The Law of Property

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It has been said that the law of land in countries under the Common Law of England is a "rubbish heap which has been accumulating for hundreds of years, and is based upon feudal doctrines which no one (except law professors in law schools) understands"and rather with the implication that even the professors do not thoroughly understand them or all understand them the same way.
RIDDEL J,
Miller v. Tipling (1918)

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1.1 The Rise of the New Form of Property

The idea of property has occupied the centre-stage of human existence from the start and has inspired many philosophers, led to revolutions, and dominated commercial life. Property has historically been the source of many rights. There are extensive discussions of property in the writings, among others, of Plato, Aristotle, Aquinas, Hegel, Hobbes, Locke, Hume, Kant, Marx, and Mill.[2] It is for this reason that Blackstone said:

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[2]It is neither possible for us, nor is it required, to discuss the various philosophies underlying the idea of property. Nevertheless, a short bibliography is given here for those who may be interested in pursuing further study. It is arranged in alphabetical order by last name. Thomas Aquinas, "Summa Theologiae [1272]," in Paul E. Sigmund (ed.) *St. Thomas Aquinas on Politics and Ethics,* (New York: W.W. Norton, 1988); Aristotle, *The Politics [c. 330 BCE],* Stephen Everson (ed.), (Cambridge: Cambridge University Press, 1988); Jeremy Bentham, *The Theory of Legislation [1802],* C.K. Ogden (ed.) (London: Kegan Paul, Trench, Trubner & Co., 1931); William Blackstone, *Blackstone's commentaries on the Laws of England [1763],* Wayne Morrison (ed.) (London: Cavendish Publishing, 2001); T.C. Grey, "The Disintegration of Property," in J.R. Pennock and J.W. Chapman (eds.) *Nomos XXII: Property* (New York: New York University Press, 1980); F. A. Hayek, *The Mirage of Social Justice Law,* Vol. II of *Law, Legislation and Liberty,* (London: Routledge and Kegan Paul, 1976); G.W.F. Hegel, *The Philosophy of Right [1821],* T.M. Knox (trans.) (Cambridge: Cambridge University Press, 1967); Thomas Hobbes, *De Cive: The English Version [1647],* Howard Warrender (ed.) (Oxford: Clarendon Press, 1983); A.M. Honore, "Ownership" in A.G. Guest (ed.) *Oxford Essays in Jurisprudence* (Oxford: Oxford University Press, 1961); David Hume, *A Treatise of Human Nature [1739]* L.A. Selby-Bigge and P. H. Nidditch (eds.) (Oxford: Clarendon Press, 1978); Immanuel Kant, *The Metaphysics of Morals [1797],* Mary Gregor (trans.) (Cambridge: Cambridge University Press, 1991); John Locke, *Two Treatises of Government [1689]* Peter Laslett (ed.) (Cambridge: Cambridge University Press, 1988); Karl Marx, *Theories of Surplus Value [1862]* (London: Lawrence and Wishart, 1972); Karl Marx, *Das Capital*, Vol. I [1867], Ben

> "There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe"[3]

Today, the dominant role in the discussions of property has been occupied by intellectual property. It is affecting the life of the common man, both the haves and the have-nots, and is responsible for creating immense wealth in a very short time.[4] What is the relationship of this new form of property with the concepts of property that have prevailed for so long and how is it different? In this chapter, we shall first describe the earlier property structures and then show where intellectual property fits in. We shall then identify some of the unique features of this form of property. The main purpose of this chapter is to show that property is a fundamental concept of the law and it must be understood completely before an analysis is undertaken from the Islamic perspective. The concept is complex and should not be taken lightly or dealt with superficially by Muslim scholars when rendering verdicts on issues of intellectual property or on issues of property in general.

1.2 What is Property?

"What is property? One will search in vain for its essence. Modern ideas of property are the product of millennia of change, their boundaries being stretched and cut to fit a long series of ideologies and social forms. One is left not with one definition of the term but rather with a variety of usages, some overlapping and some aloof."[5] It is for this reason that that the American jurist Thomas Grey asserted that the concept of property has disintegrated completely.[6] "The term [property] is extraordinarily difficult to define. One of America's foremost property law scholars even asserts that '[t]he question is unanswerable.' "[7] The problem arises because the legal meaning of "property" is quite different from the common meaning of the term. The ordinary person defines property as things, while the attorney views property as rights.[8]

The significance of rights in understanding the nature of property is so evident that most definitions of property emphasizes these rights. Accordingly, Blackstone defined property as follows: "The right of property is that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."[9]

Blackstone speaks of "the right of property" because property is in fact a right rather than a thing.[10] In general, the law defines property as rights among people that concern things.[11] In other words, "property

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Fowkes (trans.) (Harmondsworth: Penguin Books, 1976); John Stuart Mill, *Principles of Political Economy [1848],* Jonathan Riley (ed.) (Oxford: Oxford University Press, 1994); Stephen R. Munzer, *A Theory of Property* (Cambridge: Cambridge University Press, 1990); Robert Nozick, *Anarchy, State and Utopia* (Oxford: Basil Blackwell, 1974); Plato, *Republic [c. 370 BCE]*, Robin Waterfield (trans.) (Oxford: Oxford University Press, 1993); Samuel Pufendorf, *On the Duty of Man and Citizen According to Natural Law [1673]*, Jame Tully (ed.) (Cambridge: Cambridge University Press, 1991); John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971); Jean Jacques Rousseau, *Discourse on the Origin of Inequality [1755],* Franklin Philip (trans.) (Oxford: Oxford University Press, 1994); Jean Jacques Rousseau, *The Social Contract [1762],* Maurice Cranston (trans.) (Harmondsworth: Penguin Books, 1968).

[3]Sir William Blackstone, *Commentaries on the Laws of England*, bk. 2, 2.

[4]Most of the new billionaires have made their fortunes through intellectual property.

[5]http://science.jrank.org/pages/10874/Property-Nature-Property.html (last visited June, 2008).

[6]See generally, T.C. Grey, "The Disintegration of Property," in J.R. Pennock and J.W. Chapman (eds.) *Nomos XXII: Property* (New York: New York University Press, 1980).

[7]John E. Cribbet, "Concepts in Transition: The Search for a New Definition of Property," 1986 *U. Ill. L. Rev.* 1, 1, as quoted in John G. Sprankling, *Understanding Property Law* (Newark: Matthew Bender & Company, Inc., 1999), 1.

[8]John G. Sprankling, *Understanding Property Law*, 1.

[9]Sir William Blackstone , *Commentaries on the Laws of England*, bk. 2, 2. Strictly defined, this statement will destroy the concept of property. The law does not have the notion of "sole and despotic dominion."

[10]Andrew Terry and Des Giugni, *Business Society and the Law*, 2nd ed. (London: Harcourt Brace, 1997.), 315.

consists of a package of legally recognized rights held by one person in relationship to others with respect to some thing or other object."[12] Thus, in this legal definition of "property" there are two parts: (1) rights among people (2) that concern things.[13] Sprankling raises two pertinent questions and then elaborates them.[14] What are the possible rights, he asks, that might arise concerning things? Suppose, for example, that A "owns" a 100-acre tract of forest land. What does it mean to say that A "owns" this land? Exactly what are A's rights with respect to the land? [15] The second part of the definition, he points out, is equally troublesome. What are the things that rights may permissibly concern? For example, could A own legal rights in the airspace above the land, in the wild animals roaming across the land, or in the particular genetic code of the rare trees growing on the land? Indeed, can A own rights in an idea, in a graduate degree, in a job, or in a human kidney? [16] These are very pertinent questions and take a peep into the heart of the problem of property. The major issues of property law are indeed concerned with such problems.

1.3 The History of Rights in Property

The modern law of property has arisen from early English feudal society.[17] Among the central elements of English law, the law of property is the oldest.[18] It is a complex body of rules that became the foundation for other categories of law.[19] The English property law system can be traced to the Norman Conquest of 1066. When William the Conqueror became the King of England, he redistributed land to his supporters in order to protect his reign from foreign and domestic opposition.[20] Over time, the system imposed by King William resulted in two types of landholdings: free tenures (held by the nobles and upper classes) and unfree tenures (held by peasants).[21] The free tenures were by far the more important category, and formed the foundation for the modern system of land ownership. One who held land from the king in a free tenure owed both service and incidents in return. The required service might be to provide a specified number of knights on demand, to make an annual payment, or to perform another action. The incidents were specific rights; for example, the incident of wardship allowed the king to take possession of the land after the holder's death until the orphaned son reached age 21.[22]

Each person or tenant holding from the king could create subtenures with others through subinfeudation. Thus, one parcel of land could be the subject of many different tenures. Over time, as services became less valuable (e.g., knights were rendered obsolete by changes in war technology), the feudal incidents became much more important. However, the tenant could circumvent the incidents through subinfeudation. The resulting pressure produced the 1290 Statute of Quia Emptores, which abolished subinfeudation but, in return, authorized each tenant to substitute another in his stead without the overlord's consent. Accordingly, it became possible to freely transfer land ownership to others.[23]

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[11]John G. Sprankling, *Understanding Property Law*, 2.
[12]Ibid.
[13]Ibid.
[14]Ibid.
[15]Ibid.
[16]Ibid.
[17]Andrew Terry and Des Giugni, *Business Society and the Law*, 315.
[18]Ibid.
[19]Ibid.
[20]John G. Sprankling, *Understanding Property Law*, 80.
[21]Ibid.
[22]Ibid., 83
[23]Ibid., 84

As feudalism declined, the system of free tenures gradually evolved into private ownership of land, in the form of three key estates: the life estate, the fee tail, and the fee simple.[24] But to what extent could an owner burden an estate with future interests? Between 1500 and 1700, a series of common law restrictions were adopted that curtailed future interests.[25]

Personal property fell outside the scope of the system and interest in real property not acknowledged or created by the feudal process are still classified as interests in personal property although on a stricter analysis, they should be dealt as realty.[26] To complete the confusion, certain interests recognized by the feudal system as important are historically classified as realty despite their connection in land being slight.[27]

1.4 The Law and Property: Where do the Rights come from?

Where do property rights come from or are they granted by someone? The discussion after this question is the same as that in legal theory that deals with law in general. Two theories may be looked into to get a feel of the problem:

1.4.1 The Utilitarian Theory or Legal Positivism

Law is the foundation of property rights in most countries, and so too in Islamic law. The utilitarian theory expounded by Jeremy Bentham states property rights exist only if and to the extent they are recognized by our legal system. In other words, it is the state that grants rights, because the state is the law. Accordingly, Bentham observed: "Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases."[28] Professor Felix Cohen expressed the same thought more directly: "That is property to which the following label can be attached. To the world: Keep off X unless you have my permission, which I may grant or withhold. Signed: Private citizen. Endorsed: The state."[29] The view that rights, including property rights, arise only through government is known as legal positivism.

1.4.2 The Natural Law or Natural Justice Theory

As a result of the work of natural philosophers like John Locke, the natural law theory posits that rights arise in nature as a matter of fundamental justice, independent of government. All rights belong to man by birth and no one has the right to take away these rights. In his theory of social contract, John Locke maintained that the only right surrendered by human beings to the state was the right to enforce natural rights. He observed, "[t]he Law of Nature stands as an Eternal Rule to all Men, Legislators as well as others."[30] The role of government, Locke argued, was to enforce natural law, not to invent new law. Natural law was a central strand in European philosophy for millennia (though in Britain it was Bentham who reigned supreme), linking together Aristotle, Christian theorists, and ultimately Locke. The ideas of the natural law writers heavily influenced American political thought during the eighteenth century. As the Declaration of Independence recited, the "unalienable Rights" of "Life, Liberty, and the Pursuit of Happiness" were endowed upon humans "by their Creator"; governments exist merely "to secure these rights." It was Locke speaking through the American Constitution, but it is strange that when it came to practical administration, American law yielded to the positivist view.

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[24]Ibid., 85
[25]Ibid., 86
[26]Andrew Terry and Des Giugni, *Business Society and the Law*, 315.
[27]Ibid.
[28]Jeremy Bentham, *The Theory of Legislation* 69.
[29]Felix S. Cohen, "Dialogue on Private Property," 9 Rutgers L. Rev. 357, 374 (1954), quoted in John G. Sprankling, *Understanding Property Law*, 3.
[30]John Locke, *Two Treatises of Government [1689]* Peter Laslett (ed.) (Cambridge: Cambridge University Press, 1988), 358.

The United States Supreme Court in an 1823 decision in *Johnson v. M'Intosh* where the interest of two Native American tribes was involved went against the natural law theory. The Native Americans were evicted. Chief Justice Marshall stressed that under the laws of the United States, only the federal government held title to the land before the conveyance to *M'Intosh,* while the Native Americans merely held a "right of occupancy" that the federal government could extinguish. The title to lands, he explained, "must be admitted to depend entirely on the law of the nation in which they lie." The Court's decision, he said, could not rely merely on "principles of abstract justice," but rather must rest upon the principles "which our own government has adopted in the particular case, and given us as the rule for our decision."[31] American legal philosophy, however, still subscribes to the natural law theory.

The main distinction between the two theories is that according to the natural law theory, rights cannot be restricted by the government on minor grounds.

1.5 Jurisprudential Foundations of Property Law

In the previous section we have looked at two theories with respect to the origin of the rights, that is, who grants those rights. In this section we briefly summarize the theories that advance reasons for recognizing private property. The summary relies heavily on the excellent description in chapter 2 of John G. Sprankling's *Understanding Property Law*.

Why recognize private property? What is the justification for private property? The answer to these questions is crucial because the justification for private property must necessarily affect the substance of property law. Property law is based on a subtle blend of different and somewhat conflicting theories.[32] It is not possible for us to go into details of these theories in this brief section. Nevertheless, we feel that these theories must be examined in a detailed study and then compared with the various views about property that prevail in Islamic law.

1.5.1 The First Occupancy Theory or the First Possession Theory

First occupancy theory reflects the familiar concept of first-in-time: the first person to take occupancy or possession of something owns it. This theory is a fundamental part of property law today, often blended with other theories. One major drawback of this theory is that while it helps explain how property rights evolved, it does not adequately justify the existence of private property.[33] This theory is directly related to the Islamic legal theory of *ihyā' al-mawāt*.

1.5.2 The Labour-Desert Theory

The labor-desert theory posits that people are entitled to the property that is produced by their labor. Strong traces of this theory linger in property law, sometimes mixed with first occupancy theory. There are several notable objections to this theory, one of which is that the theory assumes an infinite supply of natural resources.[34] John Locke had a lot to say about this theory. Ample support for this theory is to be found in Islamic law.

1.5.3 Utilitarianism: The Traditional Theory

Under the traditional utilitarian theory, property exists to maximize the overall happiness or "utility" of all citizens. Accordingly, property rights are allocated and defined in the manner that best promotes the general

[31]Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 572 (1823), as quoted in John G. Sprankling, *Understanding Property Law*, 3.
[32]John G. Sprankling, *Understanding Property Law*, 11-12.
[33]Ibid., 12-14.
[34]14-16.

welfare of society. This is the dominant theory underlying property law.[35] This theory is tied in very closely to the utilitarian or positivist theory described in the previous section.

1.5.4 Utilitarianism: The Law and Economics Approach

The law and economics approach incorporates economic principles into utilitarian theory. This view essentially assumes that human happiness can be measured in dollars. Under this view, private property exists to maximize the overall wealth of society. Critics question the assumption that social value can be appropriately measured only by examining one's willingness to pay.[36]

Economic analysis of law is the name for the the approach of a school of law that maintains that the law has been, and ought to be, concerned with economic efficiency. It attempts to advance a theory of law that is concerned with the promotion of economic efficiency and the protection of wealth as a value. It may be stated at the outset, without going into the elaborations borrowed from economics, that economic efficiency means the optimum utilization of resources and the maximization of social wealth.[37]

The approach has its origin in the United States in the 1960s in the work of Ronald Coase, Guido Calebresi and Richard Posner.[38]

1.5.5 Liberty or Civil Republican Theory

Liberty theory argues that the ownership of private property is necessary for democratic self-government. However, the influence of liberty theory has waned due to changing economic, political, and social conditions.[39]

1.5.6 The Personhood Theory

The personhood theory justifies private property as essential to the full development of the individual. Under this approach, some items are seen as so closely connected to a person's emotional and psychological well-being that they virtually become part of the person, thereby justifying broad property rights over such items.[40] This is considered a popular theory for justifying intellectual property rights, because creations of the mind are considered an extension of the personality of the individual.

1.6 The Impact of Property Rights

1.6.1 The Scope of Property Rights: Are These Rights Absolute?

We usually hear the saying that "A man's home is his castle." This implies that a person can do anything with his house or other property, that is, he has absolute rights and control over his property. Yet, this is a simplistic view of the situation. The belief that property rights are absolute and that an owner can do "anything he wants with his property" is fundamentally incorrect. Under modern legal systems, property rights are the product of human invention. As one court explained: "Property rights serve human values. They are recognised to that end, and are limited by it."[41] Thus, property rights are inherently limited in modern legal systems. They exist only to the extent that they serve a socially-acceptable justification.[42]

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[35]Ibid., 16-17.
[36]Ibid., 17-19.
[37]see Dias, *Jurisprudence*, chapter on "Economic Analysis of Law," as quoted in Imran Ahsan Khan Nyazee, *Jurisprudence* (Islamabad; Federal Law House, 2007), 115.
[38]Ibid.
[39]John G. Sprankling, *Understanding Property Law*, 19-20.
[40]Ibid., 20-21.
[41]State v. Shack, 277 A.2d 369, 372 (N.J. 1971), quoted in John G. Sprankling, *Understanding Property Law*, 4.
[42]John G. Sprankling, *Understanding Property Law*, 4.

Sprankling maintain that private property rights are supported by a diverse blend of justifications. "These justifications share two key characteristics. Each recognises the value of granting broad decision making authority to the owner."[43] A high degree of owner autonomy is both desirable and inevitable.[44] Nevertheless, these justifications do not support unfettered, absolute property rights.[45] On the contrary, each justification requires clear limits on the scope of owner autonomy.[46] Property law is, therefore, viewed as a process for reconciling the competing goals of individual owners and society in general.[47] "Society's concerns for free alienation of land, stability of land title, productive use of land, and related policy themes sometimes outweigh the owner's personal desires."[48]

Consequently, in the world today there is no such thing as absolute control and unhindered use. "It is probably a mistake therefore to insist on any definition of private property that implies a proprietor has absolute control over his resource."[49] In fact, jurists have even argued that the terms "property" and "ownership" should be eliminated from the technical discourse of the law, because the terms convey no exact information about rights in relation to a resource.[50] They assert that a corporate owner is not the same as an individual owner; the owner of intellectual property has a different array of rights than the owner of an automobile; and even with regard to one and the same resource, the rights (and duties) of a landlord who owes nothing on his property might be quite different from those of a mortgagor.[51]

1.6.2 Property as a "Bundle of Rights"

It is common to describe property as a "bundle of rights" in relation to things.[52] But which "sticks" make up the metaphorical bundle? These again are various kinds of rights. It may be pertinent to point out here that in English law, a person who holds the entire bundle of rights is said to be the owner in **fee simple**. The owner in fee simple is entitled to use, possess, or dispose of the property as he or she chooses during his or her lifetime, and upon death the rights are inherited.[53] Persons who share ownership rights simultaneously in a particular piece of property are said to be *concurrent* owners and this is of two types: tenancy in common and joint tenancy.[54]

Nevertheless, the idea of property does possess a core meaning and this core meaning provides the standard upon which we measure everything that is called property.[55] The first indication of this core is that "the nature of property distinguishes property from mere physical possession."[56] This is the idea of *'ayn*

[43]Ibid.
[44]Ibid.
[45]Ibid.
[46]Ibid.
[47]Ibid.
[48]Ibid.
[49]Jeremy Waldron, Property (2004) http://plato.stanford.edu/entries/property/ (last visited June, 2008).
[50]See generally, T.C. Grey, "The Disintegration of Property," in J.R. Pennock and J.W. Chapman (eds.) *Nomos XXII: Property* (New York: New York University Press, 1980).
[51]For an excellent discussion of these issues see Jeremy Waldron, Property (2004) http://plato.stanford.edu/entries/property/ (last visited June, 2008).
[52]See, e.g., Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979) (referring to the "bundle of rights that are commonly characterized as property"), as quoted in John G. Sprankling, *Understanding Property Law*, 4.
[53]Roger LeRoy Miller and Gaylord A. Jentz, *Business Law Today*, 2nd ed. (St. Paul, Minn.: West Publishing Company, 1991), 808.
[54]Ibid.
[55]For the analysis that follows in the next few paragraphs, we rely on an excellent presentation of the issue by the JRANK Organisation. The presentation is available at http://science.jrank.org/pages/10874/Property-Nature-Property.html (last visited June, 2008).
[56]Ibid.

found in Islamic law.[57] It was, however, eloquently shown by Jeremy Bentham that being in contact with an object is neither necessary nor sufficient for ownership. He said: "A piece of stuff which is actually in the Indies may belong to me while the dress I wear may not."[58] He maintained that the ownership relation is not a physical relation between a person and property, but a moral or legal relation among persons with respect to the property.[59] In other words, the relation of ownership is not material but metaphysical.[60]

To understand the core idea of property, three essential meanings have to be understood. The concept of ownership, rights, and property.

1. **Property:** This can cover a tremendous variety of things: houses, steel factories, palaces, oil deposits, medallions, dividends, parts of the broadcast spectrum, works of fiction, and even forms of life themselves.[61] Thus, the things that are property have almost infinite variety.[62]
2. **Owner:** the public owns public property, the government owns government property, and private persons either individuals or artificial persons such as corporations own private property.[63] There may be trusts, churches, and mosques in addition to this.
3. **Rights:** In reality, however, it is rights that define the relation between owners and owned. This distinguishes the different senses of "property" from each other.[64] The rights are as follows:
   (a) The most basic rights that define most kinds of ownership are the rights of exclusive use. An owner has the right to use the property, and others may not use that property without the owner's permission.
   (b) Rights of control:
      - Right to transfer property (here property is alienable).
      - Right to sell the property (here property is a commodity).
      - Right to receive a stream of income from the property (here property is an asset).[65]

These rights overlap. Thus, not everything that an owner may exclusively use may be transferred (one's prescription drugs); not everything that can be transferred may be sold; not everything with economic value something that the owner has the right to sell (my professorship is an asset, but it cannot be sold).[66]

Despite this detailed analysis, the core meaning of property is that of a commodity. This pertains to an object of salable rights of exclusive use. It is the commodity that is the prototype of property. "It sets the paradigm against which we measure less central senses of ownership."[67] The rest of the relationships revolve around this central core. As the thing considered property moves away from this central core, the rights that express the relationship between the owner and property start becoming hazy. This core and the rights moving away from it can be fully understood by examining the classification of property.

1.7 The Major Classifications of Property

1.7.1 Real and Personal Property

The main classification of property is into real and personal property. **Real property** consists of the land and everything permanently attached to the land.[68] When structures are permanently attached to the land, then

[57]See next chapter.
[58]Jeremy Bentham, *The Theory of Legislation* (New York: Oceana, 1976) 133.
[59]http://science.jrank.org/pages/10874/Property-Nature-Property.html (last visited June, 2008).
[60]Ibid.
[61]Ibid.
[62]Ibid.
[63]Ibid.
[64]Ibid.
[65]Ibid.
[66]Ibid.
[67]Ibid.
[68]Roger LeRoy Miller and Gaylord A. Jentz, *Business Law Today*, 807.

everything attached permanently to the structures is also real property, *realty*.[69] In the absence of a contract, real property includes things growing on the land before they are severed (such as timber), as well as fixtures.[70]

All other property is **personal property**, or *personalty*.[71] Lawyers sometimes refer to all personal property as **chattels.** This term is more comprehensive than the term *goods*, because it includes both animate and inanimate property.[72] There are further sub-classifications of property within these broad classifications, and in particular there exists another classification of property rights not deriving from the nature of property but instead describing the right itself as either *legal* or *equitable*.[73] One important consequence was that from the earliest times a procedural distinction applied to those claiming relief from the courts for having been dispossessed of their assets.[74] *Real* actions led to recovery of possession and were restricted to those interests in land that were important for the functioning of the feudal system. Other actions were *personal* and would not lead to recovery of possession but only the payment of damages.[75] We may, therefore, look at legal and equitable interests to understand the nature of this classification

1.7.2 Legal and Equitable Interests

Real actions originated in courts of common law and these courts recognized only legal interests in property, essentially ownership or possession.[76] This served the interests of a feudal society but could not meet the requirements of a more complex and modern society. Equity, therefore, created more sophisticated interests in property.[77] Equitable interests so created fell short of legal ownership, and consisted of the rights, for example of a mortgagee (lender), or the spouse in a matrimonial home, or those of a beneficiary in a trust.

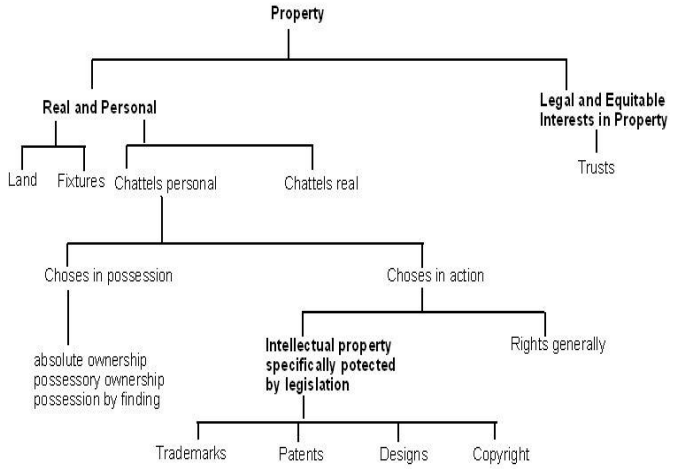

Figure1.1: Interests in Property

[69]Ibid.
[70]Ibid.
[71]Ibid.
[72]Ibid.
[73]Andrew Terry and Des Giugni, *Business Society and the Law*, 316.
[74]Ibid.
[75]Ibid., 316–17.
[76]Ibid., 17.
[77]Ibid.

At an early date, equity developed the concept of a trust and it was through this device that it was able to separate legal ownership from equitable or beneficial ownership.[78] In this arrangement the trustee of the trust is recognized as a legal owner, while the beneficiaries have equitable interests that were enforced by the courts. No conflict with the common law arose as there was no dispute as to the legal title of the trustee. Equity, however, insisted that the legal interests attached to the title be exercised under the deed of trust in favour of the beneficiary.

Gradually, the trust developed a broad scope and was used in widely differing circumstances. The two principal categories of trusts are those purposely created either during the settlor's life or after his death by will,[79] and those that come into existence by the operation of the law. The first type is called express trusts, while the second are called implied and constructive trusts.[80]

Trusts are used in the family as well as the business context. Trusts may be discretionary or fixed. In a discretionary trust the beneficiaries are simply nominated as a class or classes. In a fixed trust the beneficiaries are fixed and usually invest capital.[81] An example of the fixed trust in the modern times is the *unit* trust that contains a certain number of units of beneficial interest.[82] The National Investment Trust (NIT) in Pakistan is an example.

1.7.3 Real Property

Real property has already been described in brief above. Here we will examine its different categories in a little more detail. The general understanding of *real property* or *realty* is that it comprises ownership, possession or other interests.[83] As the distinction between real and personal property is based mostly on procedural problems, the resulting classifications are more or less arbitrary.[84] The classification may be summarized as follows:

1. **Land and fixtures:** At the most basic level, real property is land.[85] The law has determined that fixtures are part of the land and therefore realty. Fixture items comprise personal property that has been permanently attached to the land. The important practical consequence is that a fixture, being part of the land, will pass automatically to the purchaser of land.[86]
2. **Freehold estates:** Out of the feudal system of land tenure, three main types of freehold estates emerged: life tenancy; tenancy in remainder; and tenancy in fee simple. A life tenancy arises where a person owns land for life and receives the benefits of the property during that time, but is obliged to leave it intact upon death. Persons who become entitled to this land have an interest in the *remainder.* The tenancy in fee simple is virtually absolute ownership.[87] Ownership of land, as is commonly understood, refers to ownership of the fee simple.[88]

1.7.4 Easements and Servitudes

Before we describe personal property, it is essential to describe in brief certain rights attached to the land that are enjoyed by persons other than owners. The importance of this topic for this study is obvious from

[78]Ibid.
[79]Ibid., 319
[80]Ibid.
[81]Ibid.
[82]Ibid.
[83]Ibid., 321
[84]Ibid.
[85]Ibid.
[86]Ibid., 322.
[87]Though the land is held from the Crown in England.
[88]Ibid.

the fact that Muslim scholars justifying intellectual property have discussed these rights within pure rights or *ḥuqūq mujarradah*.

1.7.4.1 Easements

The law recognizes five basic categories of affirmative easements: (1) express easements; (2) easements implied from prior existing use; (3) easements by necessity; (4) prescriptive easements; and (5) irrevocable licenses or "easements by estoppel." Certain negative easements are also recognized.[89]

What Is an Easement? In general, an *affirmative easement* is a non possessory right to use land in the possession of another. For example, if A owns an easement that allows him to travel over land owned by B, A holds an affirmative easement. In contrast, a negative easement entitles an owner to prevent another owner from doing a particular act on the second owner's land.[90]

An *express easement* is voluntarily created in a deed, will, or other written instrument. In order to create an express easement, the writing must identify the parties, manifest intent to create an easement, describe the affected land, and be signed by the grantor.[91] As compared to this, three elements are required for an *easement implied from prior existing use*: (1) severance of title to land held in common ownership; (2) an existing, apparent, and continuous use when severance occurs, and (3) reasonable necessity for the use at time of severance.[92]

Two elements are generally required for an *easement by necessity*: (1) severance of title to land held in common ownership; and (2) strict necessity at the time of severance. Strict necessity exists when the parcel in question has no legal right of access to a public road. Some courts only require reasonable necessity.

In order for a *prescriptive easement* to arise, the claimant's use must generally be (1) open and notorious, (2) adverse and under a claim of right, and (3) continuous and uninterrupted for the statutory period. Adverse possession principles are frequently used in interpreting these elements.[93]

The last type is irrevocable licenses or *easements by estoppel*. Ordinarily, a license is revocable. A license that becomes irrevocable, however, becomes the functional equivalent of an easement. Three elements are necessary to create an irrevocable license: (1) a license; (2) the licensee's expenditure of substantial money or labour in good faith reliance; and (3) the licensor's knowledge or reasonable expectation that reliance will occur.[94]

The scope of an easement may evolve over time as the manner, frequency, and intensity of use change. Any transfer of title of the dominant tenement also automatically transfers the benefit of an appurtenant easement, absent an agreement to the contrary.[95] Easements may be terminated in many ways. For example, an easement is deemed abandoned where the holder both (1) stops using it for a long period and (2) takes other actions that clearly manifest intent to relinquish the easement.[96]

English law recognized only four negative easements: those that prevented blocking windows, blocking air that flowed in a defined channel, blocking water that flowed in a defined channel, and removing support

[89]John G. Sprankling, *Understanding Property Law*, 509-511.
[90]Ibid. In the example above, A's land that is benefited by the easement is called the dominant tenement, while B's land that is burdened by the easement is called the servient tenement. Every easement is classified as either appurtenant or in gross. An easement appurtenant benefits the easement holder in his capacity as owner of the dominant tenement. Conversely, an easement in gross benefits the holder in a personal sense, whether or not he owns particular land. Ibid.
[91]Ibid.
[92]Ibid.
[93]Ibid.
[94]Ibid., 525-526.
[95]Ibid.
[96]Ibid., 531-533.

from a building. More recently, solar easements and conservation easements have been authorized by statute in many states.[97] Most of these issues are discussed by Muslim jurists.

1.7.5 Equitable Servitudes

An equitable servitude is a promise concerning the use of land that (1) benefits and burdens the original parties to the promise and their successors and (2) is enforceable by injunction. The equitable servitude was born in the famous decision of *Tulk v. Moxhay,*[98]where England's chancery court held that a promise to maintain a privately-owned park in an open state, uncovered by buildings, was enforceable in equity against a successor "even though the promise could not have been enforced as a real covenant."[99]

1.7.6 Surface, Subsurface, and Airspace Rights

Here we may discuss these issues as well, because they are discussed by Muslim jurists in one context or another.

The common law doctrines governing surface, subsurface, and airspace rights all tended to favor "natural" uses of land, and were thus hostile to new development. Over the last two centuries, these doctrines have been slowly replaced by more flexible standards that consider the needs of third parties and society at large.

1. **Water Rights:**
   (a) *Watercourses:* Water rights in rivers, lakes, streams, and other watercourses are allocated through two basic systems: the riparian system and the prior appropriation system. Under the former system, an owner whose land adjoins a watercourse may take water for all reasonable uses that do not unreasonably interfere with the uses of other riparian owners. Under the prior appropriation system water rights are allocated to the first person to take water from a watercourse for a beneficial use even if his land does not adjoin the watercourse.[100]
   (b) *Diffused Surface Water:* All surface water that is not confined in rivers or other watercourses is known as diffused surface water. The law in this area focuses on the problem of too much water. In most jurisdictions, an owner may make reasonable use of his land (e.g., by building a home) even though this alters the flow of diffused surface water in a manner that harms others.
2. **Sub-surface Rights:** The traditional rule was that the ownership of land included ownership of everything underneath the land surface down to the "center of the earth." Modern courts still protect the surface owner's absolute right to possession when third parties intrude into the subsurface, whether by mining, installing a pipeline, or otherwise. However, the surface owner does not necessarily own the subsurface oil and gas.[101]
3. **Rights in Airspace:** Common law courts proclaimed that each landowner owned "to the heavens." This position collapsed with the invention of the airplane. Today it is increasingly accepted that a landowner owns only the airspace that is reasonably necessary for the use or enjoyment of the land.[102]

1.7.7 Personal Property

In other jurisdictions a distinction is made between movable and immovable property. The distinction arising out of English feudal tenure, however, is not so simple.[103] The distinction is not simply between land

[97]Ibid.
[98]41 Eng. Rep. 1143 (1848).
[99]Ibid., 560.
[100]Ibid., 496-500.
[101]Ibid., 504-506.
[102]Ibid.

and things that are not land. There are interests in land that are personal property, and known as *chattels real* in distinction to *chattels personal.* Such an interest is the lease.[104] Our main concern here is with *chattels personal*.

1.7.8 Chattels Personal

Chattels personal are usually divided into *choses* (things) *in possession* and *choses in action*. Choses in possession are physical objects that we call *'ayn* in Islamic law. They constitute goods as that word is usually understood. By their nature they are capable of being physically possessed.[105] The owner is able to exert physical control in different ways.

1.7.8.1 Choses in Possession: Absolute Ownership and Possessory Ownership

It was stated earlier that the law regards property primarily *as a right* rather than as an *object*.[106] The two concepts intermingle, however, so that important classifications depend upon the nature of the object rather than the nature of the right.[107] When we look at the right involved, we have two types:

1. *Absolute ownership:* This is the right to property (real or personal) that is superior to any right that may be established by another.
2. *Possessory ownership:* This right can be overridden by the right of absolute ownership, but is otherwise a good title.[108] A person who has bought a stolen good will have to surrender it to one who has absolute ownership, but if the owner makes no claim the possessory owner has the right to reclaim it from someone who may steal it. The right to possession may also arises from the creation of a *bailment* or *lien* in respect of the property.[109]

1.7.8.2 Choses in Action

The definition of *choses in action* was laid down in *Torkington v. Magee*:[110] "All personal rights of property which can only be claimed or enforced by action, and not by taking physical possession."

The main point is that a chose in action is intangible and cannot be enjoyed by physical possession. It can only be enforced, if the need arises, by action through the courts.[111] There are many such rights. A share in a company is a chose in action, despite the fact that it is represented by a tangible share certificate. The reason is that the true meaning and value of the share spring from the rights it carries: to dividend, to vote, to participate in winding-up and so on.[112] These rights can only be enforced by legal action and a share certificate provides very little comfort.[113]

Other examples are patents, copyrights, insurance policies and debts. We, finally, reach the meaning of *intellectual property.*

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[103]Andrew Terry and Des Giugni, *Business Society and the Law*, 325.
[104]Ibid.
[105]Ibid.
[106]Ibid., 325-26.
[107]Ibid., 326
[108]Ibid.
[109]Ibid.
[110]2 KB 427 at 430
[111]Ibid., 327
[112]Ibid.
[113]The Companies Ordinance, 1984, nevertheless, declares the share certificate as movable property for some unknown reason. § 89(1) speaking about the nature of shares and certificate of shares says: "The shares or other interest of any member in a company shall be movable property, transferable in the manner provided by the articles of the company." The Ordinance does not include debentures in this meaning.

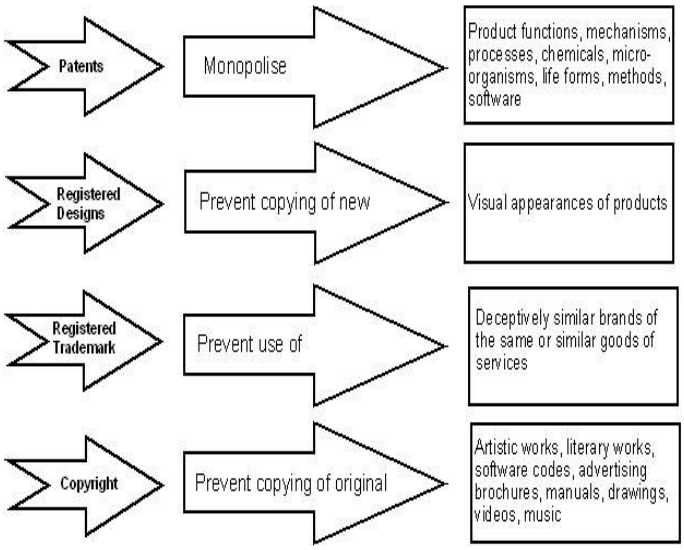

Figure1.2: Intellectual Property

We see from the above that intellectual property is intangible property that can be classified as choses in action. Intellectual property is governed by a legislative regime and encompasses a variety of rights conferred by the law.

Intellectual property is a major form of wealth. A figure is provided above to give a visual picture of the concepts underlying this form of property.

In the corporate world, almost every development revolves around intellectual property and the value associated with it.

Today, in the developed world, IP has gained increased protection with advances in technology and international trade. To protect the violation of IPRs, most countries of the world signed the agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) in 1994, administered by the World Trade Organization (WTO). Yet, most of the underdeveloped countries tolerate the widespread sale of counterfeit version of IP products. The Islamic world continues to be part of this illegal activity with some claiming that such rights are un-Islamic. There may be some difficulties in dealing with such rights, but none of these is so radical that it cannot be overcome. It is imperative that Muslims internalize concepts of IP so that they can participate in and carve out a share in this enormous source of wealth.

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