the state exacts for the good of the kinsmen, the needy, the orphans and



the traveller. Let us assume that this fifth is taken out of the land also. However, this does not make clear under any circumstance, the fate of the (remaining) four-fifth portion of it nor what kind of ownership is to be applied to it. The *khums* (the fifth) as a duty exacted for the good of specific group just as it is their like possible to assume to take it out of the moveable properties of the spoils which belong to the warriors by virtue of the principle of private ownership, on account of these groups. So also it is possible to assume taking of it on account of these groups out of the land property (the immoveables) which peoples possess by virtue of the principle of public ownership. Hence by generalization no nexus is found to exist between the *khums* and the division of the spoils. Indeed the property obtained by way of spoil is subject to the principle of quintuplet but it is not necessary that it be distributed among the participants in the war on the basis of private-ownership so the verse in respect of '*takhmis*' (quintuplet) does not point to the distribution of the spoils of war among the participants in the war.

As for the practice of the Prophet as reported in the traditions concerning the distribution of the spoils of Khaybar — the second ground of these believers — they rely upon concerning the distribution of the land of Khaybar as private-property among the warriors (who took part in the battle) they are convinced that the Prophet in the distribution of the land of Khaybar among the wagers of the war, applied the principal of private-ownerships he distributed it among those who conquered it.

However, we fully doubt the soundness of this conviction even if we assume the soundness of the historical narrations which have told us concerning the Prophet's having distributed the land of Khaybar among the warriors, for the history which relates this so speaks to us of other clear proofs concerning



his pioneering practice which give help in understanding the rules which the Prophet applied in the distribution of the 'spoils' of Khaybar.

There is the evidence of the reservation of a great portion of (the land of) Khaybar by the Prophet for the benefit of the state and the good of the Islamic community. There is a tradition mentioned in the *Sunan* of Abū Dāwūd transmitted on the authority of Sahl ibn Abī Ḥathamah that the Prophet divided Khaybar (land) in two halves a half to meet his difficulties and needs and a half for distribution among the Muslims. This later he divided into 18 portions.

There is a tradition on the authority of Bashīr ibn Yasār, the slave of *ansār*, as one of the companions of the Prophet. The tradition states when the Prophet conquered the territory of Khaybar he divided it into seventy and thirty portions, that is the whole into hundred portions. Half of this was for the Muslims and the Prophet, and the remaining half he set apart for the deputations which visited him and for the affairs and mishaps of the people.

There is a tradition from ibn Yasār that when Allāh granted His Prophet (victory over) Khaybar he divided it into a set of seventy and a set of thirty portions, the total being one hundred. He set apart the half of it for the mishaps and those who visited him from al-Waṭīḥah (a fort of Khaybar) and the al-Katībah and what does with both of them and the other half he set apart for distribution among the Muslims to meet ash-Shiqq and as an-Naṭāh as gifts or benefices for them, and whatever goes with these to both and the portion of the Prophet shared which goes with them.

There is another clear proof of it that though the Prophet distributed a part of the lands to individuals yet he had kept the management of the land under his control and authority since he had entered in direct agreement with Jews for the

cultivation of the land with the stipulation of the option of their eviction whenever he wished to do so.

In a tradition in the *Sunan* of Abū Dāwūd it is reported that the Prophet intended to expel the Jews from Khaybar. Thereupon they told him, "Muḥammad, let us work the land, we having a share as seems fit to you and your people having a share".

There is a tradition in the same book also reported by 'Abdullāh ibn 'Umar that 'Umar said: "O you people, the Messenger of Allāh (s.a.w.a.) had allowed the Jews of Khaybar to remain and cultivate the lands on condition that if we wished we would expel them from it so he who has any property belonging to him let him reach up to it (take it) for I am going to expel the Jews of Khaybar". He then expelled them.

It is also reported by 'Abdullāh ibn 'Umar as saying "When Khaybar was conquered, the Jews asked the Messenger of Allāh to acknowledge their work on the lands on fifty-fifty basis of the produce. The Prophet replied 'We let you do so on that condition for as long as we wish'. So they cultivated the land on that condition. The half date yield of Khaybar lands was used to be divided into two fixed portions and the Messenger of Allāh used to receive the *khums* (from thant)."

Abū 'Ubayyah cites in the *Kitābu 'l-amwāl* that the Messenger of Allāh handed over Khaybar — its date fields and its lands — to its owners on the fifty-fifty basis condition.

When we bring together these two narration of the practice of the Prophet his keeping a great portion of the revenue from the land of Khaybar for the good of the Muslims and for the affairs of the state and his managing the affairs from the other portion in his capacity of a ruler — when we bring these two things together we will be able to formulate an explanation of the practice of the Prophet which will be in harmony with the previously given legislative texts (traditions) which enunciate

the principle of public-ownership in respect of the conquered land; for it is possible that the Prophet may have applied to the land of Khaybar the principle of public-ownership which requires the nation's possession of the right of the proprietorship of the land and entails the necessity of its employment to the interests and needs of the nation.

The general needs of the nation of that time were of two kinds, one of which was the facilitation of the expenditures of the government which it disburses in carrying out its obligation towards the Islamic society and the other the creation of social balance and raising the standard of life which was low to such a degree that in the portrayal of it lady 'Ā'ishah said: "We had not our fill of dates till Allāh granted us victory over Khaybar". This is a degree of lowness which stands as a barrier against the advancement of a budding nation and the cure of the like of it being true in the life would be deemed a general need of the nation.

The prophetic practice realized the satisfaction of both kinds of the general needs of the nation. The Prophet guaranteed the satisfaction of the first kind of needs with half of the revenue from Khaybar by allocating it for misfortune and the deputations such other things, as stated in the tradition previously given, and the satisfaction of the needs of the second kind he remedied by way of allocating the other half of the revenue of Khaybar to the benefit of a large groups of the Muslims in order to help mobilizes the general manpower of the Islamic society and widen room before it to a higher level of life. However the division of the half of the land revenue among a great number of Muslims did not mean conferring upon them permanent proprietary right in respect of the land. The division was only in point of its revenue and the usufruct of it, while letting its proprietorship remain a common property.

It is this that explains to us the Prophet having a free hand

in the management of the disposals in connection with Khaybar land as to individuals' fixed share therein, for the permanent right of proprietorship of the land so long as it is the property of the nation, it is its guardian to whom the management of its affairs must be entrusted.

The conclusion we draw from all that is this: The conquered land belongs to the common ownership of the Muslims, if at the time of its conquest it is a cultivated land considered as a common property of the nation and held as a trust for its good it is not subject to the rules of inheritance, and whatever portion of such property a Muslim holds in his possession as an individual of the nation, is not transferred to his heirs, rather every Muslim has a right in it by the simple fact of his being a Muslim. Similarly a taxed land, too, is not inheritable nor saleable, for sale of a trust property is not valid. ash-Shaykh at-Tûsî has stated in *al-Mabsûf*, "The disposal of it (the taxed land) by sale or purchase is not legal nor by gift, nor by exchange, nor by possession nor by lease (tenancy)". Mâlik says: "The land is not divisible while it is a trust property for the utilization of tax accruing therefrom for the benefit of the Muslims in regard to such purposes of public utility as the supply of military provision for the fighting forces, construction of bridges, and mosques and in ways of such other good things of public utility".

When it is committed to the agriculturist for its fructification, the agriculturist thereby does not earn right in the land (lit. a permanent personal right of holding the proprietorship of the land). He acquires the right of its tenure as a lease to till it and he pays the rent or the *kharâj* by way of consideration for it in accordance with the terms and conditions agreed upon in the lease (tenancy) contract. When the term of the lease agreed upon expires, his relation with the land is cut off and it is not legal for him thereafter to raise crop thereon or to



make any use of it except by the renewal of the contract and by entering into a fresh agreement with the *waliyyu 'l-amr* a second time.

This has been explained with complete explicitness by the jurist Iṣfahānī in his commentary on *al-Makāsib* denying an individual acquiring any personal (private) right in the taxed land in addition to the limits of authorization by the *waliyyu 'l-amr* in the lease-contract which gives him the right of enjoying the usufruct of the land and its fructification in consideration of the rent for a fixed term.

If the taxed land is left neglected till it has become waste land and its cultivation has ceased, it does not lose its character of common ownership of the nation. Therefore, an individual will not be allowed to reclaim it except by a license from the *waliyyu 'l-amr* nor will an individual's reclamation of it result in his gaining a title to the possession of it as his private property. A person's gaining a special title to the private possession of the land by reason of its reclamation exists in respect of the state-lands only, we shall speak of it hereafter — and not in respect of taxed lands. The ownership of the taxed land is a common ownership of the Muslim nation as stated explicitly by the research scholar, the author of *al-Balghah* in his book.

So the areas of taxed lands which have suffered damage by neglect continue to remain the property of the Muslims and do not become a private property of the individual by reason of his reclamation and cultivation of them.

From a retrospect of this we can educe the following rules of the canon law (*sharī'ah*) shall apply to every land which was annexed to Dāru 'l-Islām by *jihād* while it was a land cultivated by former human endeavours at the time of its conquest:

**Firstly;** that it shall be the common property of the nation and it shall not be lawful for any individual to acquire possession

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or appropriation of it.

**Secondly:** that every Muslim shall be considered to have a right to the land in his capacity of being a part and period of the Muslim community and his kinsmen shall not receive a share by way of inheritance.

**Thirdly:** that it shall not be permissible for any individual to execute a deed of sale, gift or an analogous thing in respect of it.

**Fourthly:** that the *waliyyu 'l-amr* (the head of the state shall be considered as the one responsible for the looking after and the fructification of the land and the levying of the tax in respect of it on his handing over it to the farmer for its tillage.

**Fifthly:** the tax which the farmer pays to the *waliyyu 'l-amr* follows from the kind of the ownership of the land. It is the property of the nation like the land itself.

**Sixthly:** that the relation of the lease shall end with the expiry of the term of the lease and it shall not be valid for the lease to hold the land monopolistically thereafter.

**Seventhly:** that if the taxed land when it ceases to be cultivated and becomes a dead (waste) land, shall not (care) its character of public property and an individual shall not be allowed to acquire a property right therein by virtue of his reclamation and restoration of it to cultivation afresh.

**Eighthly:** that the cultivation of the land by the toil and labour of its previous owners at the time of its Islamic conquest shall be considered the basic condition for its common ownership for the application of the above-mentioned rules and unless the land is cultivated by definite human endeavours it will not come under the regulation of these rules.

For this basis, in the field of practical application today we are in need of a vast amount of historical informations regarding Islamic lands, and their area under cultivation in order, to single out, in the light of these informations the tracts

which were under cultivation from the other tracts which were desert lands at the time of conquest. However, in view of the difficulties of the availability of the ample conclusive informations in this connection, a large number of the jurists have been content with presumptions in respect of it. Every land in respect of which the presumption predominates that it was a cultivated land at the time of its Islamic conquest is considered a common property of the Muslims.

Let us mention by way of an example the attempts made by some of the jurists to determine out of the lands of Iraq, which were conquered in the second decade of the hijra year, the taxed lands belonging to the common-ownership of the Muslims. It is mentioned in the book, *Kitāb 'l-Muntahā* by al-'Allāmah al-Ḥillī "The *sawād* land is the land conquered from the Persians. It was conquered by 'Umar ibn al-Khaṭṭāb and that is the *sawād* land of Iraq. Its boundary limit breadth uses begins from the detached hilly tracts near Ḥulwān in the direction of Qādisiyyah adjoining with 'Udhayb bordering on the Arabian land and length wise it begins from the centre of Mawsil towards the sea-coast as far as 'Abbādān from both of eastern banks of Dajlah (Tigris). As for both of Western banks which are adjacent to Baṣrah that only is Islamic, such as the 'Amr ibn al-'Āṣ River (*shaṭṭ* 'Amr ibn al-'Āṣ). This land with its boundaries mentioned was conquered by force by 'Umar ibn al-Khaṭṭāb. He had delegated to it, after its conquest three persons, 'Ammār ibn Yāsir as a leader of its prayer, Ibn Mas'ūd, as its Qāḍī (judge) and the administrator of the *baytu 'l-māl* (public treasury) and 'Uthmān ibn Ḥanīf as its land surveyor. He had fixed a goat for them for every day the half of it, with fallen dates for 'Ammār ibn Yāsir and the half for the other two and declared "I know not, but I think the hamlet from which the goat is taken will soon be destroyed".

'Uthmān surveyed the land but there was difference in



estimation of its total area. According to the surveyor's estimation its area was thirty two million *jarib* and according to Abū 'Ubaydah's estimation thirty six million *jarib*.

In Abū Ya'lā's book, *al-Aḥkāmu's-sultāniyyah*, it is mentioned that the limits of the *sawād* land was length wise from a town let off Mawṣil upto 'Abbādān and breadthwise from 'Udhayb of Qādisiyyah upto Hulwān. In length is 160 *farsakh* and in breadth, 80 *farsakh* excluding villages named by Aḥmad and mentioned by Abū 'Ubayd as al-Ḥīrah, al-Yānqiyyā and the lands of Banū Ṣalubā and other village which were treaty lands (i.e. Dāru'ṣ-Ṣulḥā).

Abū Bakr has related with his chain of transmitters from 'Umar that "Allāh the Mighty and Glorious granted us victory over the territory from 'Udhayb upto Hulwān."

As for Iraq, it contains in its breadth the whole of the land conventionally termed '*sawād*' but falls short of it in length as compared with breadth.

It begins on its Eastern banks of Dijlah (Tigris) al-'Alath and on the Western banks of Dajlah from Ḥarbī, thereafter it extends to the extreme end of the provinces of Baṣrah to the islet of 'Abbādān. Its length maps 125 *farsakh* and is less in breadth by 35 *farsakh* ( $160 - 125 = 35$ ) as compared with that of the *sawād* land. However, its breadth is 80 *farsakh* like that of the *sawād* land.

Qudāmāh ibn Ja'far states: "This makes practically ten thousand *farsakh*. The length of a *farsakh* is twelve thousand cubit (*zura'* = fore arm) by free (*Mursalāh*) measurement and by survey measurement nine thousand cubits. This will make when the same is multiplied by the same and it is a fractionizing of *farsakh* by *farsakh* — twenty two thousand *jaribs* and five hundred *jaribs*. When this is multiplied by the number of *farsakh* that is 10,000 ( $80 \times 125 = 10,000$ ) the total will make two hundred millions and twenty five millions *jaribs*. Deduce from



it by (approximation) the area of lands occupied by hills, mounds, dung hills (ant-hills), bushes thickets, beaten tracts, high ways river courses areas of towns and villages hand-mill pools, lakes, bridges, serap, heaps of wishy out scourings, heaps, threshing floors, reed dumps, and the furance pits of the lease, etc. and we take this to be seventy five million *jarib* the remaining area will come to be one hundred million and fifty million *jaribs* take the half of it as uncultivated land and the half as cultivated land tuning with date palm and grapes garden trees.

If to what Qudāmah has mentioned in respect of the area of Iraq is added the remaining position from the *sawād* land and it is 35 *farsakh* the area of the land of Iraq will be increased by one fourth. This will make the total of the area of the *sawād* land all fit for the planting of trees and raising of crops. A part of this area however remains idle on account of uncountable accidents and happenings.

## B- DEAD LAND AT THE TIME OF CONQUEST

A piece of land which when it was added to Islam was not cultivated by human hand or by nature then it was the property of the Imām. It is such a land to which we apply the technical term 'State-Ownership'. It does not come within the orbit of private-ownership. It however agrees with the taxed-land in this that it is not subject to the principle of private-ownership yet it differs from it as to the form of its ownership. The cultivated land at the time of conquest is considered common property of the nation when it comes under Islamic possession, while the dead land when it is added to the *Dāru 'l-Islām* is considered a state property.

### The Proof of State-Ownership of the Dead Land:

The argument which establishes the fact that a land which

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is a dead land at the time it is conquered is, the fact that it forms a part of the spoils of war as has been stated in the tradition. *Anfâl* (spoils of war) means a collection of each and every one of those things and properties in respect of which the *sharī'ah* has ruled that these things belong to the ownership of the state by the dictum of Allāh in the holy Book.

*They ask thee (O Muḥammad) of the spoils of war, say: "The spoils of war belong to Allāh and the Messenger, so keep your duty to Allāh and adjust the matter of your difference and obey Allāh and His Messenger if you are (true) believers". (al-Anfāl, 8:1).*

In reference to the occasion of the revelation of this verse ash-Shaykh aṭ-Ṭusī has related (a tradition) in his book *at-Tahzīb* that some people asked the Messenger of Allāh to give them something out of the spoils. It was at that time that this verse was revealed affirming the principal of the state-ownership of the spoils of lower (*anfāl*) and rejecting their division among the individuals on the basis of the principle of private-ownership.

The Apostle's control over the spoils (of war) was by virtue of his being the head of the state to which the spoils belong and makes the ownership of the spoils an uninterrupted ownership which extends to the office of the Imām ever after him, as has been stated in a tradition from 'Alī (a.s.). He said: "To the one who is charged with the affairs of the Muslims belong the spoils which belonged to the Messenger of Allāh. Allāh the Mighty and Glorious, has said: *They ask thee of the spoils say: 'The spoils belong to Allāh and the Messenger'* and what belongs to Allāh and His Messenger belongs to the Imām".

So if the spoils were for the Prophet as ordained in the above quoted verse of the holy Qur'ān, and since the dead land formed a part of the spoils, it is natural for it to be included

in the orbit of the state-ownership.

It is on this basis that aṣ-Ṣādiq (a.s.) is reported to have said in connection with the determining of the ownership of the state (Imām) that "All dead land, each and every one of them belong to Him. This he has stated on the basis of the dictum of Allāh the High, *They ask thee of the spoils* (that you give something out of them) *say 'spoils belong to Allāh and the Messenger.'*"

There are some other things which indicate that dead lands belong to the ownership of the state. There is a tradition in which the Prophet has said "No person has any title to the dead land except with whom the Imām is pleased". Abū Ḥanīfah has inferred from this that no person is entitled to reclaim or appropriate any dead land without the permission of the Imām and this entirely agrees with the fact of the dead land's belonging to the ownership of the Imam or in other words the ownership of the state (vide appendix II). Also to this points the tradition which is given in the *Kitābu 'l-amwāl* by Abū 'Ubaydah reported by Ibn Ṭāwūs from his father that the Messenger of Allāh said: "Land belongs to Allāh and His Messenger thereafter it belongs to you". This *an-naṣṣ* (text of the tradition) gives the ruling in respect of 'adī land that its ownership belongs to the Messenger of Allāh and the other sentence 'thereafter it belongs to you' affirms the right of its reclamation of that we will speak hereafter.

It is stated in the *Kitābu 'l-amwāl* that "Every such land is an 'adī land as had men dwelling on it in the ancient time. Then not a domesticated person remained thereon. Such a land is ruled to belong to the Imām similar is the case of every lifeless land, which no man has revived by reclaiming or which does not belong to a Muslim or to man with whom a treaty is made".

Also in a tradition given in *Kitābu 'l-amwāl* it is stated on the authority of Ibn 'Abbās that "When the Messenger of



Allâh arrived at Medîna, all the land to which no water reached was made over to him to do with it, as he wished". This text of the tradition does not affirm only the principle of the state-ownership of every lifeless land which was far from supply of water but also affirms the application of this principle during the period of the prophetic rule. So two legal forms of ownership are applied to the cultivated and dead lands acquired by conquest, these were: public (common) ownership to the cultivated land and state-ownership to the dead land.

#### Result of the Difference Between the Two Forms of Ownerships:

Although these two forms of ownerships, the common-ownership of the nation and the state-ownership, agree as to their social significance, yet they express two different legal forms the owner in the case of one of these two forms is the nation while the other form it is the office of the one who conducts the government of the nation on behalf of Allâh. They reflect the difference in the way of the use of the usufruct derived from the both ownerships and the part they play in the contribution of their share towards building up of the Islamic society. The *waliyyu 'l-amr* is required in respect of the usufruct derived from the land and wealth which belong to the common ownership of the nation to employ them as to contribute their share in satisfying the collective needs of the nation and for the realization of its interests which are connected with it as a whole, such as the creation of hospitals, amplification of the means of treatment, providing the facilities of education and such other general social establishments which are of service to the whole of the nation. It is not lawful to make use of the common ownership (i.e. usufruct derived therefrom) for the benefit of a particular section of the society, unless its benefit is connected with the benefit of the society as a whole, (in benefitting it



the whole society is benefitted). For example, it is not permissible to raise fund for the benefit of the poor from the fruits of that ownership, unless it happens to be in the interest and the need of the nation such as when availing of the common ownership in this way helps social balance. As for the properties belonging to the state, just as they can be invested in the field of the general benefits of the whole of the nation so in the same way they can be invested for the benefit of a definite project, like the creation of funds therefrom for (the benefit of) any one of the individuals of the society who is in need of it.

### The Role of Reclamation Concerning Dead Lands:

Just as the cultivated a land and the dead land differ in respect of the ownership they also differ from the point of the rights which an individual is allowed to acquire in respect of them. The *sharī'ah* does not confer upon an individual special right of proprietorship of the land which was in a state of cultivation at the time of conquest even if the individual has restored it to cultivation after it had become waste land as we have already learnt.

But the *sharī'ah* has permitted individual to put in labour to reclaim and recultivate the land if it was a dead land at the time of conquest and has conferred specific right to the individuals in respect of it on the basis of their having expended toil and labour in way of its reclamation and re-cultivation. From among the traditions which establish this fact, there is a tradition from the *Ahlu 'l-bayt* that:

He who reclaims a land, that land belongs to him. He has a greater right and claim to it.

A tradition is cited in *Ṣaḥīḥ al-Bukhārī* reported by 'Ā'ishah that the Prophet said:

He who cultivated a land which belongs to no one has a greater right and claim to it.

On this basis we learn that the land belonging to the common-ownership is according to *sharī'ah* is incompatible with an individual's special right in it; so an individual does not acquire a special right in respect of a land belonging to common-ownership whatever service he may have rendered in order to revive and restore it to cultivation after it had become a waste land by neglect, while we find a land of the state-ownership is compatible with the individual's acquiring special right.

The reviving and restoring to cultivation is the basic source of the special right in respect of the state-lands. So it is performing of this work or the beginning of the preparatory operations for it which confers upon the performer of this work a special right in these lands. The *sharī'ah* does not acknowledge a private right in a general way besides this (vide Appendix III).

The important juristic question in respect of this matter is connected with the nature of the right an individual acquires by his reclamation operation so when a person works on a dead land and restores it to cultivation, the question is what kind of right it is that he acquires on it as a result of his doing so?

The reply of many of the jurists is that the right which the individual receives by his reclamation of the land is the replacement (rendition) of the possession of it to his private ownership so the land is taken out off from the domain of its ownership of the state to the orbit of private-ownership. The individual becomes the owner of land which he has reclaimed as a result of the labour he has expended on it to revive it.

However there is another juristic view which is more in harmony with the legislative texts. The view that the rehabilitation of the land does not change the form of the ownership, and that the land continues to remain the property of the Imām or the Imāmate (the office of the Imām) and does not permit an

individual to come into possession of its proprietary right even if he has restored it to cultivation. An individual acquires a right in respect of the land but not at the level of ownership. Restoration of the land to cultivation vests in him the right of the usufruct of the land and to benefit from it; and the prevention of those others who did not participate with him in the work and labour for the reclamation of it from molesting him and the seizure of the land from him so long as he fulfills his obligation in respect of it. However this degree of right does not excuse him from payment of his dues to the office of Imāmate, as the legal owner of the proprietary right of the land. The Imām has a right to impose upon him an amount of rent or as has been mentioned in the tradition — in proportion to the profit he reaps from the use of the land he has reclaimed.

The great jurist ash-Shaykh Muḥammad ibn al-Ḥasan aṭ-Ṭūsī, has adopted this view in his discussions of *jihād* in his book *al-Mabsūt*. He mentions therein: Indeed the individual does not acquire proprietary right of the land by virtue of his reclaiming of it. He only owns usufruct derived from it on condition that he pays to the Imām the dues imposed upon him for the use of the land. Here is the text of the relative sentence in his own words:

As for the dead lands; they do not come under the head of the booty of war (*ghanimah*). They exclusively belong to the Imām. If any Muslim reclaims such a land then he shall have the right on it, and to the Imām will belong its tax.

This very view we find in the book *Bulghatu 'l-faqīh* of the profound jurist research scholar, as-Sayyid Muhammad, Baḥru 'l-'Ulūm. He too learns towards the denying of the right of possession by reclamation free from any right thereon. The Imām will have right to the tax on the land as agreed upon during his hold and during his period of rule and a like fee in



absence of the agreement. This does not contradict the traditions which ascribe the ownership of the land to its reclamer that is, the traditions in which it is said: "He who reclaims the land, the land belongs to him". This is just like the conventional words of the landlords telling the farmers by way of incentive when they urge them to reclaim and make their landed estate prosperous that he who cultivates it, drills the rivers on it or dredges its irrigational canals the land will become his. This means that such a person will have a greater right to it than any other person and — his priority over to it as compared to other and does not imply denying the ownership of the land to himself and depriving him of the ownership from his person because the portion which goes to the landlords expresses their being the undeniable beneficiary of the land even if the property is annexed to the farmers on the grant of licence or general permission.

The view which ash-Shaykh at-Tūsī and jurist Baḥrū 'l-'Ulūm have avowed, is supported by a number of established traditions — through a proper channel — from the Imāms of the *Ahlu 'l-bayt* — 'Alī and his descendants (p.b.u.t.). In some of them it is given: "Anyone of the faithful who reclaims a land, the land becomes his and he shall pay *ṭasq*". And in some it is given: "Anyone from among the Muslims reclaims the land let him till and let him pay the tax of it to the Imām. For him belong what he consumes therefrom" (vide Appendix IV).

In the light of these traditions the land does not become the private property of the man who reclaims it. If it had become his private-property it would not have been a right thing to require him to pay the land rent to the state. Since he has to pay the land rent the proprietorship of the land remains the property of Imām. The individual enjoys the right of holding the land in his possession which empowers him to avail of its usufruct and to prevent others seizing it from him. In lieu of that the



Imām will impose *ṭasq* upon him.

This juristic opinion, which gives a true sense of term as to ownership of the Imām and which allows the Imām the right of imposing *ṭasq* on the state-estates, we do not find being held only by the jurists belonging to the jurist school of Shī'ah of *Ahlu 'l-bayt* such as ash-Shaykh aṭ-Ṭūsī, rather it has its seeds and manifold forms of it in various other Islamic juristic schools.

al-Māwardī mentions from Abū Ḥanīfah and Abū Yūsuf: "If an individual reclaims a dead land and irrigates it with tax-water that land will become a tax-land and the state will have the right to impose tax upon it". Both of them mean by the tax-water the rivers conquered by force like the river Tigris (Dajlah) and the Euphrates (*Furāt*) and the Nile.

It is stated in the *Kitābu 'l-amwāl* of Abū 'Ubayd, Abū Ḥanīfah used to say, "*Kharāj* (tax) land is every land which is irrigated."

As for Muḥammad ibn al-Ḥasan ash-Shaybānī, he too on his part has acknowledged the principle of the imposition of the tax on the dead lands that are reclaimed. But he has chosen details other than those chosen by Abū Ḥanīfah and Abū Yūsuf mentioned herein before, (He says) "If the reclaimed land happens to be situated on the banks of the rivers dug by the non-Arabs then it is a taxed land. But if it is on the banks of the rivers which Allāh the Supreme and Mighty has caused to flows, then it is a tithe land".

Anyway, we find in one or other form tendencies in various juristic writings towards imposing of the tax on reclaimed (dead) land, but there is not to be found in the Islamic law anything which could be considered a rudiment of justification for denying the right of imposing tax on the reclaimed land save the exceptions Imām availed of from the traditions of dispensation (*Akhbāru't-tahlīl*).

But when we cite an excerpt from the jurist produce of

ash-Shaykh aṭ-Ṭūsī concerning the principle of the Imām's ownership with this meaning which allows the Imām to impose a tax on whatever land is reclaimed. We are examining the position of it on the plane of theory only since it is on the side of theory that we find justifications for the inference of this principle from the legislative texts.

On the plane of application however, this principle was not adhered to in practice in Islam rather it was commended in the sphere of practice and was dispensed with by way of exception, in case of some person and during certain times as is indicated by the traditions of dispensation. Freezing of this principle, in the field of application or in the holy Prophet (way) cannot be considered a proof as to its being unsound theoretically. It is the right of the Prophet to exempt or excuse any person from the payment of the *ṭasq* (exercising of this right does not mean that an Imām who comes after him is not permitted to act on this principle) or his application of it when the circumstance which have prevented its application no longer exists. Similarly the texts which urge dispensation with the implementation of this principle, in respect of certain persons (by way of exception do not prevent considering it a rule which can be adopted in the other than the exceptional cases explained in the traditions of dispensation (*Akhbāru't-taḥlīl*)).

However, since in this study of ours, we are endeavouring to obtain information in respect of the theory in Islam, it is our duty to include this principle in our economic study since there is an Islamic basis for it on the theoretical side. As such it is a component part of the complete form which represents the Islamic theory in the field which we are studying irrespective as to whether it took its share of application or was forced by circumstances over which it had no control or for reasons of expediency to put it in cold storage.

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## THE LEGAL PRECEPTS

In the light of what we have already stated the difference between the farmer who works on the plots of land of the common-property and the farmer who tills the plots of land to the ownership of the state-property although both of them at the same do not possess proprietary right in either of the lands yet they differ as to the extent of their relation with the land. The farmer who cultivates the common property is only a tenant as has been affirmed by the jurist research scholar al-Iṣfahānī in his commentary of *al-Makāsib*. The Imām holds the right to take away this land from him and give it to some one else when the period of his lease contract of tenancy expires. As for the cultivator of the land belonging to the second sector (state property) the farmer who holds the land in this sector enjoys the right vested in him to derive usufruct from it and to prevent others from taking it away from him so long as he fulfils his obligation towards maintaining it in good condition and its cultivation.

Every individual is allowed freely to carry out the work of reclaiming a land in the sector belonging to the state without obtaining a licence from the head of the state (*waliyyu 'l-amr*). The above mentioned texts have given all unqualified permission for its reclamation to all. So this permission is effectual so long as the state does not see, as under certain circumstances the expediency of its prohibition. Now there are some jurists who hold the opinion that the reclamation is not valid and that it confers no right unless it is carried out with the permission and the license obtained from the *waliyyu 'l-amr* (head of the state) permission issued by the Prophet as contained in his dictum, he who reclaims a land has a greater claim and title to have it is not sufficient because this general permission was issued by him as a head of the Islamic state and not in his capacity of a Prophet so its effectuality does not extend to all times but ends with the ending of his rule.



## IQTISĀDUNĀ

Anyway, undoubtedly the head of the state (*waliyyu 'l-amr*) possesses the right to prevent the reclamation of some state-lands or fix limit as to how much of the portion of those lands will be allowed to be reclaimed if that was required in the public interest.

We extract the following points from the prescription in respect of the reclamation of dead lands:

**Firstly:** It is deemed a state-property.

**Secondly:** Its reclamation on the part of individual is valid principally unless their doing so is prohibited by the authority (*waliyyu 'l-amr*).

**Thirdly:** If an individual reclaims the land which belongs to the state he acquires a right in respect of it which vests in him the enjoyment of its usufruct and prevention of others from (putting obstruction in his way) the land will not become his private property.

**Fourthly:** The Imām shall demand from the reclamer of the land a tax because the land is his property by permanent proprietary right (*ruqbatu 'l-ard*). He shall impose this tax as a trust for the benefit of the public good and for maintaining the social balance. The Imām also shall have the right to exempt anyone from the payment of the tax under definite circumstances. We shall find the exceptional considerations in this respect from the practice of the Prophet.

### C. NATURALLY CULTIVATED LAND AT THE TIME OF CONQUEST

Many jurists hold the opinion that naturally cultivated lands — that is such of the lands as existed in a state of natural cultivation at the time of the conquest, like forests, etc. share the same form ownership as the dead lands as mentioned in the talk given a short while ago. They hold that these lands are



the property of the Imām. In their opinion they rely on the traditions transmitted from the Imāms in which it is stated that "every land which has no lord belongs to the Imām." This tradition gives to an Imām the ownership of every land to which there is no owner and the forests and such like things are of this kind. A land has no owner except by reason of its cultivation and the forest are cultivated by nature without the intervention of definite man in that respect so in *sharī'ah* it has no lord or master consequently it is subject to the principle of the state ownership.

Our observation on this opinion is, the application of the principle of the state-ownership (Imām's) to the forest and lands like those which have grown up of their own accord, because of the nature of their soil will be valid in case of forests (etc.) only if they were annexed to the *Dāru 'l-Islām* without war because they are owner-less. But as for the forests and lands which grow up of their own accord by their nature, that were conquered by force and seized from the hands of the infidels these are the common property of the Muslims for they come under the legislative texts which give the Muslims the ownership of the land conquered by force, so if the forests come under the orbit of the common ownership in accordance with these texts they will come to be a land which has a master and the owner of it is the whole of the nation so there will be no justificatory factor for its inclusion under the category of an ownerless land. So as to comprehend it within the text which holds, that every land which is lord-less belongs to the Imām.

So generalizing from this we should apply to the lands which had grown up of their own accord and forest, conquered by force, the very rules which we apply to the lands which were cultivated by human toil and labour at the time of conquest (vide Appendix VI).

## 2- THE MUSLIM LAND BY CALL (*AD-DA'WAH*)

The land which became Muslim by the call to Islam are all those lands which responded to the call to Islam without plunging in armed conflict like the city of Medina, Indonesia and a number of wide scattered spots of the Islamic world.

The Muslim lands by the call to Islam like the Muslim lands by conquest are divided into lands which their inhabitants had cultivated and their owners accepted Islam willingly; and the lands naturally grown like forests and the lands which were dead lands when they were annexed to Islam.

As for the dead land of the countries the inhabitants of which had become Muslim were like the dead lands acquired by conquest, the principle of state ownership is applied to them and all the rules apply to them which are applied to the conquered lands became the dead land are universally considered *anfāl* (accessions) and *anfāl* are the property of the state.

Likewise the naturally cultivated lands which are annexed to the possession of Islam by the peaceful acceptance of Islam too are the property of the state by the application of the juristic principle which holds that 'every land which has no owner is a part of the *anfāl*'.

But the difference between these two kinds of land – the dead land and the cultivated land – despite both of them being state property is this that an individual can acquire a specific right in respect of the dead land by way of its reclamation, and the same rules are applied to it as are applied to conquered land the legislative details of which are already given in connection with the conquered dead lands. As for the lands which have grown up of their own accord when it has voluntarily been added to the *Dāru 'l-Islām*. An individual has no means of access to the acquirement of a right and title to it on the ground of its reclamation it is land self grown and live land by nature.

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The only thing open to him is to avail himself of its usufruct. When a person makes use of it and avails himself of its usufruct then the land will not be taken from him on account of another individual. No favour is shown to one individual in preference to another so long as the first individual is availing himself of its usufruct. However, another individual will be allowed to avail its usufruct within limits which do not put the first in trouble or interfere his availing of its usufruct or when the first individual leaves of availing himself of its usufruct or of making use of land for productive purpose.

However, the cultivated land of the country the inhabitants of which have voluntarily embraced Islam will belong to them for Islam confers upon a Muslim who embraces Islam voluntarily in respect of his lands and other property all the rights which he enjoyed before he embraced Islam so the Muslims who have embraced Islam voluntarily enjoy the retainment of their lands and the right of owning it as their private property and no tax will be levied on them and their properties will be their wholly as they were theirs before Islam (vide Appendix VII).

### 3- THE LAND OF *ŞULH* (TREATY LAND)

These are those lands which were invaded by Muslims in order to capture them. Its inhabitants did not embrace Islam nor offered armed resistance to the call of Islam but remained on their religion and were pleased to live in the lap and under the protection of Islamic state in peace and security. Such a land is termed a land of peace by agreement — treaty land in juristic usage, and whatever has been executed in treaty terms will apply to this land. If the text of the treaty term lays it down that the land belongs to its inhabitants then the land will be considered on the basis of it, their property and the Muslim society will have no claim or title to it. If it has been executed in treaty terms that the land will belong to the Muslim community it will become binding and the land will be subject to



the principle of the common ownership and *kharâj* (tax) on it will become incumbent.

It will not be valid to deviate the terms agreed upon in the treaty. There is tradition in the *Kitâbu 'l-amwâl* that the Prophet said: "When you are in fight with a certain group, and they are prepared to make peace with you against their wealth (*amwâl*) in order to save their lives and the lives of their children, then do not take more than what has been due, since the excess (amount) is unlawful for you". It has been mentioned in the *Sunan* of Abû Dâwûd that the Prophet said: "Behold, whoever wrongs a contractee or mutilate or burden him with a task beyond his capability or take something from him without his consent, then, on the Day of Judgement I shall argue in favour of him (the contractee)".

As for the dead treaty lands, the rule of state ownership will be applied to them like the dead lands acquired by conquest and the waste lands acquired by its peoples voluntary acceptance of Islam. Also the forest and such other lands which belong to the country, unless there are included in the treaty terms by the Prophet in that case treaty terms will apply to them.

#### 4- THE OTHER LANDS BELONGING TO THE STATE

We will find other kinds of land which are subject to the application of the principle of state ownership, like the lands which the inhabitants had surrendered to the Muslims without any attack. These lands come under the category of *anfâl*, and belong to the state of the Prophet and Imâms as per another version as has been enjoined in the holy Qur'ân by Allâh, the High and Mighty:

*Whatever Allâh gave as accessions to His Messenger from them, you urged not any horse or riding camel for the sake*



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*thereof but Allāh gives His Messenger Lordship over whom He wills, Allāh is able to do all things* (59:6).

Also the lands, whose inhabitants have perished and had become extinct, belong to the state according to the tradition reported by Ḥammād ibn 'Isā from Imām Mūsā ibn Ja'far (a.s.): "*Anfāl* belong to the Imām, and *anfāl* is every land whose people have perished (become extinct) . . ."

So also the newly found land in *Dāru 'l-Islām*, for example, an Island (lagoon) was formed in the sea or a stream. It also will be included in the ownership of the state by the application of the juristic rule that "every land which is owner-less belong to the Imām".

### THE LIMIT TO THE PRIVATE AUTHORITY ON LAND

From the details given previously we can elicit that the competence of an individuals to the land and his personal right is established on the ground of one of the three reasons:

- i) Reclamation of a piece of a state-land.
- ii) Entering of the inhabitants in the fold of Islam and their voluntary acceptance of the same.
- iii) The land's becoming a part of *Dāru 'l-Islām* by a peace-treaty stipulating the confirming of the title of the land to the contracting parties.

However, the first ground differs from the two latter reasons as to the kind of the particular relationship which ensure from it (i.e. the kind of the title over the individual acquires over the land). It is this that on the first ground, that is the individuals reclamation of a piece of a state land the land will not come to be classified as private property nor it leads to the stripping it of its stamp of state-property or preventing the Imām from imposing upon the individual who cultivates it a (fixed) land tax

or a remuneration for his use of the land. The only title to the land which will result to the individual by virtue of his having put the land recultivation will be this much that, he will be allowed to enjoy the usufruct he derives from his raising up of it and from pre-cutting of the other from obtruding him or becoming his rivals in that as stated previously. As for the other two grounds, they confer upon a Muslims' individual the ownership of the land or the usufruct derived from the ownership of the land and will come to be classified under the category of private ownership.

The private possession of a land by an individual, whether it be on the basis of right or on the basis of ownership, it cannot be an absolute private possession in respect of time. But the possession and a (delegated) authorization limited to the individual's discharging his responsibility towards the land. So if he leaves off discharging his responsibility in this respect, in a manner which is explained in the traditions which will follow, the individual's title to the land will become void. He then will have no right of holding exclusive possession of the land and preventing others from cultivation and enjoying usufruct of it. By this, the concept that the ownership is a social function, receives its most cogent explanation in respect of the land and the rights of the individuals in respect of it.

The proof of this from the side of *sharī'ah* is a number of legislative texts.

It is stated in the tradition reported by Aḥmad ibn Muḥammad ibn Abī Naṣr on the authority of Imām 'Alī ibn Mūsā ar-Riḍā (a.s.) that the Imām said: "He who embraced Islam out of his own free will, land will be allowed to remain in his possession and tithe will be obtained from him in respect of whatsoever of it is cultivated, if it is irrigated by rain or rivers, and if watered by manual labour half of the tithe and that the Imām will take from him whatsoever of it he has not cultivated and will give

it to him who will cultivate it. The land will remain the property of the Muslims and the lessor will have to pay out of their shares the tithe or half of the tithe."

In an authentic tradition reported by Mu'āwiyah ibn Wahb it is stated that Imām Ja'far (a.s.) said: "A man who find a barron and waste land and dredges canal and cultivate it, he will have to pay *sadaqah* (*zakāt*) in respect of it. However if it belonged to a man before him who had absented himself from it and left it and wasted it and came afterward demanding it, (he has no right on it) for the land belongs to Allāh and to him who cultivates it."

There is an authentic tradition reported by al-Kabūlī on the authority of the Commander of the Faithful 'Alī (a.s.) that any Muslim reclaims a dead land let him cultivate it and pay land tax on it to the Imām of my *Ahlu 'l-bayt*. What the land yields will belong to him, but if he leaves it and wastes it and any other Muslim takes it, cultivate and reclaims it, that person shall have greater claim to the land than the one who left. This another man have to pay land tax in respect of it to the Imām.<sup>1</sup>

In the light of these texts we learn that the right which gives to the individual a title to the fixed possession of the land so as to prevent others from making use of it, he loses by the land's becoming waste land and (that due to) his neglect of it. So he loses thereby his right of denying others the right of

1. The tradition reported by al-Kabūlī and the authentic tradition reported by Mu'āwiyah ibn Wahb cannot be deemed to be in conflict with the tradition reported by al-Ḥalabī on the authority of the Imām as-Ṣādiq (a.s.) in which al-Ḥalabī says that he had asked him (the Imām) in respect of a man who comes to a waste-land, he reconditions it, causes its canal to flow, reclaims it and raises crop on it, what dues he has to pay? The Imām replied "*Sadaqah*". I then asked, "And if he happens to be knowing its owner?" He replied "Let him pay to him his due".

This is because in the reply returned in the tradition of al-Ḥalabī, the



tilling. After his neglect of the land in such a manner, it is not permitted to him to prevent others gaining control over it and making use of it so long as he is negligent of it.

There is no difference in that respect between the individual's having acquired the title over the land by virtue of his having put in labour to revive it and by other means or reason. He will not be allowed to have an exclusive control and possession of the land after its becoming a waste and after its neglect of it by him irrespective of whatsoever means by which he may have acquired the title to its exclusive possession.

Now if the land happens to be a state-land (Imâm) that a person had in his possession which he allows to be neglected till it becomes a waste that land after its becoming a waste comes back to become a land free to all (*mubâh*) to make use of it. To it are applied the very rules which are applied to all the waste lands which belong to the state. It gives room to its reclamation 'denovo'. To its reclamation denovo once again will be applied the very rules which were applied to it on its first reclamation.

There is text of ash-Shahîd ath-Thânî in his *al-Masâlik*, which elucidates this meaning. He writes: "This land, that is the land the individual had reclaimed and which afterward had become a waste-land, was originally a free land open to all to make use of it (*mubâh*) when it is left from being cultivated, it comes back

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only thing taken for granted is merely the fact of the land being ceased to be cultivated. This indicates something more general than its being a waste land on account of the neglect of its owner. Whereas the authentic tradition reported by Mu'âwiyah ibn Wahb takes for its subject matter something more specific, it is there that its former owner neglected the land and caused it to become a waste-land. This altogether is more a specific thing and the specification requires the relationship of the owner of the land with the land to terminate with and because of the land becoming a waste-land and there without his right of preventing its recultivation.



to its original status quo and becomes *mubāh* (free to all) for the reclamation and cultivation of it was the cause of the acquisition of the title to its possession. When the cause ceases to operate the effect ceases".

He means to convey thereby that the right and title to the land which the individual acquires is the outcome of his reclamation of it, hence its effect. When the land ceases to show signs of life his right as to the possession.<sup>1</sup>

al-Muḥaqqiq ath-Thānī has mentioned in his *Jāmi'u l-Maqāsid* that the loss of exclusive title to the land by its reclamer after its becoming a waste-land and validity of other person taking it and acquiring exclusive title to it is a well known accepted view among the *aṣḥāb* (Prophet's companions) and prevails in the pronouncement of the juridical opinion in respect of it.

But if the land which its owner has neglected happens to come under the category of private-ownership, such as the land

1. When this juridical text is compared with the legislative texts which have come across in the reports of Mu'āwiyah ibn Wahb and the reports of al-Kābūlī, it will be observed that the text of ash-Shahid is conspicuously clear in that when the land becomes waste-land, the relationship of the individual (who reclaimed). With it is terminated for good.

As for the texts previously given, they (do) permit any other individual to reclaim the land after it becomes a waste-land and to neglect by its owner and confer the land upon him instead of its former owner. But they do not indicate the termination for good of the relationship of the land with its former owner on account of its becoming a waste-land, for it is possible within the limited of the legislative implications of growing in these texts for us to presume its owners retaining a right and title to it and his relationship with it even after its wastage, to a degree which gives him a prior right to reclaim it *denovo* when anyone else complete with him to reclaim it. This right of priority as to his reclaiming land *denovo* continues to be his so long as no one has taken march over him in reclaiming it. However the old owner's relationship with the land is cut off finally if the other person has actually reclaimed it *denovo* during the period of his neglect of it.

which has voluntarily embraced Islam, the ownership of such a land is not transferred from its owner without the loss of his title to it on account of his neglect of it his feature of the discharge of his duty towards it as we have learnt. The land in that case is returned in the opinion of Ibnu 'l-Barrâj, Ibn Hamzah and others, to become the property of the Muslims and is included in the category of properties belonging to common-ownership.

From this we learn that the exclusive appropriation of the land whether by way of right or as property is limited to the individual's of his social duty in respect of the land, so if the individual neglects his duty towards it desists from tilling it till it becomes a waste-land his nexus with it is severed and the land becomes free from his shackles. The land comes back to the state to be its whole and sole property, if it happens to be a dead land by its nature as to and it becomes the common pro-

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Now on the basis of the juridical text of ash-Shahîd, the individual's right and title to the land is completely terminated on the lands becoming a waste-land.

But on the basis of the other texts we can presume that the individual's right and title to the land remains, to a certain extent and only his right to the holding the land exclusively is, lost that is the right of preventing others from making use of it and enjoying the usufruct derived from it.

The difference of these two presumptions will have its practical repercussion in case when the individual who neglects the land and it becomes a dead land, dies before anyone else has reclaimed it. Going by the opinion of ash-Shahîd will lead to the dictum of the non-transference of the land to his (legal) heirs the relationship of its owner with it having terminated finally after its having become a waste-land, so there is no meaning in the inclusion of it in the inheritable assets of the deceased man. But on the basis of the second opinion the land will be inherited in the sense that his heirs will enjoy the same degree of right in respect of the land which remained to the deceased after its becoming a waste-land.

Henceforth, our discussion will be based on the opinion and views of ash-Shahîd ath-Thâni.

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perty of the Muslims, if the individual who neglected his duty towards it and lost his title to it, had acquired his title to it by legal reason as is the case in respect of the lands in a country the inhabitants of which had voluntarily embraced Islam.

## THE GENERAL OUTLOOK OF ISLAM TOWARDS THE LAND

In the light of the multifarious rules of land which Islam has exacted concerning the land and our acquaintance with their details we can educe the general outlook of Islam concerning the land and its course under the auspices of Islam which the Prophet or his lawful successor who persued the practical application of it, so that when we will try to present after that the legal rules of Islam which are connected with the other natural wealths and the basic sources of production in their entirety we will revert to that general outlook of Islam concerning the land to it with an outlook more general and extensive formulating the doctrinal basic and foundation of distribution before production.

In order to be helped to the bringing to light of the Islamic standpoint and the examination of the economic content of the Islamic outlook concerning the land as well as the isolation of it from all considerations of political description, — to accomplish all this we had better start — in the determination of the general Islamic outlook from a supposed illustrative example which will help us to the bringing to light of its economic content free



from its political bearings.

Then let us suppose that a party of Muslims decides to adopt for its homeland a region which is still a virgin land. It establishes in that region an Islamic society and sets up its relations on the basis of Islam. Let us imagine that its lawful ruler, the Prophet or his Caliph undertakes the organisation of these relations and the embodiment of Islam in that society with all its ideological, cultural and legal virtues and values in their entirety. Now in what shall be the stand-point of the ruler and the society *vis-à-vis* the land and how its ownership will be organised?

The reply to this will be readily available in the light of the details already given. The land which in our supposed example, we have decreed to become the home land of the Islamic society, and on whose soil heavenly civilization will grow up, we have assumed to be a natural virgin soil. Human factor has not intervened in it yet. This will mean that this land confronts man and enters into his life for the first time at a prospective moment of history.

It is natural that the land to be found divided into two kinds of land as to soil, that is there in will, land in respect of which nature has fulfilled all the conditions of the life and production such as water, warmth, softness of the earth and such other things and that they are naturally fertile lands. And there will be lands which have not been fortunate in acquiring these distinctive features but they need human labour to fulfil these conditions in respect of them. These lands are termed dead lands in the juridical sense, so the land which we have supposed will witness the birth of Islamic society, will consist of a land which is either a naturally fertile land or a dead land and no third kind of land exists therein.

The naturally fertile land thereof shall be, as we have been told before, the property of the state or in other words

the property of the Prophet or his lawful successors in their capacity of the head of the state according to the legislative and juridical texts, so it is mentioned in *at-Tadhkirah* of al-'Allāmah al-Hillī that there is a consensus between the 'ulamā' in respect of it.

Likewise the dead land, is the property of the state as we have already learnt even ash-Shaykh al-Imām al-Mujaddad al-Anṣārī has mentioned in his *al-Makāsib* that the texts in respect of this are in profusion. It is even said they are profuse to the extent of *tawātur*.

Well, then Islam applies to the whole of the land, when it looks to it in its natural formation, the principle of the ownership of the Imām and subsequently stamp-mark of common ownership.

In the light of this we are able to understand the traditions transmitted on the authority of the *ahlu 'l-bayt* (Imāms) with chains of authentic supports which assert that all the land in its entirety is the property of the Imām and when they affirm the ownership of the Imām they look to the natural form of the land as stated afore.<sup>1</sup>

Let us look at the kind of claim to the land Islam has permitted to the individuals of the society of our supposed example. In this sphere we should eliminate mere possession of the land or the control acquired over it, as an original justi-

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1. By this we learn that an explanation as to the Imām's ownership in its entirety is possible from these texts, on the basis of its being a rule of the canon law and on being ownership in an obstruct sense, so long as it is set upon the natural form of the land wherever it be and will not be deemed to be in conflict with anyone else's owning a piece of land by legal reason which take in and apply to the natural formation of the land in its totality such as its reclamation etc. So there is no need of interpreting ownership as it occurs in these texts and consider it as an expressed matter

ficatory factor of the claim to the land taken into possession and acquired control over, because we do not possess a single authentic text which affirms such a thing in the *sharī'ah*. The only thing which we learn is that the claim which they justify by law (*sharī'ah*) is the claim arising from reclamation of the land, that is individual's expenditure of labour on a dead land to infuse life into it.

The performer of this labour, or preparatory operation for its reclamation, is considered a ground for the claim to the land. Nevertheless, it cannot thereby become a ground for acquiring a title to the permanent ownership of the land as a private property excluding it from the application of the former principle. It only results in the right and title of the individual which takes into consideration the priority in the enjoying the usufruct from the land the individual has reclaimed over other individuals, on the ground of the labours and efforts he has spent on its reclamation. The right of proprietorship remains with the Imām and of his right to the imposition of the tax upon the reclamer of the land, according to the juridical text as transcribed by the great jurist authority, ash-Shaykh Muḥammad al-Ḥasan, aṭ-Ṭūsī when he stated in the chapter "Jihād" of his book, *al-Mabsūṭ* "As for the dead land they do not constitute a part of the *ghanimah* (booty). They belong to the Imām. The one who reclaims them, will have the priority of right to his making use of them and the

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and not by legal ruling although this interpretation is explicitly in conflict with the context of these texts for, look at the tradition reported by al-Kābūlī, how it declares the matter that the whole of the land is the property of the Imām and ends with the dictum to Imām belongs the right to impose tigs tax on the one who reclaims the land and recultivates it. The Imām's imposing the tax or remuneration allotted to ownership proves explicitly that ownership is taken in its legal sense which these traditions regulate and not in their spiritual sense.



tax thereon will belong to the Imâm". We have quoted this text previously.

The right and claim of the individual to the land which his reclamation of it confers upon him continues so long as he puts in labour to keep it renewed. However if his labour on it leads to its exhaustion and the land needs a fresh labour on the part of its keeper to restore it to its cultivability. The individual cannot retain his right to it except by keeping it continuously alive and putting in the necessary labour and efforts to that end. However if he neglects it and avoids cultivating it till it becomes a waste land his right ceases.

Now we are able to fully grasp and determine the general outlook. The land is by its nature the property of Imâm and no individual possesses the right to its permanent ownership nor any right to an individual appropriation of it except on the basis of the labour the person spends on its tillage and fructification and that this right that the individual earns as a result of his spending his labour on rendering it tillable and raising crop on it, does not prevent the Imâm from imposing tax duty on the reclaimed land for benefit of the wholesome and sound humanity to share in the benefit derived from it; and that this does not come in conflict with the Imâm's forgoing of this tax or duty occasionally or under certain exceptional circumstances as stated in traditions of *tahlîl*.

This is the outlook of Islam towards the land as it appears to us, before bringing up political factor into the field. Indeed this outlook is competent to solve the contradiction which exists between the supporters of the view of individuals' ownership of the land and the opponents of it, for the ownership of the land is one of the social matters which has played an important role in the human thought following its importance as a phenomenon which has existed in the life of man since thousands of years.



The more urgent presumption is that the genesis of this phenomenon eventuated in history of man, or became widespread after his discovery of agriculture, and his becoming dependant upon the land for his life. When the farmer found to be in need of settling down in specific land for a period of time, on account of the fact that the production to be obtained from land requires time, it was but natural for him to bind himself within a certain limit, to a specific area of land to perform his labour on it and to set up therein for him a retreat and an abode to do well in, close to his firm in order to be able to keep watch over it and to protect it. Eventually the farmer found himself tied strongly to an area of the land, bound to it with a number of bonds everyone of which sprang eventually from the labour which he had expended upon the land and hard work he put in by which he had acquired close relation with its soil and every particle of it. It was in effect of this that the idea of appropriation was born, for it was reflecting on one side this bond which the farmer finds between it and his slaved labour which he had embodied into the land and had commingled with its existence; and on the other side, the idea of appropriation was confirming and resulting in the division of the land on the basis of sufficiency in that every individual keeps to himself the land he toils upon and sufficiency was established by the degree of his ability to cultivate it.

In this connection, it is presumed that the historical origin of this private right on a land is the labour, by which, by the passage of time it (land) has come out as an ownership.

#### **With the Opponents of the Ownership of the Land :**

The doubts which are usually stirred up by the opponents of the ownership of the land around it are at times directed to the imputation of its historical occurrence and to its roots ex-

tended in the depths of ages. At other times they hold to more than that. They treat the very idea of the ownership and the individuals title to the land as bolts from the blue (lit. sudden and unaware descent) upon the principle of social justice.

As for the imputation of the occurrence the ownership and its historical authority, it is mostly ascribed to grounds of power and domination. The count, on that score, holds that they have played their major role in the history in the wholly unjust distribution of the land and the conferment of title of rights, thereof upon individuals. Now if it is the power and usurpation and the factors of violence that are the factual justification and the historical authority for the ownership of the land and the rights of title to its ownership as human history has witnessed then it is natural that these rights are put an end and the ownership of the land as documented in history be regarded a kind of robbery.

We don't deny the factors of force and usurpation nor the role they have played in history. But these factors do not explain the emergence of the ownership of the land and rights thereof (as documented) in history, for you to grab the land by forcible seizure and violence it is necessary that there be one from whom you seize the land by force, drive him off and add it to your land. This presupposes that the land which you submitted to your forcible seizure and violence had come into the possession of a person or persons, before that and it became his or their title.

When we mean to explain this antecedent right for the operations of the seizure by force it would be necessary for us to leave a side the explanation by force and violence in order to seek its reason and ground in the kind of relations established between the land and the right and the title of its owners to it, and on the other sides (in the fact) that the person who we suppose grabs the land by force, could not have been by and

large a landless, outcast without shelter but, in a more acceptable form, a person capable of working on an area of land and rendering it fruitful; his abilities and means gradually would have enlarged and he would have taken to be think himself of grabbing fresh land by violence. So then there is before force and violence the productive labour and right and title established on the basis of labour and fructification.

The nearest thing to acceptance, when we visualize a primitive tribe settling on an area of land and beginning its agricultural life would be that every individual thereof occupies an area of that land according to his means and abilities and labours it to render it fruitful as well as to enjoy the benefits of its yields. From this division which was begun as a division with an idea of labour since it not being possible for all the cultivators to be share holders of every span of it — there would have arisen the private rights of the individuals have dawned right to the land which exacted from him his utmost exertions and absorbed his labour and toil. It is after that the factors of force and violence would have appeared, when the one with more might and power would have taken to raiding the lands of others and grabbing their farms from them.

By this we do not mean to justify rights and private ownership of the land as come by in history, but our aim is to set in prominence the statement that it is the reclaiming of the land on the greatest presupposition — which is the sole primary ground and reason which is recognized by the natural societies as the source of the individuals right and title to the land which his labour has reclaimed and laboured to raise crop in it. All other grounds are secondary factors, which social conditions and complexes have generated which have rendered the primary societies stranger to its indigenous form and its instinctive inspiration.

The primary ground gradually lost its historical consideration during the course of the growth of these secondary factors and



passion outbade for ascendancy over nature till the history of the private-ownership of the land was filled with various kinds of injustice and monopoly. The land became scarce for the mass of the people in proportion to it became ample for those among them who were fortunate.

Islam restored consideration of the establishment of ownership of land to its indigenous ground since it made reclamation the sole source for the acquiring of the title to it, and put an end to its acquisition on all other grounds. In this way Islam revived the practice of nature the land marks of which the industrial man had well nigh effaced.

This is about what has been connected with the imputation of the historical authority of the ownership of the land. But there is an imputation which is more cogent and more weighty. It is an imputation of the very idea of the ownership and the title to its private ownership right, identically and in a general way as has been affirmed by some of the modern doctrinal trends, like agricultural collectivism. And what we hear generally in this connection is, "Truly the land is a natural wealth. Man has not manufactured it but is one of the gifts of Allâh so it is not right that one man enjoys its usufruct over others."

However, whatever may be said in this connection, the Islamic form we have presented at the beginning of this topic will remain over and above every dialectical imputation for we hold the view that the land looked at from (the point of) its natural shape as it existed when this gift was delivered to man from Allâh the Supreme was not a property of anyone of the individual men nor had anyone any title to its ownership but was the property of the Imâm in his capacity as holder of the office of Imâmate and not in his personal capacity. The land, according to the economic theory of Islam about land, does not cease to be the property of the Imâm nor does the land become the property of any individual by violence and grabbing of it, and



for that matter not even by reclamation. Reclamation is considered only as a ground of the individual's right to the land. So if a man hastened to proceed in a legal way to restore the land to its arability and expends his labour and energy 'it would be unjust to treat him as regards his right and claim to the land on the same level as the claims to it of others who have conferred no toil or effort on it, nay not so, rather his claim to it and to its usufruct should be considered prior to all these others.

Islam confers upon the cultivator of the land a right to make use of it as his own rather than to anyone other than him; and on the side of theory allows the Imām to levy a tax on it for the whole of the beneficiary humanity to have a share of profit drawn from the land by way of the utilizing of this tax.

When the right to have and hold the land of Islam is established in the view of Islam, on the basis of the labour, which the individual expends on the land, this right is lost *de facto* when the soil of the land becomes exhausted by that labour and calls for more effort to maintain its continuous fertility and productivity, but if the owner of the land refrains from restoring it to cultivation and neglects it till it becomes a waste land, then in that case the relation of the land with the individual who was cultivating it is, under this circumstances cut out on account of its legal justification having ceased when he drew his right and title to it.

## The Political Component of the Ownership of the Land:

Now that we have wholly conversed the Economic Theory of Islam regarding the land, it is incumbent upon us to bring to light the political component which is latent in the general Islamic outlook about the land, for Islam has recognized the political side of the action of the reclamation of the land which

is by its nature an economic act. The political action which is embodied in the land and gives the doer a right to it is the act in accordance with which the land centres in to the possession of the Islam.

In fact the land's casting in it lost with and the contribution of its share in the Islamic life and its material prosperity is occasioned at times by an economic factor. It is the exertion expended by the individual on the reclamation of the land which comes into the possession of Islam in order to enfuse life into it and make it contribute its share in production. Likewise it is occasioned, at some other time, by political factor. It is that action on account of which the addition of a live land and fertile to Islam is accomplished. Either of these two action, has been met with its own consideration in Islam.

This action which results in the inclusion of a live and fertile land in the possession of Islam, is of two sorts since the land is at times conquered by *jihâd* at the hand of the Muslim army and at other times, by the voluntary surrender of it by its people.

If the addition of the land in the possession of Islam and the casting of its lot with the Islamic life were the result of conquest, then the political action here will be considered the action of the whole nation and not an action of a particular individual, the whole nation for that reason, become the owner of the land and on that account the principle of the public ownership will be applied to it.

But if the inclusion of the fertile land and the casting in of its lot with the Islamic society was brought about by way of the surrender and acceptance of Islam by its owners, then the political action here was the action of individuals and not the action of the nation. On account of this Islam recognizes here the right of the individuals in respect of the land in a cultivated state which they surrendered to it and allows them the right

to retain possession of it.

Thus we learn, political action plays a part in the Islamic general outlook toward land, but it does not strip it off its non-individuation character of ownership, if the action happened to be a collective action in which the nation contributes by various kinds of its share, like war, the land in that case comes to be the common ownership of the nation. The common ownership of the nation agrees in essence and social significance with the state-ownership even if the state-ownership is more broad based and wider in scope inasmuch as the ownership of nation indespite of its being a common ownership it is so within the orbit of the nation — but it is in any way exclusive to the nation, and it is not valid in proper to avail of it for any other purpose than for the common good of the nation, while the land belonging to the state-ownership can be availed of in a wider orbit by Imām. Hence the collective political action in connection with the fertile land conquered by the Muslim has caused to be resulted in its being placed in Islamic orbit instead of a wider human orbit and has not stripped it of its non-individuation character of ownership in any way. However, the land loses this non-individuation character of ownership and is subjected to the principle of private-ownership when the political action happens to be an individualist action like the individuals' surrender of their lands to Islam.

In the light of this we learn that the basic sphere for the private ownership of the land in possession in the Islamic legislation is that kind of land which was the property of the owners according to the social orders in which they lived before Islam and afterwards responding to the call of the Islamic army, had joined voluntarily its fold or had made peace with it, because the *sharī'ah* respects their ownership and acknowledges their rights to their properties.

In fields other than this the land is regarded a property



of the Imām and the *sharī'ah* does not acknowledge the individual's appropriation of the possession and control of the land. However the individual can acquire a private right to it by way of rendering it fit for tillage and frintage according to the opinion of ash-Shaykh aṭ-Ṭūsī already stated. This right, even though it does not differ from our present day conception of ownership differs from it theoretically, for as long as the individual does not possess the ownership of the land, and as long it is not removed from the orbit of the Imām's ownership, it shall be open to Imām to impose land tax on it as stated by ash-Shaykh aṭ-Ṭūsī and even though we are not made responsible for the payment of it on practical side on account of the tradition of *tahlīl* (exemption) which gives release from it, in an exceptional manner, yet it is acknowledged theoretically.

So then the *sharī'ah* does not acknowledge private ownership of the land except within the bounds of its respect for the real ownerships in the land before the land's coming into the possession of Islam voluntarily or by way of treaty.

We can easily find political justification for this acknowledgement if we link it with the considerations of the religious call and its chief expediencies instead of linking it with its economic significance of it for the Islamic outlook; because it is necessary that those who surrendered their lands to Islam voluntarily or who submitted themselves to the control of Islam by way of treaty, the areas of land which they cultivated should be left in their hands and that it should not be demanded of them that these should be tendered to the religious state whose fold they had entered or whose authority they had been united with, or else that would form a great obstacle before the religious call and at the various stage of its spread and expansion.

Yet indespite of Islam's granting these people the right of the private ownership of the land has not granted it as an absolute right to it but has bound these people to keep their



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lands in unbroken state of tillage and fructification and keep on doing the work on them make it contribute its share for the betterment of Islamic society. However if they leave the lands under them in a neglected state till it becomes a waste land, then in that case, in the opinion of a member of jurists like Ibnu 'l-Barrāj and Ibn Ḥamzah, the land will become the property of the nation.

## RAW MATERIALS FROM THE BOWELS OF THE EARTH

The raw materials contained in the dry strata bowels of the earth and the mineral wealths present therein, come next in importance after the earth, as to the part they perform in the productive and economic life of a man, for in fact whatever of the material commodities and dainties man enjoys come back ultimately to the products of the land and whatsoever of the mineral wealths that are treasured up on the bowels of earth. It is because of this that most of the industrial branches depend upon the construction and mining industries whereby man obtains those materials and minerals.

The jurists usually classify the minerals into two categories: *az-ẓāhir* (the open) and *al-bāṭin* (the hidden).

*az-Ẓāhir* minerals are those materials which do not require additional labour and processing in order to manifest its actual state and its mineral substance to reveal themselves like salt and oil. If and when we single out a well of oil, we will find the minerals in its actual state and would not be required to put in labour to transfer it to oil even if are required to put a great deal of labour to reach the well of the oil to open up its well and to clarify it after drawing it out from the well.

So the term *az-ẓāhir* in the juristic terms is not used in its

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literal sense, that is open or in the sense that it does not require digging and labour to reach or have access to it but is a descriptive term to denote every mineral, which when discovered is found to exist in its actual natural mineral state irrespective as to whether man is required to undergo a great deal of efforts to reach its well or springs buried in the depth of nature or finds it with ease and facility without any acts, on the surface of the earth.

As for *al-bāṭin* minerals, in the juristic term is every mineral which requires labour and developing work to light upon its mineral properties, like gold and iron, for the mines of gold and iron do not contain gold or iron in its completed state waiting for man to reach it as it lies hidden in its depths, and take what of it, he wishes; but these mines contain substance which requires great deal of labour and exertion to be expended on it for it to become gold and iron as the dealers in it understands.

Hence the openness and hiddenness of it in the juristic nomenclature is linked with the nature of the material and the degree of its completed nature, not with its location or nearness to the surface of the earth or in depth and bottom of the earth.

In order to elucidate this juristic technical term which has been expounded by us, al-'Allāmah al-Ḥillī has already stated in his *at-Tadhkirah*: "By the open minerals is meant that minerals which makes manifest its essence without any labour only the endeavour and labour to reach it, easy or arduous, and does not require disclosure, like salt, oil, coaltar, mill-stone, asphalt, China clay, ruby, antimony, stone quarry (clay-pits) and other minerals like these. By hidden minerals such minerals are meant which are not disclosed except by labour and are not reached at except after they are subjected to treatment and appliances are used for their disclosure, like silver, gold, iron, copper and lead . . ."

### The Open Minerals:

In respect of the open minerals, like salts and oil, according to prevailing juristic opinion, are things of common sharing between all of the people. Islam does not recognize anyone's appropriation of them and the possession of private ownership of them because they are included according to it comes under the orbit of common ownership and as such is subject to this principle. It only allows to individuals to acquire such quantity of it as would meet their need of that mineral wealth without appropriating it or taking into their possession its natural mines.

On this basis it comes to be for the state — or the Imâm as the head of the people who possesses the ownership of these natural wealths as common ownership — to render them fruitful fulfilling the material condition to the extent of the possibilities of the productions and extractions therefrom, and place the fruit at the service of the people.

*Sharī'ah* has absolutely interdicted undertakings by which some individuals acquire monopoly for the fructification of the minerals and even if these undertakings, carry out the work and labour of excavation to reach them or for their disclosure as they are buried in the bowels of the earth, they will not acquire the right and title to the mineral product, nor will that lead to their exclusion from the orbit of the common ownership. It allows an individual undertaking to acquire such quantity of this mineral material as meets the individual need of a person.

al-Allāmah al-Hillī, already elucidating the legislative principle concerning the open minerals, in *at-Tadhkirah* has, after quoting many examples, stated: "No one acquires the source of these minerals by reclamation and overhauling of them if it means thereby '*nayl*' by general consent", and by '*nayl*' he means the geological stratum which consists of the source of



the mineral, that is, it is not permitted to an individual to take possession of those minerals, even if he digs the well till he reaches the well of the oil, that is, its geological stratum buried in the bowels of the earth.

Also in *al-Qawā'id* when talking about the topic of the 'open minerals' it is stated as follows: "The minerals fall into two categories: the open (*az-ẓāhir*) and the hidden (*al-bā'in*). The minerals which come under the category of the open are those minerals to reach which no processing is needed, like salt and oil, sulphur, coal-tar, asphalt, antimony, bituminous substances, and ruby . . . the closer they are to the joint partnership of the Muslim therein, such being the case they cannot be taken possession by reclamation nor will it become private property by constructing an interdictory boundary line to it nor will it be valid to rent it at fee or becoming a private property to be rented. The one who gains in the race for it, first access to its location shall not be disturbed till he has satisfied his need of it. If two persons racing for it reach it at the same time lot shall be cast when both cannot jointly participate in making use of it, there are two possibilities to decide who shall be the first by casting lots or he shall be allowed first to satisfy his need whose need of it is greater".

The text of the many source books of jurisprudence like *al-Mabsūṭ*, *al-Muhadhdhab*, *as-Sarā'ir*, *at-Taḥrīr*, *ad-Durūs*, *al-Lum'ah*, *ar-Rawḍah* support the principle of the common ownership and the invalidity of the principle of private ownership in respect of the open minerals.

It is given in the *Jāmi'u 'sh-sharā'i'* and *al-Īqāḥ* that "If any individual tries to take (from these mines) more than his requirement, he must be interdicted from doing so".

In *al-Mabsūṭ*, *as-Sarā'ir*, *ash-Sharā'i'*, *al-Irshād* and *al-Lum'ah* confirm this interdiction, since it is said in them: "He who is prior let him take what his need requires".

## IQTİŞÂDUNÂ

al-'Allāmah al-Hillī says in his *at-Tadhkirah*: "This is the opinion of the majority of our jurists they however have not made it clear whether yearly or daily need".

By this he means the jurists have interdicted an individual taking more than his need requires but have not limited the need which permits the taking, whether the need is for a day or year. In this the *sharī'ah* attains to the explicatory value concerning the need laying its emphasis on the illegality of individual's exploitation of these natural wealths.

Then, the open minerals in the light of the juristic text presented by us, are subject to the principle of common ownership. However the common ownership here differs from the common-ownership of the conquered lands in cultivated state already discussed, for the common ownership accrued as a result of the political action which the nation had carried out, that is, conquest by nation, so the conquered property cannot go beyond this, but will remain jointly common property of the Islamic nation. But in the case of the minerals all people have equal share according to many juristic sources. In talking of common ownership here the people in general is used instead of the Muslims, as in *al-Mabsūṭ*, *al-Muhadhdhab*, *al-Wasīlah* and *as-Sarā'ir*. Since in the opinion of the authors of these sources there is no proof for the mining production to be exclusive property of the Muslim nation as a whole but the property of all the people living under the shelter and in the lap of Islam.

### HIDDEN MINERALS

In the juristic term those minerals are termed hidden which are not found in their finished form and state but work and processing is needed to develop and put them in their finished form, such as gold. Gold does not exist in a finished form and state but work and processing has to be done to develop and

fashion it into gold. The hidden minerals, too, are in their turn of two kinds, those that are found close to the surface of the earth and those which exist in the bowels of the earth in such a shape that access to them is not possible without hard labour and digging.

### Hidden Minerals Existing Close to the Surface of the Earth:

As for the minerals found close to the surface of the earth, they are like the open minerals, the directive, in *sharī'ah* in respect of which we have presently come across.

al-'Allāmah al-Hillī says in *at-Tadhkirah* for the hidden minerals they may be either open in the sense that they exist close to the surface of the earth or on it so as to be picked up by hand or they may not be open. Now if they are open then they too cannot be owned by reclamation as has been said already.

So then Islam does not permit appropriation of mineral materials which happen to be existing close to the surface of the earth as a private property while it lies in their mines, pits or beds, but allows every individual such quantity as he can take extract or take into his possession provided the quantity does not exceed reasonable limits nor reaches the degree in which the individuals commanding and helping himself to them becomes socially injurious and occasions putting others to inconvenience or in straits as has been specified by the jurist al-Iṣfahānī in *al-Wasīlah* we say this because we do not possess a sound text in *sharī'ah* indicating taking control or possession will constitute, always and under all circumstances — a ground for the ownership of the mineral wealths, sequestered and taken possession of irrespective of whatever the amount of it be or whatever the extent of the effect of their sequestration will be upon others. All that we know in this respect is the only one



thing: that the people in the legislative age were given to the practice of satisfying their requirements of the mineral materials found on the surface of the earth or close to it by taking into their possession these materials in such quantities that would answer their purpose and need of them.

However the quantities they could extract and take possession was, by the nature of the things, were on account of the slender productive and extractive means they could command. Hence man's indulgence towards that practice common at that time cannot constitute an argument as to *shari'ah* sanction of the individual's appropriation of whatever quantity he could take possession of even if the possessed differed in quantity, that is the amount extracted and secured, or in quality that is its effect upon others, from the quantity secured and its effect on others when this practice was commonly prevalent during the legislative age.

And even to this day and within the limits of the open minerals in the juristic sense and the hidden minerals existing close to the surface of the earth, we find that the jurists do not permit them minerals as a private property, but permit someone to take a reasonable quantity of the minerals as would meet his need, thereby leaving wide room for the use and enjoyment of them on a wider scale than their monopolistic exploitation by private individual undertakings.

### **The Latent Hidden Minerals :**

As for the minerals which are concealed in the deep bowels of the earth they call for two kinds of efforts (1) efforts to search for them and to dig to get at their bottoms; and (2) the effort spent on the material itself to refine and develop it and to bring out its mineral properties. These are such minerals as gold and iron. Let us apply to minerals of this group the name



of the latent hidden minerals.

A number of theories have been tossed up in respect of these hidden minerals in the Islamic jurisprudence (*fiqh*) for there are those who hold the opinion that they are the property of the state or Imām by virtue of his office and not as a person, of those who hold this opinion are al-Kulaynī, al-Qummī, al-Mufīd, ad-Daylamī, al-Qādī etc. Their belief is that minerals are like *anfāl* and they are the property of the state. Then there are those who hold the opinion that they are of the nature of the joint property shared in common by all the people, that is, they are of the nature of public-ownership. Those who hold this opinion are, as reported, al-Imām ash-Shāfi‘ī and many of the Ḥanbalite ‘ulamā’.

Concerning the process of the discovery of the economic doctrine we have been pursuing, it is practically of material importance for us to study the legislative form of the ownership of these minerals and to find out as to whether it is of the form of public-ownership or of state-ownership or of any other form. So as long as it is agreed that these minerals by the nature of their shape bear the general social stamp-mark and belong to no particular individual. Hence a study of the kind of ownership will remain a formal inquiry not having connection with our objective. But the material thing which it deserves the inquiry to know as to whether Islam would permit the removal of the mines of gold and silver from the field of the common wealths, and bestow upon an individual who digs up a piece of earth and discovers the mineral the ownership of the minerals, he discovers.

We have seen in the case of open minerals and hidden minerals which are close to the surface of the earth that the *sharī‘ah* according to the opinion of the jurists in common (*jumhūr*) — has not permitted appropriation of them as private property. It has permitted every individual to take such a quantity of minerals thereof according to his need and requirement as would not be hurtful to others. Therefore, of necessity we should learn the stand-point of the *sharī‘ah* concerning the

hidden minerals and make plain the extent of its agreement or disagreement with its stand-point in respect of the other minerals.

So then the problem is, whether can an individual acquire private property of the gold and iron mines, by discovering them through excavation or not.

The usual reply of the jurist to this problem is in the affirmative. They hold that the ownership of the mines can be acquired by their discovery of them through the operation of digging.

Their authority for this opinion of theirs is that discovering a mineral through excavation is a kind of reclamation. The ownership of the natural yields are acquired by reclamation. Likewise it is a mode of taking into control and possession. And control and taking into possession is considered a ground for ownership of the natural wealths in accordance to their different forms.

When we examine this opinion from the point of the economic doctrine, we must not do so apart from the reservations which it is hemmed in and the limits which were imposed upon when it permits ownership of the mine to the one who discovers it.

The ownership of the mine which the discoverer of it has succeeded in coming upon, does not according to this opinion, extend in the depth of the earth to the veins of the mineral and its roots.

Only that material which the digging reveals is included in his ownership. Likewise his ownership does not extend horizontally outside the limits of the pit which the discoverer has constructed. This part is what is termed in juristic parlance the precinct of the mine for others.

It is clear that these divisions of the ownership are greatly restricted and narrowed and permit any other person to carry

out digging operations at another place of the very mine itself and if he sucks up, in fact, the very springs and roots which the first discoverer sucks up, because the first discoverer does not own its veins and springs.

This limitation as to the ownership of the hidden minerals is made evident by those who believe in it in a number of juristic texts. al-'Allāmah al-Hillī says in *al-Qawā'id*: "If a person digs and reaches the mine he does not get the right to prevent another person from digging it from another side. If he — the other — reaches its vein, it is not for him — I mean the first digger — to prevent him for he possesses the place which he has dug up and its precinct (*ḥarīm*)".

He says in *at-Tadhkirah* — while explaining the range of ownership — "If the area dug is widened, and what is obtained is not found except in the middle part of it or at a portion of the sides, his property of it will be confined to the location where the material is found but just as he becomes the owner of it, he becomes the owner of what is by and about it, what may fitfully be described as its precinct and that to the extent of the place on which stand his assisting hands and his animal.

"Concerning the validity of that digging that is digging from another place — is not prohibited — to another person even if he reaches the vein irrespective of whether we say or do not say that the mine is his for if he at all to own the mine he owns the place he had dug up but not the veins which are contained in the earth."

These texts restrict the ownership within the confines of the digout pit and the area surrounding it to such an extent as would facilitate carrying out of the operation of extraction but do not admit extension of area to more than that either horizontally or vertically.

If we add to this restriction placed upon it by the jurists who uphold the belief in the ownership of the mine, the principle



of invalidating the disuse which prevents the individuals who perform the operation of digging of it and the process of revealing its contents from freezing the mine and putting it out of use, and decree its seizure from them when they abandon it and leave it neglected.

Yes, when we add up these restrictions we will find that the belief in ownership which allows to appropriate the mine within the confines of the restrictive limitation, a strong ground of denial of the private ownership of the mines from the side of positive results and the lights which they throw upon the theoretical discussion of the Islamic economics because the individual is not allowed by the directive ruling of these restrictions the appropriation of the mineral product except only within the confines of the pit dug up by him and is confronted, from the very commencement of his digging operation, with the cautioning threat of the seizure of the mine from him if the miner block the mine, breaks off the work and freezes the mineral wealth.

This category of ownership differs, in all its clarity, from the ownership of the natural public utilities found in capitalist doctrine of economics, for this kind of ownership does not go beyond by a great degree, from being a mode of the distribution of labour among the people and it can neither lend to the creation of individualized monopolistic enterprises like those of the undertakings which dominate in the capitalist society nor can it become an instrument for acquiring authority and control over natural public utilities and monopoly of mines and what they contain on natural wealth.

Over against this belief in the ownership (of the mine) which usually prevails in the juristic media there is found a trend which denies an individual's appropriation of the ownership of the mines, even within the limits recognized by the jurist who uphold such a belief.

The juristic trend takes help from the controversial arguments and holdings of the believers in the ownership (of the mines) for the justification of the denial of it. It does not determine to make these jurists admit that the opener of the mine owns the mine on the basis of reclaiming it by opening it or on the basis of his holding it in his possession and his having control over it, because reclamation does not establish in *shari'ah* a special right on the basis of it except in the case of the land according to the text in which it is said: "Whosoever reclaims a waste land does acquire the property of it." Since the mine is not a land so that the text may comprehend it. The argument is that when the jurists discussed the precepts relating the lands in cultivated state acquired by conquest and said that they are the common property of the Muslims they did not include in this category of ownership the mines found these lands thereby acknowledging the fact that mines are not lands.

Similarly no proof is found in the *shari'ah* as to the fact that a control and holding in possession constitutes a ground for the ownership of natural resources.

On the basis of this juristic trend an individual cannot avail to take anything from the mine so long as it is in the mine. He can only take possession of material which he extracts from it as his own private property. This would not mean that relation to the mine does not differ on the legislative side, from the relation of any other person to it, on the contrary in despite of the fact that he would own the mine yet he would be deemed legally better entitled to enjoy the benefit of the mine than any other person and to carry on the work in the way of digging of the mine which he has dug up for its opening it up on account of the fact that it was he who created the opportunity of utilizing the mine in the way of that digging on which expended his effort and his labour and penetrated to the mineral material lying in the deep bowels of the earth. Hence he is entitled to

prevent others from making use of the pit, to that extent of removing the obstacle; and it is not permitted to anyone to make use of the pit in such a manner as would put obstacle in the way of the pit-owner's reaching the mineral material.

\* \* \* \* \*

In the light of whatever the juridical texts and theories about (ownership of) mines, we can educe that the miner, in the predominant juridical opinion, jointly shared common properties and are subject to the principle of common-ownership. That is no individual shall be allowed to appropriate the veins and the sources of the mine as they like sank deep and shrouded in the bowels of the earth. The individual's property right in respect of them mineral material contained therein is allowed to extend only to the extent of the vertical and horizontal dimension of the pit. However, it constitutes a locus of difference between the prevalent juridical opinion and the juridical trend contrary to it. In the prevalent juridical opinion, the individual is given the right to acquire the mine within those boundary limits in case of mine latent hidden mine, and in the contrary juridical trend, the individual is given the right to own as his property only such quantity of the material as he extracts from the mine and he is entitled to prior claim to the utilizing of the mine and the availing of digging of the pit for the sake of it to anyone else.

#### DOES OWNERSHIP OF MINES FOLLOW THE OWNERSHIP OF THE LAND?

Uptil now we have meant by the mines which exist in a free land, which belong to no particular individual. The result we arrived at from our discussion we have educed a while ago. Now it behoves us to observe as to whether this result includes



the mines which exist (found) in a land which is the private property of a particular individual or they become the property of that individual in the sense in which the land is his property.

The fact is that we find no preventive to the application of the result arrived at in our discussion concerning these mines, unless there exist a necessary consensus (*ijmā' ta'abbudī*) to the effect that the presence (existence) of it in the land of a particular person is not a sufficient ground of his appropriation of it as his private property from the juridical point for we have learnt in the previous discussion that the title of the individual to the appropriation of the land arises on two grounds viz reclamation and a country's entering into *Dāru 'l-Islām* by its people's voluntarily surrendering the land. Since reclamation results in entitling the reclamer to have a claim upon the land he has reclaimed and the person's voluntary surrender of his land renders the land his property. The effect of neither of these ground extends to the mines existing in the bowels of the earth, but only to the earth which contains them in accordance with the *shar'ī* argument concerning either of them. The *shar'ī* argument in regards to reclamation is the legal text to the effect that "whosoever reclaims a land he has the best right and title to it. He shall have to pay tax in respect of it". It is clear that this text bestows upon the one who reclaims the land a title to the land he has reclaimed not to what of the riches which lie yet hidden in the deep bowels of the earth.

As for the *shar'ī* argument about the property of the individual belonging to the country the people of which have voluntarily surrendered the land, it is that Islam protects their blood and property so he who embraces Islam, has his blood protected and his property which he possessed before he embraced is left to him. This principle is applied to the land itself and to the mines which are contained therein. The reason is the

person who embraced Islam did not possess those mine before he embraced Islam so that they may be protected to him in other words the principle of protecting the blood and property in Islam does not legalize new ownership. It gives protection to the person, for the reason of his joining the fold of Islam in respect of those properties which he possessed before he embraced Islam. And mines do not come under the category of these properties for him to keep in his possession by his embracing Islam. Islam honours and recognises his land which formerly belonged to him. So it remains his property after Islam and is not taken away from him.

And there does not exist in *sharī'ah* a *nass* (text) to the effect that the ownership of the land extends to each and all of the riches contained therein.

Thus we learn that unless there exists a consensus to the contrary, it is juridically possible to say that the mines existing in possessed or owned land are not the property of the owner of the lands, even if when they will be made use for productive purpose the owner of the land's right will have to be taken in consideration since reclamation of the mine and extraction of the material contained therein rests with the free will of the land owner.

#### *IQTĀ'* (FEUDAL INSTITUTION) IN ISLAM

Among the technical terms of Islamic law connected with land and mines, there is found a word, the *iqtā'* (fief). We find in the talk of many of the jurists the statement that the assigning of this land or this mine belongs to the Imām along with the difference between them as to the limits within which it is permissible to the Imām to do so.

The word *iqtā'* (fief) is so conditioned to in the history of middle ages, in particular the history of Europe, to well-defined

conceptions and institutions as to cause a result of it, to evoke in the mind all of those conceptions and institutions, which define the relations between the owner of the land (the feudal lord) and the tillers of the soil (his vassal) and regulate their respective rights in the ages during which the system of feudalism was dominant in Europe and in different parts of the world.

Indeed since these connotative evocatives and reflexive conditionings are the linguistic outcome of cultures and social doctrines which did not exist in Islam, nor with which Islam was acquainted with equally as to whether or not Muslims in some parts of the Islamic homeland, having been lost to their fundamental roots and cut off from their basic moorings and having become submerged in the non-Islamic current, had become acquainted with them, it would not be reasonable for us to burden the word *iqṭā'*, as used in Islam with this linguistic meaning proximate to it.

We neither intend nor are interested in giving a talk about historical dregs of the word nor the legacy it is burdened with as a result of specific periods of Islamic history, it not being our aim to institute comparison between the two senses of the word. On the contrary we do not find any justification at all for instituting comparison and contrast between the sense of the word *iqṭā'* as used in Islam and the sense of the word which the feudal orders reflex upon it so as to cut off theoretically the relationship between them just as to make them distinct from each other historically. Our only aim is to expound the word from juridical point of view for the sake of defining the complete shape and form of the precept of the Islamic *sharī'ah* as to the distribution which is consolidated and crystallized through the process of discovery pursued by this book.

*Iqṭā'* is defined by ash-Shaykh aṭ-Ṭūsī in *al-Mabsūṭ*. In fact it is Imām's granting a person the right of working a source of natural wealth, work thereon being deemed to constitute a



ground of an appropriation or acquisition of a specific right therein.

In order to fully comprehend this definition, we should bear in mind that it is not permissible for the individual to work in all the sources of raw source of wealth unless and until he is permitted by the Imâm or the state to do so in general or in particular as will be stated in a subsequent chapter when we will take up the study of the principle of the state's intervention which makes feasible supervision of the production, the distribution of work and the opportunities in a sound and valid manner. Hence it is natural for the Imâm to undertake the work of turning to good account those resources by himself doing so, or by bringing into existence a joint enterprise or giving individuals opportunities to turn them to good account, in accordance with the objective conditions and productive possibilities which would be fulfilled as regard the society on the one hand and demands of social justice from Islamic point of view on the other.

In respect of a raw material, for instance, like gold, it may be held preferable for the state to undertake the work of the extraction of it and to make readily available goodly extracted quantities for the service of the people or that the Imâm finds such a thing practically not possible on account of the non-fulfilment of the productive possibilities of extracting huge quantities of them at the initiation of the work on the part of the state, so he prefers another mode of production. The permission to individuals or groups to reclaim the mines of gold and to strive to extract from them as much large quantities of gold as possibly could be extracted therefrom. It is thus that the Imâm fixes up in the light of the objective reality and the adopted maximum of justice, the mode of turning to good account the raw material from the natural resources and the general policy of production.

In this light we can understand the role of the *iqṭā'* and its

juridical terminology. It is a mode of turning to good account raw material the Imām adopts when the Imām sees it is the best mode for the utilization of it under a definite circumstances. So the Imām's giving a person *iqṭā'* of the mine of gold to a person means permission to him for reviving that mine and for extracting the material from it. Therefore it is not permissible for the Imām to grant a person the *iqṭā'* of what is beyond his means and ability to manage and what he is unable to turn to good account as has been stated textually by al-'Allāmah al-Ḥillī in *at-Tahrīr* as also by Shāfi'ī, because *iqṭā'* in Islam means permission to an individual to turn to good account by work the riches assigned to him by way of *iqṭā'* and if the individual is not able to turn it to good account by working on it, the *iqṭā'* will not be lawful.

So this definition of *iqṭā'* reflects explicitly the nature of it (*iqṭā'*) as a mode of the distribution of work and fructification of the nature.

Islam does not consider *iqṭā'* a ground for the appropriation of the individual assignee of the natural resources granted to him by the Imām that would be misconstruing its character as a mode of work fruitful and the distribution operative abilities *iqṭā'* only gives the individual assignee of it, the right to put to good account the natural resources, and this right means that it is his duty to work on that natural resources and that no other person will be allowed to prevent him from doing so, or to work upon it instead of him as has been explicitly stated by al-'Allāmah al-Ḥillī in *al-Qawā'id* saying therein: "*Iqṭā'* imports *ikhtiṣāṣ* (an exclusive right)". In the same way ash-Shaykh al-Ṭūsī writes saying in *al-Mabsūṭ*: "If the sultan gives to a man of his subject, a piece of dead land by way of *iqṭā'* (fief) he becomes more entitled to it than any other person by reason of the sultan's giving him the *iqṭā'*, without any objection."

So *iqṭā'* is not a process of appropriation, but a right and a

title which the Imâm confers upon the individual about a natural raw resources, which makes him better entitled than any other person to avail for productive purpose a piece of the land or the mine assigned to him which is determined according to his ability and means.

Evidently giving this right is necessary as long as *iqṭā'* is, as we have learnt, a mode of distribution of operative abilities and labour forces with the intention to obtain better yields from the natural resources; since without this right being given, *iqṭā'* would not be able to play this role of it in accordance to a general planning unless every individual enjoys the right to invest on those resources assigned to him by *iqṭā'* and has the preference over others by virtue of it to revive and work on it. So this right leads to guarantee regulating of the distribution and the success of *iqṭā'* as a mode of the profitable productive use of the natural resources and their distribution between the working forces on the basis of efficiency.

In this way we find that the individual has no right from the moment the Imâm's assigning to him the *iqṭā'* of a piece of land or a portion of mine and until he starts the operation i.e. to the interval between the intervening period of his preparing and making ready the conditions for the starting of the work, save the right of carrying out his work in the assigned limited area of the land or that definite portion of the mine which he is given permission to reclaim and to put into productive use, and the right of preventing others from competition with him, so as not to disturb the mode which the Imâm pursued in regard of obtaining production from the natural resources and the distribution of energies thereon on the basis of sufficiency.

This period which intervenes between the grant of the *iqṭā'* and the commence of the operative work must not be delayed for *iqṭā'* does not mean the individual's proprietary right in regard of the land or the mine but the distribution of an overall



operative work for the exploitation of the natural resources on the basis of efficiency. Therefore, the assignee of the *iqṭā'* has no right to delay the engagement period of work without justification because his delay in assuming of the work becomes an obstacle to the success of the *iqṭā'*, in its character as a productive use of the resources on the basis of the distribution of work; just as another person's interference in his work, after he has already been appointed with the duty on behalf of the state to that particular portion given to him, could also be an obstacle to the *iqṭā'*'s performing its Islamic role.

Therefore, we find ash-Shaykh aṭ-Ṭūsī stating in *al-Mabsūṭ*, "If he (the assignee) delays the reclamation, the Sultan will tell him you may either reclaim it or leave it for another person so that he may reclaim it. If he puts excuse for delay, and prays the Sultan to give him time, the Sultan may do so. But if he has no excuse for the delay and the Sultan gives him the two options, and he does not do so the Sultan will take it away from his possession".

It is given in the *Miftāḥu 'l-karāmah*: If he (the assignee) pleads his being hard up and prays for time to till better days, his prayer will not be taken into consideration for that would be indefinite delay and would entail prolongation, leading to abandonment.

This is the whole of the role of the *iqṭā'* and its effect during the period intervening between the grant of it and the commencement of the work. It is this intervening period wherein *iqṭā'* produces its effect from the point of *sharī'ah* and this effect does not go beyond — the right of work, as we have learnt, which makes *iqṭā'* a mode which the state avails under certain circumstances for fructification of the natural resources and the distribution of the operative powers over these resources to the extent of their efficiency.

After the individual's carrying out the production work on

the land or the mine, the effect of the *iqṭā'* does not remain from the point of *sharī'ah* but work takes its place for the individual will have that much right to the land or the mine what the nature of the work fixes in accordance with the details which we have come across.

This is the truth about *iqṭā'* which shows it as an Islamic mode of distribution of work which we find establishes the truth by proof adding to the previously given texts and precept as to the definition of the shape *sharī'ah* has formed of *iqṭā'* for the resources of nature to which *iqṭā'* is permitted on account of working on them confers to right or a kind of appropriative possession of them are termed in juristic parlance dead lands for *iqṭā'* in respect of those natural utilities, is not legally valid or permissible in which no right or a special claim is generated by virtue of work as per verdict by ash-Shaykh aṭ-Ṭūsī in *al-Mabsūṭ*, illustrated by a vast number of the various ways of reporting of the tradition. The prohibition of granting *iqṭā'* of this sort of public utilities and limiting it specifically to the dead lands indicates quite explicitly the fact we have made clear and established that the function of the *iqṭā'* from the point of *sharī'ah* is only granting of the right of working up a definite natural resource for a specific purpose as a mode of the distribution of labour to be expended on those natural resources which are in need of reclamation, work and labour. As for the right and claim of the individual to the natural resource, is established on the basis of work and labour, and not on the basis of *iqṭā'*.

However if the natural resources of public utilities are not in need of being reclaimed and worked, and therein does not lead to giving the person who works on it a specific right or title to it then *iqṭā'* in case of it is not valid or permissible inasmuch as *iqṭā'* of such a utility loses its Islamic meaning since it is in no need of work nor work has any effect therein, so that the

right of work may be conferred on to an individual on the contrary restoration of *iqṭā'* in this respect of this utility will be a manifestation of monopoly or selfish exploitation of natural resources. This does not agree with Islamic concept of *iqṭā'* and its original function. It is because of this it has been forbidden by the *sharī'ah* and has limited the valid *iqṭā'* to that kind of natural resources which are in need of work.

### ***Iqṭā'* of the Taxed Land:**

There remains another thing to which the term *iqṭā'* is applied in the juridical parlance. However it is not in fact an *iqṭā'*, but is a payment for service.

The locus of this *iqṭā'* is the taxed land which is considered a property of the nation since it happens that the governor can grant an individual something from the taxed land and authorize him for collecting tax thereon.

This authorization is exercised by the governor though it sometimes expresses in its historical significance, and without right, process of appropriation which results in the proprietary right to the land. Yet in its juridical sense and within permitted limits does not mean any such thing, but represents a mode or payment of remuneration or compensation for work which the state takes up itself to pay to the individuals against the public services rendered by them.

In order to understand this we must call to mind the fact that the tax, that is the land tax which the state demands from the tillers of the soil, is considered a property of the *ummah* (Muslim community) following from the *ummah's* ownership of the land itself. It is, therefore, the duty of the state to spend the tax derived from the land in the general interest of the *ummah* as has been declared textually by the jurists giving example of such interests or the providing of the administrators



and judges, construction of mosques and bridges, etc., for the administrators and judges serve the *ummah*. Therefore provisioning of them is the obligation of the *ummah*. As mosques and bridges are a part of the public utilities which are linked to the life of the people as a whole, so creation of them is with the money of the people and their claims to the tax-money is valid.

Evidently providing of means to administrators and judges, and likewise the payment of any other individual for public services rendered may be made either by the state either out of public treasury (*baytu 'l-mâl*), directly or may be made by giving the recipient the permission of collecting them out of the returns of some of the properties of the *ummah*. The state usually follows the second mode in case it does not enjoy a strong central administrative machinery.

In the Islamic society the payments of salaries and expense of the individuals who render public services to the *ummah* are made in cash, just as it happens in accordance with the administrative circumstances of the department of the Islamic state. These payments and salaries are paid by way of the states granting the right of control over the tax of a limited landed property from among the lands belonging to the *ummah*, and his exacting it directly from the tillers of the soil in consideration of the individual's wages for the service rendered by him to the *ummah*. So it is in this sense that the term *iqṭā'* is applied to it, but it is not an *iqṭā'* in fact but the charging of the individual with demanding his wages out of the tax accruing from a limited area of land which he obtains directly from the cultivator of that piece of the land.

The assignee to the *iqṭā'* owns the tax on the land, as a wage for the service he has rendered to the *ummah*, but he does not own the land, and there exists no basic title to its proprietary possession or to its usufruct, as such it does not go out of its

being the property of the Muslim nor its being a taxed land as the jurist research scholar, as-Sayyid Muḥammad Baḥru 'l-'Ulūm has stated in his *Bulghatah* while defining this kind of *iqṭā'*, that is, *iqṭā'* of tax-land, he writes: Indeed *iqṭā'* does not deprive the land from being a tax-land, for its meaning is the tax for the assignee, does not deprive it from being a tax-land.

### *HIMĀ* (PRESERVED OR PROTECTED LAND) IN ISLAM

The conception of *himā* obtained among Arabs from olden times. It expresses distant areas of waste land which strong people and individuals from among them used to monopolize for themselves, and would not allow others to enjoy the benefits derived therefrom. They considered whatever of energies and riches these areas contained as their sole and exclusive property or account of their having forcibly seized, and their might and power of forbidding others to avail themselves for their advantage. It is mentioned in the book named *al-Jawāhir* by the research scholar, an-Najafī that: "It was the custom of these people in the days of ignorance that one of them when he set his foot on a fertile land he would cause his dog to bark from a surrounding hill or a plain land and then would declare as his own property all the land upto where the barking sound reached and claimed all the area, on every side to which the sound of the bark of his dog reached. It was because of this that it was termed *himā*."

It is natural that Islam forbids *himā* because the specific right in respect of it is based on domination, not on the basis of work and labour. So on account of this it is not permitted to any Muslim. There has come a tradition which affirms the eradication of this mode of acquiring possession and monopolistic acquisition of the natural resources. It says: There is no *himā* except for Allāh and His Messenger. In some of the traditions it has come that a person asked al-Imām aṣ-Ṣādiq (a.s.) about a

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Muslim who had a landed estate wherein was a hill which is a salable thing among others sold to him then comes a brother Muslim, he has sheep and is in need of the hill. Would it be lawful for him to sell the hill just as he sells other things therefrom or to forbid it to him without price of it. What will be his position in this matter and what he takes? The Imâm replied. It is not lawful for him to sell his hill to his brother.

The mere happening of a natural resources to come under the control and power of an individual is not considered in Islam a ground for the creation of a right and title of the individual to that resource of nature. The only *himâ* which Islam has permitted is the *himâ* of the Messenger of Allâh, peace be upon him and his progeny. For the Messenger of Allâh had preserved some places from the waste land for the general good like *Baqi'*, since it was reserved for the camels of *ṣadaqah* (charity) cattles of *jaziyah* (head tax on free non-Muslims under Muslim rule) and for the horses of warriors.



## NATURAL WATERS

The sources of water are of two kinds: the uncovered sources which Allāh has created for man on the surface of the earth like oceans, rivers, and the other kind of sources buried and hidden in the bowels of the earth which man gets at by labour such as wells which man digs up to get at the springs of water.

The first kind of the source of water is considered a common property shared jointly by the people. Those natural wealths are termed commonly shared properties which Islam does not permit any individual to appropriate as his own private property but allows all the individuals to enjoy the usufruct of them, while leaving intact the character of the principals that is the actual substances and the right of ownership of them as being jointly and commonly shared. No one owns the natural sea or river as his own private property and all are allowed to enjoy its usufruct. On this basis we learn that the uncovered (open) natural sources of water are subject to the principle of the public ownership.<sup>1</sup>

1. There is a popular juristic opinion, that such source found on a land belonging to an individual as his private property is accepted from the application of this principle – vide Appendix – viii.

## IQTIṢĀDUNĀ

If a person collects a quantity of water therefrom in a container, whatever kind of container it may be, he becomes the owner of that quantity of water he has collected. If he ladles up a quantity of water with a jug, or puts it up by an instrument, or digs up a pit in a manner legally allowed and connects with the river, the quantity of water ladled up, pulled up or drawn into the pit becomes his property on account of having taken it in his custody. He cannot acquire as his own any quantity of water he has not taken into his possession of and put in labour for it. This has been confirmed by ash-Shaykh aṭ-Ṭūsī in *al-Mabsūṭ*. He says water *mubāḥ* (free to all) is water of sea and the big rivers like Tigris and Euphrates, and similar streams which spring up in waste-land of plains and uplands. These water are free and open to every one to make use of it as he wishes. There is no difference of opinion in this respect for the tradition related on the authority of Ibn 'Abbās from the Messenger of Allāh already cited herein before in which it is stated. The people are co-sharer and partners in three things; water, fire and grass. If this water increases and enters into the properties of others and collects therein, they cannot appropriate it as their private property.

Then it is labour which is the basis of the appropriation of whatever quantity of water person gains control over or brings under his authority from these sources. But if water from a river finds its way to that person's land, not by his labour or efforts on his part, then in that case he will have no justification for claiming it as his own private property, on the contrary, unless he puts in labour for that purpose, that water will remain *mubāḥ* (free) to all.

As for water, source of which lies concealed in the bowels of the earth, no one can claim it as his own unless he labours, to gain access to it, carries out digging operation to discover its sources and makes it available for use. And when a man opens its

source by his labour and digging, then that will become his title to the discovered spring which validates his availing of its usufruct and prevent others from interfering from his doing so since it was he who created the opportunity for the availing of the use and advantage of that spring, so it is a part of his right to avail usufruct of that opportunity and it is for none of those who did not join in his effort of creating that opportunity to come in his way of enjoying its benefit and he becomes more entitled than others to the spring and own its water he had striven for, because it is a kind of possession but he does not become the owner of the spring which existed in the bowels of the earth before he opened it up by his labour (vide Appendix IX). Therefore, it is his duty to supply water of it to others after he has satisfied his requirement of it gratis; and he is not allowed to demand something in return for their drinking and providing water to their live-stock inasmuch as the substance (water) has not ceased to remain a jointly shared common property and gives its discoverer only the right of priority on account of the labour he puts in for its discovery. So when he has fulfilled his need and requirement of it, others have a right to derive benefit from it.

It has been narrated on the authority of Abū Baṣīr from al-Imām aṣ-Ṣādiq (a.s.) that the Messenger of Allah (s.a.w.a.) has forbidden *an-niṭāf* and *al-arba'ā'*. He (the Imām) said: "So do not sell them, but lend them to your neighbour or brother (in faith). *al-Arba'ā'* means one makes a dam for irrigating his land, till he is satisfied. *an-Niṭāf* means one has a fixed limit of time for irrigating his land to his satisfaction". It has come in another tradition from al-Imām aṣ-Ṣādiq (a.s.) that he said "*an-Niṭāf* means the fixed limit of time for irrigation. When you are satisfied with it, you are not allowed to sell it to your neighbour but leave it to him. *al-Arba'ā'* means dams made between lands of a (certain) group, when one of them is satisfied



with the water of his dam", (the Imām continued) "he should leave it to his neighbour, and he is not allowed to sell it to him". (See Appendix X)

ash-Shaykh at-Ṭūsī also declares in *al-Mabsūt* the same thing that we have mentioned and makes it explicit that the relation of the individual to the spring of water is that of right and not of property despite of the fact that in his (the Shaykh's) opinion he (the discoverer) owns the well that is the pit he dug whereby he gained access to the spring of the water for he has said at every place (context) we have said he owns the well (we have meant by it) that he is more entitled to its water to the extent of his drinking need of it, his watering of his live-stock and the irrigation of his farm. After this if there remain any surplus it is upto him to give gratis to anyone else needing it for his drink and for the watering of his live-stock. However, water which he has secured in his big earthen jar or water-pot or in a tankard or in a pool or a well, that is the pit and not the substance (water) or in his manufactory or such other things, he is not obliged to give anything out of this stock to anyone even if it is in surplus of his need without any difference – because it is not its substance.

So then, the individual cannot prevent other individuals from availing of the substance in it as a natural source, within limits which do not come in conflict with his right and title to it for according to this opinion he does not own the substance itself but has a greater right to its usufruct as a result of his having created the opportunity which facilitated to the availability of the benefit of the substance. So others should be allowed to avail of the benefit of the substance in a way and to the extent it does not come in conflict with his enjoyment of its usufruct.

## ANOTHER NATURAL WEALTH

As for other natural wealth they come under the category of *al-mubāḥātu 'l-'āmmah* (things permitted to all).

The things free to all are all those natural wealth which all individuals can make free use of and enjoy the usufruct of them as well as their private property, for this general permission is a permission not only for the usufruct of theirs but also means ownership of them.

Islam has laid down private proprietorship in the freely allowed things (*al-mubāḥātu 'l-'āmmah*) on the basis of work and labour for acquiring possession of them in accordance with their difference in kind; for instance, the work or labour for acquiring possession of the birds is catching of them by hunting them, that of firewood is the gathering of them, and the work of acquiring the pearls and corals is the diving in the depth of the seas. So the taking possession of the electric powers (energies) lying concealed in the water-fall consists in the converting of these energies to the current of the flow of electricity. In this way the ownership of the freely allowed natural wealth is acquired for securing possession of it.

The ownership of these natural wealth cannot be acquired except by work so it will not suffice for their entering into the

control of man unless he puts in positive work for securing them. This text is given in *at-Tadhkirah* of al-'Allāmah al-Hillī. If the *mubāh* (freely allowed to all) water increases and a part of it enter into another land it becomes the property of that man. The Shaykh says: "He cannot become its owner just as the rain or snow falls on another person's property and remains on his property, or a bird hatches eggs on nest and reared the youngs in his garden, or a deer sinks in the mire in his land, or a fish falls in his boat — he does not become the owner of it, but by seizing and securing". In *al-Qawā'id* of the 'Allāmah in respect of the rules of hunting "prey does not become his property by falling in the mire of his land or birds nestling in his house or a fish leaping up to his boat".



## CHAPTER THREE

### THE THEORY OF DISTRIBUTION BEFORE PRODUCTION

#### 2 - THE THEORY



## THE THEORY

We have now concluded with minute precision of the general upper structure of Islamic legislative enactment containing the main collection of the precepts in accordance with which distribution before production and the regulation of the rights of the individuals, the society and the state in respect of the natural wealth with which the universe is replete, has been accomplished.

Having conceived it from the Islamic core; we would be traversing half the distance of the path to the discovery of the theory; and there remains for us the basic investigation from the religious angle wherein we should unfold the fundamental principles and the general theories on the base of which stands the upper structure and upon which rest that concentration of the precepts which we have passed by. This will be the second half of the process of discovery which proceeds from the upper structure to the base, and from the legislative details to the theoretical generalities.

In our presentation and interpretation of these legislative enactments and precepts we have always followed a method reflecting with continuity and clearness, the strong theoretical bonds between these precepts. The same method will contribute



its share in this new stage of the process of discovery and will help in availing of those important precepts in the general religious outlook we are attempting now. We shall dissect the general religious theory of distribution before production and study it in stages, and in respect of every stage we shall take up a side of it and gather up from the previous investigations those legislative and juridical texts and precepts which reveal that side and justify it.

After we have fully mastered different sides of the theory in the light of the upper structures, every one of which is attributed to one of these sides, we would combine in the end all the threads of the theory in one composite whole and give it its general form.

#### 1- THE NEGATIVE SIDE OF THE THEORY

Let us begin with the negative side of the theory. This side holds as we shall know to the belief in the non-existence of proprietorships and primary private rights in raw natural wealth without labour.

##### Its Upper Structures:

1. Islam has abolished (declared invalid) *himâ*. *Himâ* belongs only to Allâh and His Prophet and is not lawful for any one else. By this is denied any exclusive right of the individual to a land by his having control or authority over it or his defence of it by force.

2. If the *waliyyu 'l-amr* gives an individual a land as a fief, the individual thereby acquires the right to labour on it and without the fief giving him the right of the ownership of the land or any other right therein unless he labours on it or expends his efforts on its soil.

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3. The springs and roots of the mine lying deep in the bowels of the earth are not private properties and there exists no special right therein for any individual thereon, as al-'Allāmah al-Ḥillī has made clear in *at-Tadhkirah* saying: "He does not possess the vein which is in the earth. He who reaches it from another side then he will take from it."

4. The open oceans and rivers belong to no one in particular nor does there exist any special right for any person thereon. ash-Shaykh aṭ-Ṭūsī says in *al-Mabsūṭ*: "Water of seas, rivers, or streams springing up in the plane or hilly waste land, all these are *mubāḥ* (free to all). Any one can make use of what he wants and how he wishes", according to the report of a tradition on the authority of Ibn 'Abbās from the Prophet, "People are co-sharers in three things: Fire, water and herbage".

5. If water increases and enters the properties of the people and collects without these people having taken possession of it by any particular labour, it will not become their property.

6. If an individual does not spend efforts for hunting a prey, but the prey comes to his control, it does not become his property. al-'Allāmah al-Ḥillī in *al-Qawā'id* says, "A prey does not become one's property by its entering one's land, nor a fish by leaping up to one's boat".

7. Same is the case of other natural wealth, their falling under the control or coming to the hand of a person without any exertion on his part does not justify his appropriation of it. It is because of this that it is given in *at-Tadhkirah* "A man does not become the owner of the snow falling under his possession merely by its falling on his land".

### Deductions:

From these precepts and their likes in the collection of the

Islamic legislative enactments we have come across, we are able to know that there does not primarily exist for an individual private right in the natural wealth to distinguish him from others on the legislative level unless that be a reflection of his specific labour which distinguishes him from others in the existential reality of life. The individual does not appropriate a land if he has not reclaimed it nor a mine unless he has opened it, nor a spring of water unless he finds it first, nor wild animals unless he secures them by hunting, nor a natural wealth on the (surface of the) earth or in the air unless he secures possession of it and has spent efforts in doing that.

We see through these examples that labour which is considered in the theory as the sole basis of acquiring primarily appropriative rights in the wealth of nature, differs in its theoretical sense in accordance with the difference in the nature and kind of the wealth. Hence what is considered practically labour in respect of some of the natural wealth, and a sufficient ground for the establishing the appropriative rights on the basis of it, is not considered. Such is in respect of some other kind of natural wealth. You can appropriate stone found in the desert by securing possession of it. Securing possession in connection with the stone, in theory admits as labour and permits the establishment of the appropriative rights on the basis of it. But it neither admits securing possession as labour nor permits the appropriative rights on the basis of it *vis-à-vis*, the dead land, mine and natural springs, so it will not suffice for you in order to appropriate a dead land or a mine or a spring of water existing in the bowels of the earth to acquire control of those wealth and join them to your possession. There is no way of acquiring appropriate rights in them but that you must embody your exertions in the land, the mine and the spring, revive the land, open the mine and extract water from the springs. We will define in the positive sides of the theory its meaning of 'labour', and



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the criterion it follows in the matter of describing as labour different kinds of exertions which the men carries out in the fields of nature and its wealth. When we will grasp fully this criterion, it will be then that we will be able to appreciate why while taking stone into one's possession constitutes a ground for its appropriation and possession of the land does not constitute labour nor a justifactory ground for acquiring any appropriative right in that land.

### 2- THE POSITIVE SIDE (ASPECT) OF THE THEORY

The positive side of the theory runs parallel to its negative side and completes it. It holds to the faith that the labour is a legitimate basis for acquiring the rights and appropriation of properties in respect of natural wealth. Hence rejection of any primary right in the natural wealth apart from the labour is a negative form of the theory.

And, faith in the appropriative right therein on the basis of the labour is matching positive form.

#### Its Upper Structures:

1. The land is his who reclaims and revives it, as stated in the tradition.

2. He who digs a mine till it is opened up, has a greater right and claim to it and the ownership of the quantity uncovered from the pit and such other material.

3. He who digs up a natural spring of water is more entitled to have it.

4. If an individual takes possession of a wild (*an-nāfir*) animal by hunting, wood by gathering it, or a natural stone by carrying it, or water by scooping it up in pail or such other vessel from the river it is his property by possession of custody

as is texted by all the scholars.

### Deduction;

All these precepts in one have one common factor evident thing. It is this that labour is the sole source of the rights and appropriative properties in the natural wealth with which the man on all sides is surrounded yet nevertheless that we find this legal evident thing in every one of those precepts, we shall be able, by a minute study, of them and their legislative texts to discover a constant factor and two variable factors, differing from each other by the kind and the class of the wealth. The constant factor is the link of the individual's appropriative rights in respect of the natural raw wealth with the labour. Unless labour is put in, nothing is gained; and if labour is amalgamated with the natural wealth in any operation an appropriative right can be achieved, for the relation between labour and the appropriative rights in a general form is the common contents of those precepts and the constant factor therein.

As for the two variable factors, they are the kind of labour and the kind of appropriative rights which labour creates, for we shall see the precepts which establish by law the appropriative rights on the basis of labour differ from each other as to the kind of labour which goes to make it the source for the entitling right and as to the kind of entitling right which arise in respect of the land for having in possession is not considered labour in the case of the land, while the labour of taking in possession of stone lying in the desert is considered a sufficient ground for the proprietorship of it, as alluded to by us a short while ago. Similarly, we shall see while the reclamation is considered labour in respect of the land and the mine leads to only a specific right in the ownership (*raqbah*) of the land and the mine

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in accordance with which the individual is made more entitled to it than any other individual, but does not become owner of the land or the mine itself; while we find that the labour put in for taking possession of the stone from the desert and ladling up of water from the river will be considered a sufficient ground, from the *sharī'ah* point of view, not for acquiring only a priority right in respect of the stone and water but a right to its private ownership of it.

So there is a difference between the precepts which connect the private property rights of an individual on account of his labour and exertions as to the determination the kind of labour which produces these rights and as to the determination of the nature of those rights which rest upon labour. On account of this it will give rise to a number of questions requiring answer to them. Then why is it, for example, that these labours of securing possession of stone from the desert and of drawing water from the river will be sufficient for the man who puts in the labour to acquire appropriative special right therein, while this kind of labour in respect of the land and the mine, for example, will not constitute a ground for any appropriative right therein, and how was it the right which the individual earned in respect of water of the river by way of his taking possession of it from it, was raised to the level of proprietorship while it did not enable one who reclaimed the land or opened the mine to become the owner of the land or the mine, but only gave him the right of priority to the natural source of which he reclaimed. And if it was the ground for the private special rights, then why was it that when a man finds a land fertile by its nature and availing of the opportunity naturally conferred upon it, he tills it and expend labour on its tillage, he does not receive the rights analogous to the right for the reclamations, not withstanding his having put up many efforts and great labour on the soil. And how is it that reviving of the dead land became



a ground for the right of the proprietorship of the land, while the exploitation of the fertile land and its cultivation did not become a justifactory ground for an analogous right for the individual?

Indeed reply to all these questions which the difference of the precepts of Islam in respect of labour and its right has given rise to depend upon the determination of the third side of the theory which expounds the general basis for the estimation of labour in the theory. In order to determine this side we should collect those different precepts in respect of labour and its rights which have given rise to these questions and add to it all the analogous precepts which resemble them, and formulate therefrom the upper structure by way of which we will arrive at the determination of the outstanding main features of the theory with clarity and precision because the body of these different precepts in fact reflects the determinate main features of the theory we shall decide them now.

### 3- VALUATION (ESTIMATION) OF LABOUR (WORK) IN THEORY

1. If the individual carries out reclamation work on a dead land and renders it fit for cultivation or utilization, that shall be his right and title to the land he has reclaimed. But he shall have to pay tax on it to the Imâm unless he is exempted from the paymnet of it, as has been stated by ash-Shaykh at-Ṭūsî in the book of "*Jihād*" of his work *al-Mabsûṭ* conformably to sound texts of traditions, the burden of which is that he who reclaims a dead land has prior right to the land he has reclaimed and rendered fit for cultivation. However he shall have to pay tax on it and suitably to the right which he earns to it by virtue of his reclamation of it, no one else shall be allowed to seize it from him as long as he holds his right though he does not own the land

itself.

2. If the individual carries out the work of tilling a naturally cultivable land, makes use of it and raises crop on it he shall have the right to retain the land in his possession and the others shall have no right to hinder his utilization of land and enjoy its usufruct so long as he continues exercising this right of his. But he acquires no ampler right than this, that is, this right does not invest him with the authority of the monopoly of the land and hindering another person's utilization of the land when he (himself) does not make profitable use of it. On account of this the right which results from the cultivation of a land naturally fit for cultivation differs from the right which accrues from the reclamation of a dead land since the right which accrues from the reclamation confers upon the reclamer the power and authority to forbid any other person's getting control of it without his due consent and permission as long as the signs of life existing in the land, irrespective of the fact as to whether or not the reclamer practises actual (profitable) utilization of it or not, whereas the right which the individual earns as a result of the tillage of a land naturally fit for cultivation does not go beyond the right of priority to the land so long as he pursues profitable utilization of it. If he stops doing that any other person shall have a right to avail himself of natively gifted utility of the land and to play the role of the first.

3. If the individual exhumes a land to find a mine and reaches it, another individual shall have the right to avail himself of the advantage of the self-same mine when he does not hinder him, and that, for instance, he digs up the mine from another place and get at the intended material of the mine as has been specified by the learned divine (al-'Allāmah al-Hillī) in his book, *al-Qawā'id*. In the event of his exhuming and reaching the mine he shall not have the right to prevent another individual's digging

from another side of it, nor, in the event of the later's reaching the vein, he shall have the right to hinder that other persons availing of its usufruct.

4. ash-Shahîd ath-Thānî has stated in his work *al-Masâlik* in respect of a land which the individual has reclaimed but which afterward had gone waste that such a land was originally a *mubâh* when it had been left neglected and became again a waste land, it would revert to its previous status, and would be of *mubâh* property, just as water drawn from the river Tigris and then thrown back into it. Reclamation being the cause of its ownership, on the cause becoming extinct the effect in this case the ownership — became extinct. This means that if the individual reclaims the land that becomes his right and title to the land and that right continues as long as the reclamation remains physically therein. When the reclamation becomes extinct, the right becomes void.

5. In the light of this if the individual exhumes a land to find a mine or excavates it to open a spring of water and if he afterwards leaves it lying neglected till the excavated pit is filled up or the seams of the dug earth are joined up by natural causes, another person comes along, and begins excavatory work till he reopens the mine, it shall constitute his right to it and the former exhumers of it will have no right of preventing others to make use of it.

6. Holding possession or custody of property does not constitute a ground for giving ownership or rights to the natural resources *viz.* the land, the mine and the springs of water, such an ownership right amounts to *himâ* and *himâ* is valid only for Allâh and His Messenger.

7. Wild and refractory animals are owned by overpowering and breaking down of their resistance by hunting them even if the hunter has not secured them in hand or in his trap, actually possession being not necessary for the ownership of a prey. The



learned divine al-'Allāmah al-Ḥillī affirms in the *al-Qawā'id* that the grounds for the property to the prey are four, (namely) rendering nugatory of its resistance, evidence of its ownership, weakening of it, or its falling into any device of hunting. Hence any one who hits with a miss a hunted animal to which another person has a claim or which shows no signs of being another's property, he becomes its owner even if he has not secured possession or custody of it if there is no one to challenge his ownership.

8. He who excavates a well till he reaches the water he is more entitled to its water to the extent of giving drink to his animals and to the irrigating of his farm. If thereafter there is any excess it is obligatory upon him to give it gratis to another person who is in need of it as has been specified by ash-Shaykh aṭ-Ṭūsī in *al-Mabsūṭ*. The relevant text we have already quoted before.

9. If a man holds a property in possession and he afterwards neglects and abandons, his right and title to it becomes extinct and it becomes a freely *mubāh* property just as it was before it was taken possession of. And it will be lawfully valid for any other person to take it in his possession inasmuch as the owner's avoiding to utilize and derive the usufruct from his property and his abandoning of it severs his connection with the property, as has been mentioned in the sound tradition narrated by 'Abdullāh ibn Sinān on the authority of *Ahlu 'l-bayt*. They say:

He who lights upon a property or a camel in a deserted tract of land exhausted or gone astray, its owner abandoning it, having not pursued it, another person takes it up, maintains it, spend for it to restore it to life out of its sheer exhaustion and inanimation, that will becoming his property undisputably and the former has no right in it. This is like a *mubāh* (free to all).

Though the tradition turns round the abandoned camel lent the (word) camel is conjuncted with the (word) property we learn it is a general rule applicable to each and every such case.

10. The individual neither obtains the proprietary right to the land he pastures his cattles nor does he become owner of the pasture land on which he pursues pasturing. He will obtain the right to it only by reclamation of the land. Hence it is not allowable for a person to sell a pasturage unless before his doing so he has acquired a right to it either by his having reclaimed it or his having inherited it from a person who had reclaimed it or in some such other way.

It is reported on the authority of Zayd ibn Idrīs that he questioned Imām Mūsā ibn Ja'far (a.s.) about a person's enclosing a piece of land as his private preserve for pasturage, telling the Imām that they possessed landed farm property in the country, boundary line of each property being clearly delineated. They possessed cattles. In the country there were pasture lands, one of them had camels and sheep and he was in need of the pasturage for the same. Would it be valid for that man to hold the pasturages as his private preserve (*himā*), to meet his need. The reply of the Imām to the query was if the land was his own land then he can enclose it as his private preserve and make what use of it he was in need of. Then he asked the Imām about a person selling his pasturage. The Imām replied that if the land belonged to him there was no objection to his doing so. This reply indicates that action of adopting a pasture land does create for the herdsman the transfer of this right to another person by sale.

#### Conclusion:

In the light of the upper structure and its particular tradi-

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tion from the doctrinal fundamental we will be able to perceive the land-marks of the theory and subsequently shall be able to answer the question we have previously presented.

### **The Economic Work ( Activity ) is the Basis of the Rights in the Theory:**

The Theory distinguishes between two classes of activity, one of them is utilization and fructification and another monopolization and exploitation. Works of utilization and fructification are works of economic character by their nature whilst the works of monopolization are established on the basis of force and does not directly justify utilization and fructification.

In the theory the source of the exclusive private rights is the work which is connected with the works belonging to the first category like the gathering of the firewood from the forest, and the transferring of the stone from the desert land the reclaiming of the dead land. As for the works which come under the second category have no significance in the theory for they are one of the manifestation of force and not an economic activity of utilization and fructification of the natural sources and their wealth. And force cannot become a source of the special rights nor their sufficient justification. It is on this basis the general theory has eliminated the work of the possession and control of the land and has not established any special right on the basis of it, as such work, in fact, is an act of force and not one of utilization and fructification.

### **The Double Nature of Possession:**

When we assert this, we surely come face to face with the difference between taking possession of the land, and the taking in possession of the stone by carrying it from the desert land,



of firewood by gathering it from the forest or of water by ladling it up from the river. Now since taking possession is a manifestation of force, and not a work of economic nature like the work of utilization and fructification how is it allowable for Islam to distinguish between the work of taking into possession of the land and the work of taking into possession of the firewood and confer upon the latter the special rights whilst it eliminates the former and strips it of all the rights?

The reply to this question is that in the theory of Islam the differentiation between the works of utilization and fructification and the work of monopolization and exploitation does not stand on the basis of the form of the work. Rather the work bearing the stamp mark of utilization at one time and the work of monopolization and exploitation at another time, take one and the same form according to the nature of the field in which the worker is engaged and the kind of wealth he is handling. Taking possession of, for instance, even if it be from the point of form of one kind of work yet by the general theory differs according to the kind of wealth over which the individual acquires control, now the taking in possession of the firewood by gathering it up or of the stone by transference of it from the desert land, is a work of utilization and fructification. But taking possession of the land or acquiring control of a mine or a spring of water is not such a work but is a manifestation of force and domination in the latter cases.

In order to demonstrate this we may postulate by way of a hypothesis a man living all alone in an immensely vast area of land (rich) in springs of water, mines and natural resources, far from any claimant and opponent and study his behaviour and the kind of possession he will pursue.

Such a man will not bethink himself of taking possession and control of a great area of land and what of the mines and springs that are there in and the protection of them from the

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encroachment of others upon it, for, he will find no claimant for this protection and will derive no profit from it in his life, as long as the land will be at his service and disposal for all the time with none to compete with him but will only utilize by reclaiming such part of the land as may (be proportionate to) the level of his power and ability to fructify it.

Yet despite of the fact that he will not bethink himself of securing possession of a great area of land, he will always strive to secure possession of water by transferring it to his tankard of the stone which he will carry to his shanty and of the firewood to build his fire upon.

So taking in possession of the land such and other resources of nature will have no meaning when competition is non-existent, rather than that rehabilitation will be the one and only work the individual will practise under such a circumstances in respect of the resources of nature in order to fructify them and derive benefit therefrom. But taking possession of the land will acquire its value (significance) when competition in respect of the land will come into existence. Then the individual will set out to secure possession and control of a vast area of land and to take it under his protection to guard it against encroachment upon it by others. This means that the taking possession of the land and the belike other natural resources is not a work of economic character of utilization and fructification but is the operation of surrounding and production of the resources of nature against the encroachment of others upon them.

Contrary to that the securing possession of the firewood, the stone and (a quantity of) water is not a work of force but by its nature an economic work of utilization and fructification. It was because of this that we saw that the lonely man pursues this kind of possession despite of the fact of its being free of any motive or incentive for the use of force or violence. Thus we learn that taking possession of portable things of natural resources

is not altogether an act of force but is in fact an act of utilization and fructification which a man carries out even if there does not exist before him any justification for the use of force.

On the basis of this we can include taking in possession of the natural resources such as lands, mines and springs of water among the works of monopolization and exploitation, which have no value in the theory and can include the natural wealth which are transferable and portable, among the work of fructification which is the sole source of the special rights in respect of the natural wealths.

From this we derive a conclusion. It is the economic character of the work which is a necessary condition for the producing of special rights. So the work will not become a source for the appropriation of a property unless it is by its nature a work of utilization and fructification.

#### The Theory Differentiates Between the Works of Economic Character:

Let us take the work of utilization and fructification which bear the economic stamp mark in order to examine the standpoint of the theory in respect of their valuation and the kind of rights which are established on its basis.

In this field we do not need anything more than pursue the second and the tenth paragraphs of the preceding upper-structure in order to know that the *shari'ah* does not always confer upon the individual the right and ownership of the natural wealths viz. land, mines and water springs by the individual's mere performance of a specific work of utilization and fructification, for instance, from the second paragraph that the carrying out (the work of) fillage of a cultivable land does not give the cultivating individual that right which it confers upon his carrying out the work of reclamation of a dead land; and also observe



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from the tenth paragraph that the utilization of the land by taking it for pasturage does not confer upon the herdsman a right to the appropriation of that land although his making use of it as a pasture is an act of utilization and fructification. Well then here there is a difference to be elucidated between the reclamation and the works on it, and the fructification of the fertile land for cultivation and pasturage although these works appear collectively to be of economic nature and kind of utilization and fructification. With the finding of this differential advancement will be made to a new stage in determining of the general theory and all its aspects.

### How the Special Rights are Established on the Basis of Work?

The fact of the matter is that this difference is closely connected with the justification in which the theory believes for conferring upon the individual's special rights to the natural wealth on the basis of work.

In order to fully understand theoretically the difference between the body of the works of utilization and fructification of economic character, we have presented, it is necessary for us to acquaint ourselves with the theoretical stipulation for the special rights which are connected with the work and how, and to what extent the work plays its positive role in the theory and which is that principle on the basis of which the work creates special right for the person to the natural wealth on which he carries out the work? If we become acquainted with this principle we will be able to differentiate, in the light of it, among that collection of works of utilization.

We can summarize this principle in the light of the complete upper-structure of the theory in the following form: The worker appropriates the product of his work which he has produced by spending his exertion and strength on the natural raw material.

This principle is applicable to every work of utilization and fructification which the individual carries on the natural resources and the raw materials obtainable from them without any differentiation between the operation carried out for the reclamation of the dead land or the exhumation of the mine or the extraction of water or his cultivation of the land naturally fit for cultivation, or his employment of it for the pasturing and the rearing of his live-stock. Each and everyone of these operations is a work and the worker is entitled to reap the fruits and to appropriate the product of any work he carries on raw materials.

But the right and title of the worker to the appropriation of the product of his work and labour he carries out on natural resources does not mean that all these works agree as to their products so that they will agree as to the rights which accrue therefrom, on the contrary they differ as to their products and on the basis of this, differ as to the kind of rights which arise from them. The reclamation of the dead land, for instance, is an operation the individual carries out on a dead land which is unfit for production and utilization. He removes from the surface of its soil hard granite and rocky stones and fulfils all the conditions which are necessary for rendering it fit for production and utilization. In this way he, on account of his having reclaimed the land, has realized what did not exist before the reclamation of the land. But this is not the result of the existence of the land itself. The process of reclamation does not create the land but it is the utility which the individual has produced by his labour and work, for the reclamation of the dead land results in the creation of utility which renders it fit for utilization and fructification. Since this utility was not available in the land before its reclamation but resulted from the operation of reclamation and the worker becomes the owner of this utility according to the general theory, it being the product of his labour and work; and his ownership of the utility

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results in preventing other from stealing of him of this utility or of despoiling it by depriving him of it by their seizure of the land from him and of their utilization of it instead of him, for, thereby they deprive him of the utility which he created by his strenuous labour he carried out in the reclamation of the land and his ownership of it he acquired by a duly lawful work. On account of this the individual becomes more deserving by entitled to it by reason of his having reclaimed it than others so that he may be enabled to avail himself of the benefit of the utility he has produced. This right of priority is all of his right to the land. Thus we learn that the right of the individual to the land he has reclaimed is reinstated as invalidation of others' spoiling him of the product of his work and the despoiling him of the benefit of the utility he has created by his duly lawful labour and work.

The discovery (and utilization) of the mine or the extraction of the spring of water from the inner bowels of the earth are wholly like the reclamation of the dead land in this respect. The individual who carries out the operation of reclamation creates the utility of a part of nature by reclaiming it and appropriates it as a fruit of his labour and toil so it is not allowable to others to despoil him of the utility and the worker shall have the right to prevent others if they try to seize it from him of that part of nature and this is considered as his right to the land mine and water spring with differences which we shall examine after a while.

As for the carrying out of the work of tilling on the naturally fertile land or making use of for the pasturing of his animals, even though these are works of utilization and fructification of the natural sources yet they cannot justify the (for bring into) existence of a right of the farmer or the herdsman to the land because he neither produces the land itself, nor a general utility like the utility which the work of the reclamation



of the dead land produces. True the husbandman or the herdsman has produced the crop or has reared the animal wealth by way of his work done on the land, but this justifies only his appropriation of the farm product which he produced or the animal wealth he was engaged in rearing and not his appropriation of the land or his right to it.

Well, then the difference between these works and the operations carried out for the reclamation of a dead land consists in this that those operations (reclamation) create utility to be derived from the land or the mine or the spring of water which did not exist before its reclamation, so the individual appropriates the utility and through his appropriation of this utility he acquires his right to the source of nature he has reclaimed. So, for the land naturally cultivable or naturally fertile land on which the husbandman carries out the tilling or pasturing operation, its utility for tillage or pasturage existed therein before that and did not result from specific work. The only thing which resulted from the work of cultivation, for instance, was the farm yield and it is his special right, for it is the product of his work.

In the light of this we can deduce a new condition in respect of work which affords special right on the natural resources. We have already found the first condition on the fulfilment of which the special right to natural resources is acquired and it is that the work be of economic nature. We now deduce the second condition. It is that this work produces a new circumstances or a definite new utility which the worker appropriates and through it he acquires his right to the source of nature.

From our finding this correlation between the right of the individual to the natural resource and the utility which the work produces in that source, it logically follows that the right of the individual becomes extinct when that utility which the work

has produced, is destroyed, for his right to the natural resource stands, as we have learnt, on the basis of his appropriation of that utility. Hence if it becomes extinct the right becomes void. This is what we find entirely from the fourth and the fifth paragraphs of the upper structure, we have already given.

Let us now take these works of reclamation which confer upon the working individual special rights to the natural resources, like the reclamation of the dead land, the exhumation of the mine and the finding of the spring of water in order to examine minutely. We see that these works differ in respect of conferring the rights which they produce after our having examined the difference between them and all the works of utilization and fructification, and after our having learnt before this the difference between the work of utilization and fructification in general and the work of monopolization and exploitation.

When we re-examine (lit. review) the preceding upper-structure the rights which are established on the basis of reclamation, we find it different from the work on the other reclamation differs from the right accruing from finding of the spring of water. Thus the land reclaimed by an individual it is not permissible for another individual to raise crop on it without his permission or make any other use as long as the former who has reclaimed it take advantage of his right in the land while we find that the individual who extracted the spring has only the right to the water commensurate with his need, and it is allowable for the other to derive the benefit from the spring from whatever it is excess after the need of its owner.

It is, therefore, upto the theory to explain the ground which leads to the discrepancy between the right of the re-claimant of the land which he reclaims and the right of the finder of a spring of water to the spring he discovers, and to give reason as to why it is permissible for any other individual to avail

himself of water from the spring of it, when it is in excess of the need of its owner. While it is not permissible for any one to make use for cultivation of a land which a reclaimant has reclaimed without his permission even when he reclaimed does not actually employ it for cultivation.

Indeed the reply to it is readily available from the informations we have found till now from the theory. The reclaimant becomes first of all the owner of the product of his work, and it is the right to the benefit of the utility from the natural resource and his ownership of the utility imposes upon others the duty of refraining from spoiling it from him or despoil him of its benefit by seizing it from him. So it is by this reclamation that he obtains the special right to the resource. And this results in its entirety follows consistently in the case of all natural resources, without any distinction between the land, the mine and the spring of water for the rights which result from reclamation of the natural resources are similar.

The permission for others availing of water from the spring of water which is in excess of the need of the discoverer of the spring does not arise from the difference of right but arise from the nature of the thing. The individual is not despoiled of the ownership of the utility which he receives as a result of his digging work and the discovery of the spring by another person's sharing in the usufruct of the spring's water so long as the natural water in excess of his need for the underground water is not usually stinted by the addition of two persons and by the satisfaction of their need of it. As such the discoverer of the spring preserves his right of enjoying the usufruct of the utility he has created without losing his enjoyment of the utility by another person's sharing its usufruct along with him.

Contrary to this is the case of the dead land which the individual reclaims and acquires the right to the usufruct of the utility created therein, for the land is not, by its nature,



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capable of being fructified by two person simultaneously, so if a person were to forestall and fructify the reclaimed land, that would amount the seizure of the utility the reclamer creates by its reclamation, since the land when it is assigned to a specific agricultural product cannot play a similar part and cannot be utilized for the purposes of production of another individual heretofore.

In this way we learn that the fructification and deriving of profit from the reclaimed land is not allowable to any other person than its reclamer for that would amount to despoiling the reclamer of utility which he created by his work and labour so in order that the reclamer retains this right to the usufruct of its utility, it is not permissible for another person to fructify the land irrespective of the reclamer's actually making or not making use of it, in any way it being the utility which he has created and it is within his right to keep the land so long as the labour and toil he has spent on reclaiming the land remains rectified therein. Contrary to this is the case of the spring of water, any other person than the one who discovered to avail of the benefit of the spring from drawing such quantity as is in excess of the need of the discoverer of the spring. Since that does not amount to the discoverer's being deprived of the utility he has created on account of the water's responding to the discoverer's need of it and its ability of satisfying the need of the other at one and the same time. Hence it is the difference between capability and the mode of its utilization in respect of which explains permission of the spring and not the land to others.

As for the discovered mine, Islam has allowed every individual to avail himself of the benefit to be derived from it in a way that it does not result in depriving the discoverer of the utility which he has created and thus by his carrying out the digging at another place from the mine or to avail himself of the benefit from the very pit which the first discoverer has

dug up, in case it is rich enough to afford another person its benefit without depriving the discoverer of it from deriving the advantage of its utility.

Hence the general criterion for the permissibility to other than the discoverer of a limb of natural resource which discoverer has made available for reclamation and created the availing of the advantage of its utility is, the extent of its effect on the utility which the reclamer has created by his reclamation of the natural resources.

### **The Basis for the Right of Possession Concerning Moveable Properties:**

So far we have almost kept our discourse confined to the work about the natural resources like the lands, the mines and the springs of water, we must now, in order to include the full contents of the theory, to examine minutely the application of the theory to the moveable properties other than the natural wealths and explain the difference between them and the natural resources and the theoretical justification of these differences.

The only thing we have come by as to the stand-point of the theory, is taking possession of these wealth considered a work of utilization and fructification bearing the economical to the taking possession of the natural resources which are against the character mark of monopolization and exploitation which does not bear economic character.

We have already employed the hypothetical example of an individual to demonstrate the difference between taking possession of the natural resources and taking possession of moveable properties.

So then taking into one's custody a quantity of water, or a forest wood, or any other wealth which has the possibility

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of being carried is considered before everything a work of utilization and fructification. Hence taking possession of moveable wealth are admitted in the estimation of theory which does not recognize any work except the work of utilization of economic character.

But taking possession is not the only work which the theory recognizes and which it values in the field of moveable wealth. Here there is another kind of work which resembles the work of reclamation in the resources of nature. It is the work of creating utility of benefit from the moveable wealth when it consists in the natural ability of the moveable wealth to offer resistance to availing of its benefit, for example, the hunting of wild animals. The work of a hunter who paralyses the power of the resistance of the animal he is hunting is the work whereby he creates the utility of the animal made available to be profited from by his breaking down of the resistance of the animal just as the reclaimer of the dead land creates the utility of the land made available for the benefit to be derived from the land through his reclamation of it by breaking down its resistance and subjugating its soil to cultivation.

Hence taking possession and creating utility for benefit are two kinds of work which carry together the economic mark in the field of moveable wealth. But the creation of a new utility to make available the benefit from the moveable wealth, stands apart from taking possession by its positive role on account of creating this utility since taking possession has, from the economic point a negative role, as being a mere control over the moveable wealth, it creates no new utility making available a fresh benefit from it in a general shape, for when you take possession of a stone on the public road or water from the well you do not create a new utility therein in general shape which was not there in it before, for the stone or water was lying there, offered itself to one who is hungry



for it and by your taking control over it and your storing it against your need of it nothing more was added to it. True, you transferred the stone to your house and water to your vessel, but this does not create a new utility which was not there before in the thing the benefit of which is made available in a general shape by your doing so, for this transfer only makes easy your ready utilization of the stone or water but does not subdue a general obstacle nor does it confer on the thing a quality which imparts to it a greater capacity or power of profit in a general shape as the reclamation of the land which breaks down the resistance of the land and confers upon it a new sufficiency to play a general role in the life of man.

On the basis of this we can compare, hunting and a certain of its works, like the creation of a new utility in the moveable wealth, with the operation of the reclamation of the land, for the hunting and reclamation agree in one thing the creation of a new utility which was not available before and compare the taking in possession of the moveable wealth with cultivation of a fertile land for just as the cultivation of a fertile land does not create a new utility in the land but is only a work of utilization and fructification so is the securing possession of water from natural spring.<sup>1</sup>

This differentiation between the taking in possession of the moveable wealth, and the work in respect of it which creates utility like the work of hunting does not mean separation of either of the work from the other, more often the work of

1. It may be observed here that I have not compared *mubâh* water with a land naturally fit for cultivation, but have compared securing possession of water with the cultivation of a land naturally fit for cultivation, for taking possession of the land is not a work of utilization and fructification — as stated before — but taking in possession of water is a work of utilization of economic character like the cultivation of the land naturally fit for cultivation.

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taking possession of a moveable wealth is associated with the work of creation of a new utility and so the work of taking possession become combined into a single operation so also either of them are likely to be found practically separate from each other.

There are certain moveable wealth, which possesses some degree of natural resistance to its utilization like the marine fish or the over-flowing river which runs by its nature to the sea to be lost in the depth of it at the end of its long journey. If the fisherman succeeds in tempting the fish to fall into the net laid for fishing it, he may be said to have secured possession of it as well as have created utility therein as a result of his overcoming its resistance through his single operation. Likewise his storing of over-flown water of the river means his taking possession of it while at the same time creates its utility by arresting its running away and slipping into the sea.

It may happen that the individual performs a work for creating a new utility in the moveable wealth and for breaking down of its natural resistance without being able to secure actual possession of the wealth, for example the bird catcher throws a stone at a bird soaring in the air and arrests its motion and compells it to descend to the earth. The bird descends to the earth far removed from the place of the bird-catcher and dawns upon a position, it does not lend itself to become tractable like a domesticated animal except by walking over. Surely utility was accomplished by this operation through the way of hunting it and breaking down of its resistance by the throwing of the stone at it but when the bird has walked far away from the bird-catcher it cannot be deemed to have come into his possession or under his authority, but if the bird-catcher pursues it and secures it, his possession of it will be completed.

The individual may take possession of the moveable wealth without performing the work of creating a new utility therein,

like when the moveable wealth possesses by its nature aptitude of being utilized, without its wrapping itself up with resistance intervening in between like taking possession from springs and stone from the earth. Hence taking possession of and creating new utility in the moveable wealth are two kinds of work. They may be combined into one single operation and they may be separate operations.

Let us explain the second kind of the work which creates the new utility in the case of hunting as an outstanding example of the work which produces a new utility in the moveable wealth.

In order to examine both these kinds of work we will take up either of them in a separate manner from the other, theoretical ground discover the prescriptions specific to either of them and the nature of the rights which result from either of them and their theoretical basis.

### The Role of Productive Works in Theory:

When we examine the act of hunting apart from the act of possession that it is a work which produces a definite utility. It is natural that it may confer upon the performer of it the right and title to the ownership of the utility which has resulted from his work in the same manner as the reclaimer receives the ownership of the utility which results from his work of reclamation of the land according to the afore-mentioned principle of the theory which confers upon every worker for his work in respect of natural raw materials, the right of ownership to the product which results from his work.

And the bird-catcher by way of his acquiring the ownership of the bird, it becomes his special right to a special ownership of the bird he has hunted and compelled it to descend to, and walk on the earth even when he does not secure possession of it as pointed to by the application of the texts of *shari'ah*,



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(vide appendix XII). Hence it is allowable to another individual to forestall him in appropriating it or taking advantage of the bird-catcher's occupation in getting into contact with the prey to take it into his custody by out-racing him to it for that would result in the deprivation of the bird-catcher of the utility he created by his act of hunting.

For the right of the bird-catcher to the bird he has captured does not depend upon his securing possession or his practical commencement of the availing of its utility but the mere accruing of the utility he has created, invests him with the right to it irrespective as to whether he thinks of actually availing of its usufruct or hurries to secure it or not.

The bird-catcher is like the worker who reclaims a land, just as it is not allowable for any other individual to fructify and cultivate it, so in the same manner it is not correct for any other person than the bird-catcher who has subdued and broken down the resistance of the prey, take the prey so long as the said bird-catcher retains his right to it even if he has not actually hurled to secure possession of it.

But if the bird which is paralyzed as a result of the bird-catcher's striking it with a missile, is able to regain its strength recovers from the blow it was struck before the bird-catcher has secured possession of it and takes to its wings, once again, the bird-catcher's claim comes to an end since this right depends upon the right and claim to the utility which the bird-catcher produced by his act of hunting and this utility is destroyed by the fleeing of the bird to the air, so there remains no right of the bird-catcher to the bird (vide appendix XIII).

In this also it resembles the worker who has the land and right to it on this basis. Since he loses his right to the land if life is extinguished in it and it becomes again a dead land and the theoretical ground in either case is the same in both of the cases, that is the right of the individual to the wealth is linked

with his appropriation of the utility which results from his work, so that when that utility comes to an end and that effect of his work becomes non-existent his right to the wealth comes to an end.

So then when hunting is viewed in respect of its prescriptive rules, independently of possession resembles the operation of reclamation of natural resources. This resemblance, as we have seen springs from the unity of the theoretical explanation of the right of the bird-catcher to the prey and the right of the reclaimer to the dead land he has reclaimed.

### The Role of Possession in Respect of Moveable Wealth:

Possession differs from pure hunting as to their respective prescriptive rules. Because of this we find that when the catcher of the bird becomes the owner of the bird he hunts and when it comes into his possession it becomes his right to recover it when it flies away and avoids him, another person shoots him, whilst the other person has no right to retain possession of the bird, on the contrary he must return it to the one in whose possession the bird was, for the right relying on the authority of possession is an immediate right in the sense that the possession was the immediate reason of the ownership of the bird and it is not that the possession is connected with the ownership of a specific utility so as to end with its ending.

It is this difference between the possession and other operations which we have come across. Thus hunting is the ground for the bird-catcher's ownership to the utility he produced and his right to stand upon that basis (in respect of the bird) the reclamation is the ground for the reclaimers' appropriation of the utility which accrued from his reclamation of the waste land and as a result of which he came by his right to the limb of natural resources he reclaimed. As for the possession of the moveable

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wealth, the mere possession in itself is the original and immediate ground of their ownership.

This difference between the possession and other works makes the confrontation of the following questions on the plane of theory, inevitable that when the right of the individual to the natural resources he reclaims or to the prey that he hunts is established on the basis as a result of his work which is the enjoyment of the advantage of utility of that resource. Then on what basis stands the right of the individual to the stone which he meets with on the road which he takes up and makes his own is established, or his right to the still water which he takes into his possession from a natural lake, although taking possession of this water or this stone does not produce new general utility in the property as the hunting and reclamation do.

Reply to this question: The individual does not receive his justification for this right by taking the ownership of the utility which is the result of his work but justifies the individual's availing of the usufruct of that property. Just as it is the worker's right to enjoyment of the advantage of his work, so likewise it is his right to enjoy the advantage which the grace of Allāh the High provides him with water, for instance, when it was hidden in the bowels of the earth and if an individual finds and unearths it by excavation, he created the advantage of its utility, so becomes deservedly entitled to its ownership. But when water accumulates in a natural way on the surface of the earth and as the advantage to be derived from its utility was achieved without the effort of the man it will be necessarily open to every man to enjoy the benefit of it, nature having dispensed with them the work and having conferred upon them the advantage of its utility.

If we suppose that an individual taking in his vessel a quantity of water from the naturally accumulated water on the surface of the earth he may surely be said to have carried out



the work of utilization and fructification in the theoretical sense as stated by us in the early part of the discourse; and as long as it is the right of every individual to enjoy the wealth which nature presents before man it is but natural that the individual be allowed to take in his possession a quantity of water found on the surface of the earth from natural source. His taking in his possession therefrom constitutes an act of utilization and not a work of monopolization and force.

If the individual retains possession of a quantity of water it is not allowable for another individual to contend with him in respect of it and seize it from him to utilize it for his benefit. The theory holds that taking in one's possession of a quantity of water or such other moveable wealth is a work of utilization and fructification so long as it is a continuous possession; deriving of its benefit is a continuous permission on behalf of the possessor of it and as long as he continues the utilization of the wealth there is no justification for another person to proceed against him, if he so intends.

Thus individual continues to enjoy his right to the moveable wealth in his possession, so long as the possession is continuous defect or *de jure*.<sup>1</sup>

Thus it is clear that the right of the individual to the quantity of water from the lake he takes into his possession or the stone he takes from the public highway does not rest upon his appropriation of the general utility which accrues from his work but upon the basis of that individual's pursuit of the

1. By "*de jure*" continuous possession, we mean: the uncontrollable circumstances by which nexus to the property is cut off like amnesia, loss and usurpation etc. The *shari'ah* estimates continuous possession and advantage (right of usufruct) *de jure* on account of that it orders return of the lost or usurped goods or property to the custody of its owner and this estimation refers it back *de facto* to the emphasis on its voluntary constituent and negation of the effect of the compelling circumstances in diverse legislative fields.

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availing of the advantage of that wealth by way of his having taken possession of it.

In this light we are able to add to that preceeding principle of the theory which holds: that every individual becomes the owner of the product of his work a new principle that is the pursuit of the individual's availing of the advantage from a natural wealth, gives him a right to it so long as he continues to take advantage derived from that wealth and because of the possession being, in the field of the moveable wealth, a work of utilization, this principle fully includes it and establishes on the basis of his right to the wealth, which he holds in his possession.

### **The Generalization of the Theoretical Principle of Possession:**

This principle is not applied to the moveable wealth only but is also applied to other sources of nature. If a person carries out a work of utilization as when he cultivates a naturally cultivable land his cultivation of it constitutes a work of utilization, he acquires a right to the land on the basis of it which refrains others from interfering with him and seizing of the land from him so long as he continues to take advantage of it. But this does not mean that his mere possession of it is sufficient for his earning of this right to it, like taking possession of a quantity of water because taking possession of the land is not a work of utilization and fructification. He avails himself of the advantage from the naturally cultivable land by way of his utilization of it for cultivation, for instance. So if the worker practises cultivation of the naturally cultivable land and connects it with this kind of profit from it, it would not be valid for another person to seize from him so long as the worker continues his work of cultivation for the other person has no more right to it than one who actually makes profitable use of it, but if the individual gives up cultivation of it and availing of advantage

from it, his right to retain his possession of it comes to an end, in that case it becomes valid for another individual to practise a work of utilization and fructification on it. We may look at the difference between the two principles at the time of the person's leaving of deriving profit from the land. The right of the individual which stands on the basis of his continued profiting from the natural wealth vanishes simply by the individual's giving up taking advantage of the utility of the land and discontinuance of it while the right which stands on the basis of the reclaimant's ownership of the utility lasts so long as the utility remains intact and the efforts of the reclaimant remain rectified in the reclaimed land.

#### Summary of the Theoretical Deductions:

We can now aduce from the examination of the general theory of the distribution before production two basic principles of this theory.

One of which is: The worker who carries some work on the natural wealth becomes the owner of the product of his work. It is the general utility of the advantage derived from that natural material and the result of the worker's appropriation of the ownership of this which will constitute his right to the property itself following from his assuming the ownership of the utility which his work has produced and his right to the property is linked with this utility by virtue of his ownership of it, so, if the opportunity he has created slips and becomes non-existent, his right to the property becomes void.

The second principle is: The pursuance of availing of the profit from whatsoever of the natural wealth confers upon the pursuant individual a right forbidding other individuals to seize the wealth from him so long as he continues to avail of the profit derived from it and practises a work of utilization and



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fructification for no other person possesses a prior right than him to the wealth so that it may be forcibly taken away from him and be bestowed to other person.

On the basis of the first principle the prescriptive rules which regulate the operations of reclamation and hunting are established and on the second basis rest the prescriptive rules for the taking possession of the moveable wealth in which nature abounds for man to derive the benefit of their utility.

So the creation of a new utility in the natural wealth and continued deriving of ample profit which is naturally stored up are the two basic sources of the special right to the natural wealth.

It is the economic quality which is the jointly common mark of these two sources of nature for both, the creation of a new utility or the deriving profit on the basis of the utility made naturally available are considered to be a work of economic character and not a work of force and exploitation.

## OBSERVATIONS

### 1- A COMPARATIVE STUDY OF THE ISLAMIC THEORY

We have seen that Islam permits the individual's acquisition of special rights to the natural resources within the limits of which the general theory of the distribution before production lays down. The theoretical determination of these rights differ from the determination of them in the Capitalist and Marxist theories.

In the doctrine of capitalism appropriation of all the sources of nature is permitted to every one on the basis of the principle of economic freedom. The individual may regard of every wealth which he holds under his control as his property unless that clashes with the freedom of the ownership bestowed upon other persons, for the permitted scope of every individual's private property is unlimited except to the extent of the safeguarding of other individual's freedom of ownership in this respect. Thus the individual receives justification of his ownership on account of his being man and his not interfering with other's freedoms.

But the Islamic general theory of distribution before production which we have studied does not recognize freedom of private ownership in the capitalist sense but considers the

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individual's right to the ownership of the natural resources of raw material as connected with his ownership of the product of his labour or his continuous availing of the benefit of that source. Therefore his right to it expires when both of these two basis become non-existent.

Capitalism regards private special rights to the natural resources as an expression of the man's freedom which he enjoys under the aegis of the capitalist system while in Islam it is an expression of the activity of the man and his pursuit of a labour for the utilization and fructification.

Marxism, however, believes in the annulment of every kind and type of private property in the natural resources and all other means of production and calls for the release of all those means from the bondage of private rights, since there no more remains any justification ever since, history has entered in the modern industrial age a determinate stage ringing the bells of the mechanized industrialism in the present capitalist age.

But the Marxism's belief in the need of this annulment does not mean, from analytical doctrinal point of view, that the private proprietorship in the Marxist is altogether without any justification. It interprets only its belief doctrinally that the private ownership has exhausted all its aims and objects in the movement of history and there remains no room for it in the modern history after it has lost its justification and has become a force of its cross-current.

In order to make comparison between the Marxist theory of the private ownership and Islamic theory of private ownership it is necessary for us to know as to what are these justifications in the Marxist theory of private ownership and how it has lost its justification in the modern age.<sup>1</sup>

1. Here by the Marxist theory we mean economic theory of the Marxist doctrine and not the Marxist theory of the interpretation of history and its analysis. (Cont. p. 210)



Marxism holds the opinion that raw natural materials possess by their nature no exchange-value, they have only numerous use values. The exchange value in a natural raw material comes into existence only as a result of the rectification of human labour therein. It is human labour which creates exchange-value in things. The raw materials which are in their natural form and are not rectified with human labour possess no value from the point of exchange. It is by means of this that Marxism links human labour with exchange value and fixes that it is the worker who pursues with his labour a natural resource or a natural wealth confers upon the goods he pursues with his labour an exchange-value proportionate to the amount of labour he spends on it.

Just as Marxism links labour with exchange-value, links exchange-value with ownership. It confers upon the individual who created the exchange-value by his labour the ownership of that property and the enjoyment of the value which he creates. Hence the individual's ownership of the wealth receives, according to Marxism, its justification from the capacity of the individual as the creator of the exchange-value in that wealth as a result of the labour he has spent on it. It is thus on the basis of this theory, a right to the ownership of the natural resources and the natural means and sources of production dawns upon the individual if he is able to spend some effort and to confer exchange value upon them. This ownership shows itself to be, in the light

The private-ownership is sometimes studied as a historical phenomenon. In this capacity it is justified marxistically on the basis of the Marxist theory of history with the condition of class-conflict, the form of production and the kind of the forces of production.

At other times, the private-ownership is studied purely on the economic basis in order to find its legislative justification and not its historical justification of its existence. At this time it is necessary to search for its Marxist justifications in the Marxist theory of 'the value' 'the labour' and surplus value.

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of the Marxist theory, an ownership of the property which results from the labour and not that of the natural resources apart from the product. But this product of which the worker becomes the owner, is not the advantage of the utility as a case resulting from labour just as we have seen in the Islam's general theory of distribution before production but it is in the opinion of Marxism the exchange which is generated from labour so it is the worker who confers upon the natural source definite value and becomes the owner of this completed value of the goods.

Elevating on this Marxist basis the justification of the private property, Marxism states that this proprietorship continues to be licit till it enters the age of industrial production wherein the owners of the sources and the means of products which they own pay something to those who do not own them to work for them on wages and to hand over to the owners of those resources and means the profits. The value of these profits will become within a short period of time equivalent proportionately with the exchange of these sources and means. By this it will be that the owner will have had in full for his entire right to these sources and means because his right to these sources and means is connected with the value of the product of his work on these sources and means as long as he recovers this value embodied in the form of profits which it has maximized. Thus private ownership loses its justification and the private-proprietorship becomes illicit according to Marxism with the advent of the age of capitalism or hired labour.

On the basis of this which links the ownership of the worker with exchange-value, make room for another worker, if he works on the wealth, to become the owner of a new value which results from his work. If a man goes to the forest cuts a part of its wood, spends upon it some labour so that makes out of it a board. Then another man comes. He makes out of the

board a bedboard. Each one of them becomes the owner of the exchange-value which results from their respective work. Therefore, Marxism considers that it is the hired-man in the capitalist system who is the owner of the entire exchange-value which the material acquires through his work and the owner of that materials taking a part of this value in the name of profit is a robbing hired man.

Value is linked with work and the ownership, well it is only within the limits of the value which results from the owner's work.

These are the Marxist justifications of the private property and they can be summed up in these two propositions.

- i) Exchange-value is linked with work and results from it.
- ii) The ownership of the worker is linked with the exchange-value which his work creates. We differ from Marxist in both of these propositions.

As for the first proposition, which connects exchange-value with work, and makes it the sole basic criterion we have examined elaborately in our discussions under the heading of the chapter of this book bearing the title of "With Marxism". There we have been able to prove that exchange-value does not spring basically from work and have been able thereby to repudiate the basis of all the upper-structures Marxism has built upon this proposition (vide vol. 1, pt. 1, pp. 160-185).

As for the second proposition which links individual's ownership, with exchange-value, it comes in conflict with the trend of Islam's general theory of distribution before production, for though in Islam the individuals private rights to the natural resources stand on the basis of the individual's ownership of the product of his work yet the product of the work of which the worker who reclaims a piece of land, becomes the owner through the work of a week, for example, it is not the exchange-value which his work of the week has produced, as is held by



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Marxism but the product of which the worker becomes the owner for the work done by him on a piece of land which he reclaims is the utility of advantage he has produced in that land and it is through his acquiring his ownership of the utility that his special right to the land itself is born. As long as this utility stands his right to the land will be deemed to be standing and it will not be valid for another person to take in his possession the land to spend a fresh labour thereon even if the fresh work increase its exchange-value, since the advantage of the utility is the property of the first individual and no other person is allowed to interfere in his work.

This is the basic difference on the theoretical side between the specific Marxist basis and the Islamic basis. The special right on the first basis leads to the owners ownership of the exchange-value which the land has acquired on account of his work and nothing more, and on the second basis leads to the worker's ownership of the actual utility of the land which his work has produced.

The principle which holds: that the special rights to the natural resources stand on the basis of work and that the work acquires the ownership of the actual product of his work reflects the Islamic theory.

The principle which holds: that the exchange-value of the natural resources stands on the basis of the work and the worker's ownership is limited to the exchange-value which he has created reflects the Marxist theory.

The main difference between these two principles in the source of all the differences which we find between Islam and Marxism about the distribution after production.

## 2- THE PHENOMENON OF THE TAX (*TASQ*) AND ITS THEORETICAL EXPLANATION

We find from the upper-structure body of a specific phenomenon which shows that it differentiates the land from other natural resources so its examination, and its explanation in the light of the Islamic general theory or distribution or its nexus with other economic theories, in special manner is rendered necessary.

This phenomenon is the *tasq* (a fixed land tax or return) which the *sharī'ah* has allowed the Imām to exact from the individual, if and when he reclaims a land and takes the advantage of it. It occurs in a sound tradition and in some juridical texts of ash-Shaykh aṭ-Ṭūsī: that if an individual reclaims a dead land, he has a *tasq* on it (its rent) which he has to pay to the Imām.

The question is what is the justification for this *tasq* and why is the land singled out among the other sources of wealth for this *tasq*? Why the reclamer of other natural resources of wealth are not charged with the payment of some thing from their revenue?

The fact is this *tasq* the levy of which is permitted to the Imām on a dead land reclaimed can be given shape to doctrinally and interpretively from the theoretical side on two basis.

The first: On the basis of general theory of distribution itself. When we observe that *tasq* is a rent which the Imām imposes upon the land on account of its being a part of *anfāl* and we learn in addition to it that the Imām employs it in the interest and the good of the society, as shall come in later discussion, and our comparison between the owner of the land's obligation as to the *tasq* and the obligation of the owners of mines and springs of water as to the permission to others to whatever is in excess of their need does not conflict with his right

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to the mine (or the spring of water). We will add up all this together, we will have before us to draw a new principle of the theory, which confers upon the society a common right of availing of the advantage of a natural resource as it is put at the service of the humanity in a general manner *so He created for you all that is on the earth* (Qur'ān, 2:29). This common right to the society does not lapse with the natural resources acquiring the mark of special rights but the *sharī'ah* determines the method of the societies deriving benefit of this right in a manner or shape it does not come in conflict with those special rights. In the case of the mines and springs of water all are afforded to avail of their benefit in a direct manner, since every individual is free to avail the benefit from the vein of the mine if he digs it from another side. Likewise, in the case of the spring of water he has a right to seek watering from it, if it be in excess of the need of the one who excavates it. But as for the land, since it cannot, by its nature permit two person to avail of its benefit at one and the same time so *ḥaṣq* is legalized in respect of it which the Imām has to spend for the good and interest of the society so others are afforded the advantage of it after the special right of the owner who reclaimed it having become a barrier preventing others benefitting directly from that land.

The second: That we explain it apart from the general theory of distribution and that on the basis that it is tax levied upon by the state in the interest of the social justice, for, when we will take up the study of *anfāl* and its social function in the Islamic economics, we will see that the main object of the *anfāl* in the *sharī'ah* is guarantee of social security and protection of general equilibrium and so long as *ḥaṣq* is regarded legislatively as a part of *anfāl*, it is reasonable to regard it as a tax springing from the general theory as to the social justice and things which are connected with primary guarantee and general equilibrium. But the land was singled out for the imposition of this massive



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tax on account of its role of importance and weight in the economic life. Law imposed this tax for safeguarding of the Islamic society from the hazards of the private proprietorship of the land, the severe sufferings and the trials non-Muslim societies have undergone or experienced, and to arm against the tragedy of landed revenue of which the history of the human orders is vociferous and its role in the spreading of differences, conflicts and their deep penetrations. The *ṣasq* resembles on this basis the '*khums*' (one fifth) which is levied upon the materials which are extracted from the mines.

In conclusion, having advanced these two theoretical explanations of *ṣasq* it is possible for us to replace each of them with the other by bringing together in a more inclusive and broad-based theory so that we can explain the *ṣasq* as a tax, the imposition of which the Imām is permitted for the objects of guarantee of social security, maintainance of social equilibrium and for the protection of the poor members of the society and explain these objects themselves and their positive carrying out a duty of the strong members of the society in respect of whatsoever of above stated public rights of the society and make them its right upon those who reclaim and fructify these natural resources, in respect of its protection of its interest and the rescue of the poor.

### 3- ETHICAL INTERPRETATION OF OWNERSHIP IN ISLAM

We have been examining uptill now ownership and special rights in the light of the general theory of distribution before production. The discussion was based on the economic doctrine. In the course of the discussion we were able to advance a theoretical interpretation of ownership and special rights reflecting the view-point of the economic doctrine of Islam. We now propose to present the ownership, Islamic ethical interpreta-

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tion. We mean by the ethical interpretation of the ownership a broad-based presentation of the ideal conception, which Islam has given about ownership, their role, their objectives and the work for its spread among the individuals in order to become a force directed towards the behaviour and influencing the conducts of the individuals in relation of their properties and their special rights.

But before we begin to give details of the ethical interpretation of the ownership it is essential that we make explicitly clear the distinction between it and the doctrinal interpretation of the ownership which we have treated in earlier pages, from the economic point of view. In order to facilitate us in making this distinction we may borrow the meaning of *khilāfah* from the following details so that we may compare it with the general theory of distribution on the basis of which we have explained the special rights from the point of view of the economic doctrine.

*Khilāfah* adds to the private ownership the mark of deputyship and converts the owner into a trustee of the wealth and a deputy on behalf of Allāh the High Who is the Lord and Master of the world and all the things contained therein. This Islamic conception of the essence of ownership; when it concentrates and becomes dominant over the mentality of the Muslim owner it becomes a force directed towards the field of behaviour which make it duty of the owner binding him to the instructions and prescribed limits on behalf of Allāh the Mighty and Glorious, just as a deputy is bound always to carry out the wishes of the person who appoints him as his deputy or his vicegerent.

When we look into this meaning we find it does not explain the justifications of the private-ownership from the doctrinal point of view of the economics because the private ownership be it *khilāfah* or any other thing, stris up the question about its doctrinal justifications which explain it why this indi-

vidual besides the other individual is made the vicegerent or the deputy? Simply its being a deputyship is not a sufficient reply of it. But we find a reply to this question in the economic explanation of the private ownership on a definite basis, for instance, on the basis of work and nexus of the worker with the product of his work.

Thus we know that the completion of the imprint of vicegerency or deputyship on the private-ownership, for instance, is not sufficient for the formulation of the theory of distribution because it does not give an economic explanation of this phenomenon. This imprint creates a specific out-look about the ownership standing on the basis that it is purely a vicegerency or a deputyship. If this outlook grew, predominated and became common among the individual members of the society it will become for it a power which will delimit the behaviour of the individuals and adopt it to the mental reflection of the ownership and will evolve out of the sense whereby the wealth inspires the minds of the wealthy. In that way the conception of *khilāfah* becomes a dynamic force directed towards the economic life and towards the social life.

Then the ethical interpretation justifies those conception of ownership which every Muslim usually meets with from Islam. He is mentally and spiritually moulded by them and his sense and activity are determined in conformity with them.

The basis of these conceptions is the concept of *khilāfah* to which we alluded. The property is the property of Allāh. He is its real Owner and men are His vicegerents on the earth and His trustees over it and whatever other wealths and properties that exist on it. Allāh the High says:

*He it is Whō made you viceroys in the earth. Therefore whoever disbelieves, his unbelief is against himself; and their unbelief does not increase the disbelievers with their*



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*Lord in anything except hatred . . . (Qur'ān, 35:39).*

It is Allāh the High who has conferred upon man this vicegerency and if He wished He could take it away from him . . .

*If He pleases He may take you off, and make whom He pleases successors after you . . . (Qur'ān, 6:134).*

The nature of the successorship imposed upon the man in respect of the wealth he has been made successor to meet his instruction from the one who has granted him that successorship. Allāh says:

*Believe in Allāh and His Messenger, and expend of that unto which He has made you successors. And those of you who believe and expend shall have a mighty wage (Qur'ān, 57:7).*

So likewise as a result of this (vicegerency) the man will be accountable for it before the one who appointed him as the vicegerent to it, he being subject to the watching of Him (the conferrer) over his uses and disposals of it and his works, Allāh, the High, says:

*Then We appointed you viceroys in the earth after them, that We might behold how you would do (Qur'ān, 10:14).*

The vicegerency belongs to the whole of the society, for this vicegerency actually expresses itself in Allāh the High's preparation of the wealth of the world and the placing of it at the disposal and the service of man and by man is here meant the public which include all of the individuals:

*He it is Who has created for you all things that are on earth (Qur'ān, 11:19).*

The forms of ownership as to ownership and special rights are but modes by the following of which facilitates the society in carrying out of its burden in respect of rendering the world prosperous and flourishing. Allāh the High says:

*It is He Who hath made you vicegerents in the earth. He has raised you in ranks, some above the others: that He*

*may try you in the gifts He has given you* (Qur'ân, 6:165).

The conferring upon some besides the others the ownership and special rights and making different their ranks as to *khilâfah* is a kind of test as to the gifts of the society and the extent of its ability to carry the burden and having the driving force for the discharge of the important duties of vicegerency and for the race in this field. Thus private property becomes in this light a mode of the society's discharging its business of the vicegerency and assumes the stamp mark of the social function as a manifestation of a general vicegerency and not the stamp mark of absolute right and control of the principal. There is a tradition reported on the authority of Imâm aş-Şâdiq (a.s.) "Indeed Allâh has bestowed upon you this abundance of wealth not to hoard it up but to direct it to the ends to which He has directed you".

Since the *khilâfah* (vicegerency) — in truth belongs to the society and the private property is a mode of the society's achieving the aim of this *khilâfah* and its mission so, the society's relation is not cut off nor does its responsibility cease in respect of the property on its becoming the property of an individual, on the contrary it will be obligatory for the society to protect the property against the mentally weak owner in case he is not mature, for it is not possible for an immature individual to be able to play a fit part *vis-à-vis* the *khilâfah*. It was on account of this that Allâh the High says:

*To those weak of understanding make not over your property which Allâh hath made means of support for you, but feed and cloth them therewith and speak to them words of gentleness* (Qur'ân, 5:5).

He directed the address to the society, for the *khilâfah* (the vicegerency) belongs to it and forbade it to hand over to the weak of understanding their property and ordered it to protect this property and to spend out of it for the good of its owner.

In despite of the fact that it speaks about the property of the weak of understanding, it joins it to the society itself that is, it says: *And give not your property to those weak of understanding* (ibid.) and herein is the radiation that the *khilāfah* principally belongs to the society and the properties are owned by *khilāfah* even if the property be of the individuals by private property and has followed on the heel of this radiation the verse indicating to the object of the *khilāfah* and its mission and has described the property saying: "your properties which Allāh has made means of support for you". So Allāh has made the property for the society that is Allāh has appointed the society as its guardian, not for the purpose of squandering it or for freezing it but to discharge your duty in respect of it fructify it and preserve it. So if this purpose is not realized through an individual then society may be made responsible for discharging it.<sup>1</sup>

On this basis the individual is made conscious of his responsibility in respect of the use and disposal of properties before Allāh the High Who is the real Owner of all the things. Likewise He has been made responsible of His accountability to the society, too, because its *khilāfah*, in fact, belongs to it and the ownership of the property is only one of the manifestations and modes of that *khilāfah*. On account of this it is the right of the society to discard him if he is incapable of making proper use of it on account of his immaturity or of mental weakness and prevent equally a person of mature age from the use of his property in a way leading to doing great harm likewise to strike on the hands if he renders his property a material for evil or corruption as the Prophet struck on the hands of Samrah ibn Jundab and ordered his date-palm to be cut off and thrown away since

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1. In the understanding of this verse we have followed one of the various possible interpretations of the Qur'ān.



he made it the source of evil, and told him: "You are a harmful person."

When Islam gave the private property the conception of *khilāfah* and divested it of all its mental distinction which had become associated with it with the passage of time and disallowed the Muslim to look to it as a measure for respect and estimation in the Muslim society nor to attach to it any value in the mutual social intercourse. Even in the tradition, reported on the authority of Imām 'Alī ibn Mūsā ar-Riḍā (a.s.) it has come that "One who meets a poor Muslim and greets him with the *salām* different from the *salām* to a richman, Allāh will cast on him wrathful look on the Day of Judgement".

The Qur'ān has cast awful recrimination upon the individuals who measure their respect and their care of others with the measuring rod of wealth and riches and has said:

*He (the Prophet) frowned and turned away, because there came to him a blind man (interrupting). But what could tell thee but that perchance he might grow (in spiritual understanding)? Or that he might receive admonition, and the teaching might profit him? As to one who regards himself as self-sufficient, to him dost thou attend, though it is no blame to thee if he grow not (in spiritual understanding). But as to him who came to thee striving earnestly, and with fear (in his heart), of him thou wast unmindful (Qur'ān, 80:1-10):*

By this Islam put back the private property to its place and re-instated it to its true field as a kind of *khilāfah* and incorporated it in the general Islamic mould not permitting it to reflect its entity on fields other than its own specific field or to create material standard of respect and estimation since it is a *khilāfah* and not a personal right.

In the sublime form in which Qur'ān has narrated the sense of private property and its reflections on the human mind

reveals clearly to us Islam's belief that the sense of distinctions and the attempts at the extension of the private property to fields other than its original field in the end springs from the misunderstanding of the meaning of the proprietorship and from regarding it as a personal right and not a *khilāfah* which has its own responsibilities and benefits.

And the most sublime of the forms of it is the story which the Qur'ān narrates of two persons one of whom Allāh had enriched with and appointed a trustee (*astakhlafa*) in respect of two of the natural gardens (vide Qur'ān, 18:34-42).

*... and He said to his companion in the course of a mutual argument "More wealth I have than you and more honour and power in (my following of) men (34)*

believing that his high and elevated (social) position justified him adopting the high tone in which he addressed his companion:

*And he went into his garden in a state (of mind) unjust to his soul (35)*

for he was preparing by this declination of the function and the nature of the ownership factors of its devastation and destruction,

*He said: "I deem not that this will ever perish (35) nor do I deem that the hour (of judgment) will ever come. Even if I am brought back to my Lord, I shall surely find (there) something better in exchange" (36). His companion said to him in the course of his argument with him: Dost thou deny Him Who created thee out of dust, then out of a sperm-drop, then fashioned thee into a man? (37). But (I think for my part that) He is Allāh, my Lord and none shall I associate with my Lord (38). Why didst not thou say when thou wentest into the garden: 'Allāh's will (be done). There is no power but with Allāh!'*

and had felt that it is a *khilāfah* which Allāh has given thee in order to discharge what is due to it you wouldst not feel the

high brow conceit and arrogant greatness nor would you have been puffed up with the sense of pride and vainglory.

*If thou dost see me less than thee in wealth and sons (39) it may be that my Lord will give me something better than thy garden and that He will send on thy garden thunderbolts (by way of reckoning) from heaven, making it (but) slippery sand! (40) Or the water of the garden will run off underground so that thou will never be able to find it (41) So his fruits (and enjoyment) were encompassed (with ruin), and he remained twisting and turning his hands over what he had spent on his property which had (now) tumbled to pieces to its very foundations, and he could only say "Woe is me! Would I had never ascribed partners to my Lord and Cherisher!" (42).*

With this contraction of the entity of the private property and the compression of it into its original scope on the basis of the conception of *khilâfah* the ownership is converted into a means not an end. The Muslim who merges in his spiritual and mental entity with which Islam looks upon the property as a means for the realization of an aim of the general *khilâfah* and for the satisfaction of the variagated needs of humanity and not an evil in itself which calls for gluttonous unsatiable desire of collecting and hoarding up. There occurs, in respect of this view of the picture of the property i.e. the view of property that it is an instrument, a means — a tradition from the Messenger of Allâh (s.a.w.a.) that "out of thy property nothing is yours save that which you consumest by eating or that which you wearest out by dressing yourself with it or that which you preserves by dispensing in the way of Allâh". In another tradition he is stated to have said "The servant of Allâh says my property, my property, whereas out of his property that property is his which he has eaten up and consumed, has dressed himself up and worn it out or has given it and has saved as for the rest he



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will pass away and leave it behind for the people”.

Islam has opposed the end-view of the ownership i.e. the view that it is an end, not merely by the commutation of its meaning and divesting it of all its distinctions other than its original field, rather it has set up in line with that a positive action in order to oppose that view and has opened up before an individual a horizon of more specious range than that of a limited scope and of the present material perspective and a run of the longer distance than a short journey of the private ownership which ends with death. It gave the Muslim the good news of the gains of another kind. Gains of more lasting nature, of more powerful inducement, of greater motive to one who believes in them. On the basis of this private property, when it stands as a barrier to the acquiring of those gains nay, at times become a deprivation and a loss. Likewise the renouncement of the ownership, when it leads to the substitute of a bigger nature in exchange for it, may possible become a gainful operation for the life hereafter. It is clear that this belief in the substitute of it in exchange of it, and in the wider perspective and in the spacious (range) of the portion of the gains and profits plays a great positive role in extinguishing the selfish motives of the property and the changing of the end-view to the model view of it. Allāh the High says:

*... and whatever ye spend from anything He replaces it, for He is the best sustainer. (Qur'ān, 34:39)*

*... whatever of good ye give, benefits your own souls; and ye shall only do so seeking the nearness of Allāh. Whatever good ye give, shall be rendered back to you, and ye shall not be dealt with unjustly. (Qur'ān, 2:272)*

*... and whatever good ye send forth for yourselves ye shall find it in Allāh's presence. (Qur'ān, 73:20)*

*On that day every soul will be confronted with all the good he has done... (Qur'ān, 3:30)*

*Of the good they do, nothing will be rejected of them for Allāh knowest well those pious ones.* (Qur'ān, 3:115)

The Qur'ān has compared the widely opened view for profits and losses measuring rod of which does not measure by the only measure of the sense of the present with the narrow capitalist view which possesses no other measure than these measures, it is ever under the shadow of poverty and is frightened by the mere thought of subjecting the private property to objectives more wider and general than that of the motive of hoarding and selfishness because the shadow of awful loss and poverty hevers in front of it from this kind of thinking. The Qur'ān has assigned this narrow capitalist view to the Satan, and says:

*The Satan threatens you with poverty and bids you to sordidness while Allāh promises you with His forgiveness and bounties, and Allāh is All-embracing, All-knowing* (Qur'ān, 2:268).

#### THE TIME LIMITATION OF THE SPECIAL RIGHTS

The general theory which fixes the special rights in a manner we have imposed upon these rights a timely limit in a general way, every proprietorship and right in Islam are limited to the time of the life span of the owner of the property and he is disallowed its extension unlimitedly. Therefore, in Islam the individual does not possess the right to decide the fate of his property after his death. Its fate has been decided by the law under the rules and legislative acts of regulation in respect of inheritance which regulate the distribution of the personal property left by the deceased among the relatives. In this respect Islam differs from capitalist societies. The capitalist societies believe that the authority in respect of his personal property extends to a far reaching scope and invests him with the right

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of deciding the fate and future course of his property after his death and of bestowing it upon anyone he wishes and in any way he seeks to do so.

This time — limitation in respect of the special rights is in fact, the outcome of the general theory about distribution before production which is the basis of these rights. We have already known in the light of the theory that the special rights are based upon two bases. The first of the basis is the creation of utility of a nature for profitable utilization of it by reclaiming it. The reclamation of it gives him the ownership of the utility which he created as a result of his work, and through it his right disallowing others to take away from him that utility is produced. And the other basis is the continuous profitable utilization of a definite (source of) wealth. It gives the utilizer of it a priority right to the use of the wealth over others so long as he is making profitable use of it. These two bases do not remain intact after his death: for instance, the utility which an individual creates by his reclamation of a dead land naturally is destroyed since profitable availing of its utility as concerning him comes to an end. So any other person's making profitable use of it will not amount to his robbing him of it inasmuch as with his death. He is naturally deprived of the utility, same is the case with the continued profitable utilization in the event of the death. The special rights lose their justifications fixed by the general theory.

Hence time limitation for the rights and private properties according to the *shari'ah's* law of inheritance constitute a part of the structure of economic doctrine and is connected with the general theory of distribution.

This time limitation expresses the negative side of a part of those laws of inheritance, which declare that the relation of the individual with the personal property he possesses is discontinued at the time of his death. As for the positive side of those laws of inheritance which limit the new owners and regulate the



distribution of the property among them are not the outcome of the general theory of distribution before production, but is connected with other connected theories of Islamic economics as we shall see in the forthcoming discussions.

Islam while it laid down time-limit upon the private property confining it to the life time of the owner of it and forbidding to make a will (bequest) in respect of his property and arbitrary disposal as to the fate of his wealth after his death made an exception of one third portion of the left property permitting the owner himself to decide the disposal of that one third portion. This does not come in conflict with the fact that we have learnt about the time-limitation and its nexus with the general theory for the legislative texts which point to the permission to the owner of the one third of the left property explicitly indicate that this permission is in the nature of an exception set up on the basis of a specific good, for it occurs in a tradition by 'Alī ibn Yaqtīn, that he asked the Imām Mūsā (a.s.): "What portion of the property belongs to the owner of it at the time of his death?" "One third" replied the Imām, "and one third is a too large a portion".

A tradition occurs on the authority of the Imām aṣ-Ṣādiq (a.s.): "Will is for the one forth, and one fifth which is preferably better than the one third". It has also occurred in the tradition that Allāh the High says to the son of Adam (man): I have granted you in respect of three things. I have kept concealed (your misdeeds) that which had the members of your family known that would not have buried you. I granted you ample then asked for a loan out of it, then why didst thou not advance it for a good thing; and I assigned to you one third portion at your disposal at your death then why didst not send it as a good in advance.

Then the one third portion in the light of these traditions is a right to incline the owner to the non-use of it for others

## THE THEORY

thank and consider it a gracious gift which Allāh has bestowed upon his *'abd* (slave) at the time of his death, and it is not for the natural extension of the life span of the rights which he has earned during his life. All these things point to the fact that permission to the deceased for bequeathing one third of his property is an exception to the rule and it is an admission of the fact which we have already presented about the time-limit and its nexus with the general theory.

The objective which the *sharī'ah* sought from the legislation of this exception to the rule was to acquire new gains for the social justice for it enables an individual, while he is bidding farewell to his wordly materials of it and meeting centering a new realm, to avail himself of the advantage of his wealth beneficial to him in the new realm. It is most probable that at the inexorable moments of his departure from his life a Muslim's flame of material incentives and carnal desires of life may have been extinguished — a matter which helps man to thoughts of new kind as to spending of his wealth for his future and for his next life to which he is preparing to shift to. It is this kind of spending to which the term '*khayr*' (a good) is applied in the above-mentioned tradition and in which the individual who does not avail of his right about his making a will by his non-realization of the purpose on account of which he had been given that right is admonished.

At the very time Islam has urged to bequeth one third of his wealth or property, it has persuaded him to avail himself of this last opportunity in the cause of the protection of his future welfare and his life hereafter by allowing this one third to some cause of public good and benefit as a contribution for the consolidation of social justice.

Then the time limit of the property is the fundamental law and the permission as to the one third is an exception prescribed for the purpose connected with other sides of Islamic economics.

















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