

The Classification of Rights and their Transfer in Islamic Law

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Abstract

Al-Shāfi'e (God bless him) said: "O so and so, you criticise a person (Abū Hanīfah) to whom the entire ummah concedes three-fourths of knowledge when he does not concede them even one-fourth." The man said, "And how is that?" He replied, "Fiqh is questions and responses (through the formation of cases) and he is the one who alone formulated the questions, thus, half the knowledge is surrendered to him. Thereafter, he answered all the questions and even his opponents do not say that he erred in all his answers. When that in which they agreed with him is compared with what they disputed with him, three-fourths is surrendered to him. The remaining is shared by him with all other jurists."

AL-SHĀFI'Ī

*Introduction to al-Hidāyah (2006)*²

Intellectual property revolves around a system of rights. It is, therefore, imperative that the types of rights related to property be discussed and analysed in order to understand the position taken by Islamic law with respect to this type of property. In this paper, we shall discuss the types of rights associated with such property and whether there other pure types of rights that can be sold.

It is also important to discuss the nature of these rights, because most scholars who have tried to justify the validity of intellectual property rights in Islam have relied, in their analyses, on a discussion of rights. They have tried to show that there are certain types of pure rights in Islam that are the subject-matter of claims even if they are not exactly classified as property. From such discussions, the scholars have tried to derive rules that can be used to justify intellectual property with respect to their sale and ownership. This is especially true of scholars like Justice Taqi Usmani.³

There are a large number of classifications of rights in Islamic law. Rights are viewed from various perspectives and classified according to a specified purpose. Not all such classifications are relevant for the present discussion, but a brief overview of the classifications will place the classification we need in the proper perspective. This overview will be attempted first. The overview will be followed by a representative classification adopted by modern scholars. As mentioned, the classification we have selected is the one adopted by Justice Taqi Usmani. The rules he derives for later justification will then be mentioned. The classification adopted by the learned scholar is quite complex and does not help in a precise understanding of the rights. Accordingly, we shall follow our own classification based on the writings of the earlier jurists in order to simplify the complexity surrounding the discussion of rights in Islam.

Key Words: Haqq, hudūd, zakāt, kaffārāt, Huqūq mujarradah.

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² See al-Marghanāni, *al-Hidāyah*, trans. Imran Ahsan Khan Nyazee, vol. 1, xviii.

³ See Muhammad Taqi Usmani, *Bay' al-Huqūq al-Mujarradah*, vol. 1, 72–125.

Overview of the Different Classifications

The term used for the word “right” is *haqq*. In its literal meaning, the word *haqq* is the name of the Almighty. Some say that it is one of His attributes. Literally, it is a verbal noun and is considered the opposite of the word *bāṭil* (falsehood). *The literal sense* also includes the meanings of claim, obligation, certainty, and the rights pertaining to real property and its easements.⁴ Technically, it is used in two meanings. First, the ruling that corresponds to the facts, and in this meaning it is the opposite of falsehood (*bāṭil*). Second, it is used in the meaning of an obligation that is established, that is, a right. In this sense, it is said to have two types: the right of Allāh and the right of the individual. The right of Allāh is one that pertains to a general benefit that is not specific, and settlement has no role to play in it, as in the case of *hudūd*, *zakāt*, *kaffārāt* (expiations), and so on.⁵ Sometimes the words *haqq* and *hukm* are treated as synonyms, but in reality *haqq* is the legal effect of the *hukm*.⁶ The *fuqahā* define a *haqq* as “something to which a person is entitled.”⁷

Different meanings of the term right according to the jurists

The jurists employ the term *Haqq* or right in different meanings. Some of these meanings are given below:

1. The application of the term to mean rights that pertain to financial claims as well as non-financial claims.
2. The legal effects or obligations that flow from contracts. These are like entitlement to price or delivery of the commodity.
3. The stipends given to the jurists, the judges and other officials from the treasury.
4. Easements and servitudes pertaining to landed property. These are like the right of way, the right to water for drinking and irrigation.
5. Pure rights (*Huqūq mujarradah*). These are like the right to acquire property, the option available to the buyer or the seller, the right of divorce possessed by the husband.

The general view is that a right exists where the *shari‘ah* grants such a right. Where the *shariah* does not grant a right there is no right.

The Ingredients of a Right

The writings of the jurists show that there are three elements of each right.

1. The owner of the right. In the case of the rights of individuals he is the person for whom the right is established.
2. The person who owes the duty or from whom the right is claimed.
3. The object of a right whether it is wealth or some other duty. It is stipulated for such an object that it be *halāl* according to the *shari‘ah*.

The Different Classifications

Rights are subjected to different classifications on the basis the perspective adopted. Some of these classifications are as follows:⁸

1. From the perspective of the right being binding or permissible.
2. From the perspective of the right being of general benefit or individual benefit (right of Allāh and right of the individual).

⁴See *Lisān al-‘Arab*, s. v. “*Ḥaqq*.” See also *al-Miṭṭabā fī al-Munṭar* and *Ta‘rīfāt* by al-Jurjānī.

⁵Ibn al-Qayyim, *I‘lām al-Muwaqqafīn*, 4 vols. (Beirut, 1973), vol. 1, 108.

⁶See al-Jurjānī, *Ta‘rīfāt* (Cairo: n.p., n.d.), s. v. “*Ḥaqq*.”

⁷Ibn Nujaym, *al-Baḥār al-Rā‘iq*, vol. 6, 148.

⁸For the list that follows, see *Mawsū‘ah Kuwaytiyyah*, s.v. “*haqq*,” vol. 18, 13.

3. from the perspective of the ability or inability of the individual to relinquish the right.
4. from the perspective of the underlying meaning of the right being rational or a matter of ritual obedience.
5. From the perspective of each right containing an element of both the right of the individual and the right of Allāh.
6. from the perspective of the right pertaining to worship or to human practices.
7. From the perspective of the right being perfect or imperfect.
8. From the perspective of the claim underlying the right being limited or unlimited.
9. From the perspective of the right being determinate or indeterminate.
10. From the perspective of the right being qualified or unqualified.
11. From the perspective of the right being communal or universal.
12. from the perspective of the right being, or not being, subject to inheritance.
13. From the perspective of the right being financial or non-financial.
14. From the perspective of the right being justiciable or moral.
15. From the perspective of the right being temporal or pertaining to the hereafter.

According to Fakhr al-Islām al-Bazdawī⁹, the source of these classifications is either from the point of view of the owner of the right, or from the point of view of the one from whom it is claimed, or it is in the light of the object of entitlement or the thing to which the right is related.⁹

It is not possible for us in this study to deal with all these classifications. We will, therefore, present those classifications that are important not only for this study, but also within classifications generally. The first such classification is between rights of Allāh and the rights of the individual. The second is based on relinquishment and transfer of a right. After explaining these classifications we shall turn to what Mawlana Taqī Usmani has to say.

Classification into the Rights of Allāh and the Rights of Individuals

The first classification of rights in Islamic law is that into the rights of Allāh and the rights of the individuals. It is a division based on general and specific benefits. This classification is more popular with the Ḥanafī jurists and is discussed in detail by al-Bazadawī, al-Sarakhsī and ṣadr al-Shariah.¹⁰ In this classification, the *ahkām* are divided into four kinds of legal effects or rights: pure rights of Allāh; the rights of individuals; a mix of the two types of rights in which the right of Allāh is predominant; and a mix of the two types where the right of the individual is predominant.¹¹ These are further divided into the following.

1. Eight types of the right of Allāh:
 - *Pure Worship*: belief in Allāh or *Emān*; prayer; *zakāt*; fasting (*Ṣawm*); *Hajj*; *jihād*.
 - *Pure punishments*: *Hudūd* penalties.
 - *Imperfect punishments*: prevention from inheritance in case of murder where the murderer cannot inherit from the victim.
 - *Those that are a mix of worship and penalty*: *kaffārāt* (expiations).
 - *Worship with a financial burden*: *sadaqat al-fiṭr* or payment made before the *ʿĪd* following *Ramadān*.
 - *Financial liability in the nature of worship*: *uṣhr* (ten percent charge on the produce of land).
 - *Financial liability that is in the nature of punishment*: *kharāj* tax.

⁹Abd al-ʿAziz al-Bukhārī, *Kashf al-Asrār* (Beirut: n.p., n.d.), vol. 3, 157.

¹⁰Al-Sarakhsī, *Usūl*, vol. 2, 332; ṣadr al-Shar ʿah, *al-Tawdīh*, vol. 2, 729 passim.

¹¹See al-Bukhārī, *Kashf al-Asrār*, vol. 4, 134–35.

- *independent categories*: initial rules; additions to rules; and those associated with the initial rule. The examples of these are the *khumus* levied on cattle, minerals, and treasure-troves.
2. Those in which the right of Allāh and the right of the individual come together, but the right of Allāh is predominant: *hadd* of *qadhf*.
 3. Those in which the right of Allāh and the right of the individual come together, however, the right of the individual that is predominant: *qisās* or retaliation for bodily injuries.
 4. The last category is that of the right of the individual. This category includes almost everything that is not included in the above and is beyond reckoning. It is this category that is most relevant to the discussion of intellectual property, because all intellectual property will fall within the right of the individual.

It is to be noted that some jurists like al-Shāṭibī¹² have tried to show that every right contains an element of the right of Allāh. He says that no *hukm* is free of the right of Allāh, thus, even the rights of individuals contain the right of Allāh.¹² Likewise, he says that in every right of Allāh there is an element of the right of the individual.¹³

Classification into Rights that can be Relinquished and Transferred and Those That Cannot

The transfer and relinquishment of a right may be with or without compensation. Transfer is of property sold with compensation or it may be without compensation as in the case of a gift. Relinquishment may be for value as in the case of *khul* 'and pardon, or it may be without value.

Transfer and relinquishment in the broader context are again seen by the jurists in terms of the right of Allāh and the right of the individual. for this purpose, the idea of the right of Allāh is expanded somewhat and to it are added even those cases of the right of the individual that are expressly laid down by the *shariah* or by the texts. The right of the individual is divided into its various components and analysed. We shall see later that it is this classification that is employed by Justice Taqī Usmān¹⁴ for his analysis, although he changes the terminology somewhat to mean *shar'ih* rights and '*urfi* rights.¹⁴ We may now proceed with the description of this classification.

Relinquishment of the Right of Allāh and Rights Expressly Laid Down by the Shar'ah

The general principle is that the rights of Allāh, whether these are acts of worship like prayer and *zakāt*, or punishments like *hudūd*, or those vacillating between punishments and acts of worship like *kaffārāt* cannot be suspended by an individual, because the individual does not possess this right in reality. To these are added personal rights that have been specifically granted by the *shariah* like: the right of the *wali* over the minor, the rights associated with fatherhood and motherhood, the right of the child over his parents and his lineage. These too do not accept relinquishment, that is, the individual does not possess the right to give up these rights.¹⁵ Thus, if an entire community gives up the call to prayer, it may be subjected to military action. The same applies to those who deny the payment of *zakāt*. Likewise, pleading for forgiveness of *hudūd* is not allowed: "Do you intercede in a *hadd* laid down by Allāh, the Exalted."¹⁶ In cases where the right of Allāh and the right of individuals are mixed, as in the case of *qadhf*, where the right of the individual is predominant, it is permitted by the Shāfi'is and hanbali that the victim may take back the charge. The

¹²Al-Shāṭibī¹², *al-Muwāfaqāt*, vol. 2, 317 passim.

¹³Ibid.

¹⁴Taqī Usmani, *Huqūq Mujarradah*, 72–125.

¹⁵Al-Kāsānī¹⁵, *Badā'i' al-Ṣanā'i'*, vol. 7, 55-56; al-Shāṭibī¹⁵, *al-Muwāfaqāt*, vol. 2, 376; al-Qarāfī¹⁵, *al-Furūq*, vol. 1, 140-41, 195.

In addition to these sources see *al-Mawsū'ah al-Kuwaytiyyah*, vol. 18, s.v. "*ḥaqq*," 21. In fact, we have relied on the excellent discussion in the *Mawsū'ah* for this presentation.

¹⁶Al-Bukhārī¹⁶, *Sahih* vol. 12, 87; Muslim, *Sahih* vol. 3, 1315.

Ahanaf do not permit this either. *Ta'ziri* offences may be forgiven. The Ḥanafī jurists classify them as the right of the individual.

The cases where certain rights have been laid down for the interest of the individual by express provisions of the *shariah*, the individual does not have a right to relinquish the right. One example in this category is the *wilāyah* of the father over the child; it cannot be suspended by the father.¹⁷ The right of residence during *'iddah* for a woman cannot be suspended or relinquished. The husband or other relative is not entitled to expel her from the house. The option of inspection (*khiyār al-ru'ya*) is another example.¹⁸ It is established by a tradition: "He who buys something that he has not seen has an option when he sees it."¹⁹ Here the right is not established by the parties to the contract, but is laid down by the text. Thus, this right cannot be extinguished or relinquished. This rule applies to all cases where the right of Allāh is found and the matter is expressly laid down by the *shariah*.

The important point to note here is that non-extinction of the right means that it is also not permitted to take any counter-value or compensation in exchange for relinquishment. Nor can these rights be set aside on the basis of settlement (تسوية).

When the right has to be extinguished or relinquished, it is the *shariah* itself that provides relief in cases of harm and hardship. In other words, these rights accept relinquishment by the Lawgiver Himself. Consequently, many acts of worship may be avoided where the Lawgiver has acknowledged hardship. Likewise, the *hudūd* are waived on account of *shubah* (doubt).²⁰ The exemption granted is called a *rukhsah*, with the most well known examples being curtailment of prayer during journey and the consumption of the prohibited in duress.

5.1.5.2 Relinquishment of the Right of the Individual

The right of the individual with respect to extinction and relinquishment is divided into: the *'ayn* (chattel), benefits, debts and absolute rights that are neither chattel, benefits or debts.²¹

The rule is that the owner of a thing is not prevented from the extinction of his right if he can undertake valid transactions in his property that is, not being prevented through interdiction, where the subject-matter is lawful and the right of another person is not linked to it.²² This rule is analysed by considering the various types of these rights as follows:

1. **The *'ayn* (chattel):** The *'ayn* is something that can be taken into physical possession and is always subject to ascertainment. It includes most things like clothes, real estate, land, houses, animals and all things measured and weighed.²³ The owner of such property has the right to dispose of it as he likes through a valid contract or transfer by way of gift. With respect to extinction of the right in such property, the jurists maintain that if a person says "I have extinguished my right in this house in favour of so and so," where he intends the extinction of his right of ownership and the establishment of the right of another, then, this is absolutely void. The reason is that *a'yān* do not accept extinction (*isqāt*). This is the general rule, however, there are exceptions. The emancipation of a slave, for example, is considered extinction of the right of the owner and so also a *waqf* (charitable trust).²⁴

¹⁷Al-Kāsānī, *Badā'i' al-Sanā'i'*, vol. 5, 152, vol. 6, 48.

¹⁸al-Kāsānī, *Badā'i' al-Sanā'i'*, vol. 5, 292; al-Marghanānī, *al-Hidāyah*, vol. 3, 32.

¹⁹It is recorded by al-Dār'quṭnī, vol. 3, 5.

²⁰See al-Kāsānī, *Badā'i' al-Sanā'i'*, vol. 7, 61; al-Qarāfī, *al-Furūq*, vol. 4, 172.

²¹al-Kāsānī, *Badā'i' al-Sanā'i'*, vol. 6, 42–48.

²²Ibid., 263

²³Ibid., 43.

²⁴Ibn Nujaym, *al-Ashbāh wa-al-Nazeir*, 352. Some jurists have different ways of classifying rights. For example, a five-fold classification of rights has been followed by Ibn Rajab al-Ḥanbalī in his book on *Qawā'id Fiqhiyyah*:

(a) **The right to acquire ownership**, as in the case of a master having right in his slaves goods.

Debt (Dayn): A debt may extinguish and compensation may be taken in lieu thereof, by agreement of the jurists, whether the debt has arisen from a price, a claim or reparation for an injury. The debt may be relinquished in whole or in part.²⁵ al-Qarāfi considers compensation for relinquishment as *isqāt* through settlement.

3. **Benefits (manāfi’):** Benefits may be relinquished too whether the person relinquishing them is the owner of the property or merely the benefits.²⁶ As for relinquishment in return for compensation, the majority of the schools distinguish between the exclusive right to *manfa‘ah* and a restricted permission to use premises. The latter concerns permission to be in a *madrassah*, a mosque or a market. The former means property that can be rented out or given through a commodate loan.²⁷ The Ḥanafī’s permit compensation where the person owns the *raqabah* as well as *manfa‘ah*, that is, when he has exclusive ownership of the property.²⁸
4. **Absolute Rights:** As stated earlier, these are rights that neither fall under the category of ‘*ayn*, nor *dayn* nor *debts*. The right of pre-emption, options in contracts, the right of a wife in sharing conjugal rights, the right of *qisās*, the right to the period of deferment (*ajal*), and so on. The rule for taking compensation for such a right according to the Ḥanafīs is that no right is to be compensated unless it is attached to some property. As for relinquishment, according to the agreement of the jurists, where the right concerns the right of another person it cannot be relinquished, as in the case of a interdicted person due to insolvency. Some of these rights are a matter of disagreement as in the case of deferment.

The Classification into *Shar‘i* and ‘*Urfi*

Justice Taqī Usmani in reality adopts the previous classification discussed by us, that is, on the basis of transfer and extinction of rights. Nevertheless, taking the cue from the writings of the Ḥanafī jurists, he changes the heading into *huqūq shar‘iyyah* and *huqūq ‘urfiyyah*. The distinction is found in Ibn ‘Ābidīn’s book while discussing valuation.²⁹ Briefly, the details are as follows:

1. ***Al-huqūq al-Shar‘iyyah*:** These are rights that have been established [expressly] by the Lawgiver, and analogy has no role in establishing such rights. These are divisible into two types:
 - (a) *Rights that have not been instituted primarily for the benefit of the individual, but only to protect him from injury.* Examples are the right of pre-emption. This is a right given to a third party (other than the two parties to the contract) to prevent injury to him. Further, there is a right of the woman to shared conjugal rights, that is, where there is more than one wife. This right has been established to prevent injury to the woman. The rule for such rights is that they cannot
 - (b) **The right to acquire possession**, like the right of a father in the wealth of his son, or the right of a party to a contract when delivery becomes due.
 - (c) **The right to utilize benefits**, like a neighbour placing a beam on his neighbour’s wall, or crops that have not begun to ripen in land that is sold.
 - (d) **The right to utilisation of benefits without ownership**, like easements and public roads and markets.
 - (e) **The right to make a claim on property**, like mortgaged property, or the property of an offender, or the right of the creditors over the estate of the deceased. Ibn Rajab, *al-Qawa‘id al-Fiqhiyyah*, rule 85 (electronic file).

²⁵ Al-Kāsānī, *Badā‘i’ al-Sanā‘i’*, vol. 5, 203, 314; al-Dusūqī, *Hāshiyah*, vol. 2, 220, 310; Ibn Qudāmah, *al-Mughni* vol. 5, 22.

²⁶ Al-Kāsānī, *Badā‘i’ al-Sanā‘i’*, vol. 7, 227.

²⁷ See al-Qarāfī, *al-Furūq*, Qā‘idah No. 30.

²⁸ Al-Kāsānī, *Badā‘i’ al-Sanā‘i’*, vol. 6, 189–220; al-Marghinānī, *al-Hidāyah*, vol. 4, 253.

²⁹ He says: “It is ‘*urfi* and this is through gathering. The ungathered like hunt and grass is not *mutaqawwam*. And it is *shar‘i* through permission of utilisation.” He indicates that the classification is in *Talwih*. The classification is also found in texts of jurists like al-Sarakhsī and al-Kāsānī.

be transferred for wealth by way of sale nor by way of settlement. They cannot be relinquished in lieu of wealth.³⁰

(b) *Rights that have been established primarily for the benefit of the individual and not merely to prevent injury to him.* These are like *qisās*, the conjugal rights of a husband over his wife, the right to inheritance and so on. The rule for these rights is that these rights cannot be transferred to another for compensation, like selling away the right so that the buyer comes to enjoy the right like the seller. The owner, however, can relinquish such rights in lieu of wealth by way of settlement. In this sense, the owner loses his right, but the right is not transferred to another.³¹

2. *Al-huqūq al-‘Urfiyyah*: Taqi Usmani says that we may call these rights as *‘urfiyyah* as they are established for the owner by the *hukm* of *‘urf* and practice. These are legal rights insofar as the Islamic *shariah* has acknowledged them due to custom and practice, but the primary source of these rights is *‘urf* and not the *shar‘*. These are like the right of way, the right to water for drinking and irrigation.³² These rules are divisible into several types:

(a) *Rights available through benefiting from property*: These are rights available through benefiting from material things. The Hanafī jurists have termed these rights as *huqūq mujarradah* (pure rights). Some jurists have permitted their sale in absolute terms; others have prohibited it absolutely, while the third group has permitted it for some rights and prohibited it for others. These rights are like the right of way, the right of access to water (*shirb*), the flow (passage) of water through property, placing a beam on the neighbour’s wall, the right to construct the upper level on another’s lower building. The well known view of the Ahanaf is that these are mere rights and it is not permitted to sell them.³³ The view of the majority schools in general is that it is permitted to sell these rights.³⁴ The major difference, among others, is that according to the Ahanaf most of these are rights attached to property and go with the property. According to the majority, these are benefits with independent existence and can be sold. Taqi Usmani quotes a recent jurist, a commentator on the *Majallah*, al-Atāsi to show that these rights may be sold or relinquished in certain cases, as in the case of relinquishing the right to construct the upper storey.

(b) *Other Types of Rights*: Taqi Usmani then includes other types of rights in the *‘urfi* category. These are: the right of first occupation (*asbaqiyyah*), like revival of barren land; the right to enter into a contract; relinquishing office; vacating premises (also called *pagri*).³⁵

The Rules Derived From the Classification

Justice Taqi Usmani then attempts to derive rules after the lengthy discussion of rights in which he quotes many jurists of all schools. The rules are stated very briefly below:

1. Rights stipulated by the *shariah* for protection of the individual from injury and not primarily for his benefit cannot be transferred for compensation under any circumstances, neither by sale nor by relinquishment through settlement. These are like the right of pre-emption.
2. Expected rights that are not established at the moment, but will accrue later cannot be transferred through compensation under any circumstances. These are like the right of inheritance during the lifetime of the person from whom one will inherit.

³⁰Taqi Usmani, *huqūq Mujarradah*, 76–77.

³¹*Ibid.*, 78–80.

³²*Ibid.*, 80–81.

³³*Ibid.*, 81.

³⁴*Ibid.*

³⁵*Ibid.*, 97–115.

3. The *shar‘i* rights that have been established *ab initio* for the benefit of the individual, but that do not accept transfer, cannot be sold for compensation by way of sale, however, they can be relinquished by way of settlement in lieu of wealth. The illustration is the right to claim *qisās*, and the right of the husband to conjugal rights through *khul‘*.
4. The *‘urf* rights that are based upon permanent benefits arising from corporeal property (*a‘yān*), like the right of way, can be sold without restriction according to the Shāfi‘is and the Ḥanbalis, and it also appears to be so according to some Mālikis. According to the later Ḥanafis, as long as these rights are attached to corporeal property they are legally wealth and can be sold and bought, like the right of way, provided there is no other obstacle to the sale like *gharar* and uncertainty. The right to construct the upper storey is not permitted for sale according to them as it is not attached to a stable corporeal property. It is, however, permitted to relinquish the right for wealth according to Atās¹.
5. *‘Urf* (custom) has a role to play in establishing rights related to wealth, because financial value depends on what the people consider valuable. He places the burden of this statement on Ibn ‘Ābidin.
6. The preferred view, according to the Ahanaf, with respect to relinquishment of office is that though this right cannot be sold, it can be relinquished in lieu of wealth. The same may apply to vacation of premises.

Analysing the Rules and Simplifying the Relevant Classification

A few observations about the rules derived by Justice Taqi Usmani and the classification adopted by him for analysis of intellectual property rights is in order. After this we shall attempt to simplify the classification.

Observations About the Rules and Classification

The observations are as follows:

1. The classification into *shar‘i* and *‘urf* appears to have been adopted intentionally to convey the idea that the category of *‘urf* is more or less a free area in which human desires and practices are acknowledged relatively easily. Consequently, if intellectual property rights are examined, they should not pose a big problem for they belong to the *‘urf* category. Our observation is that everything is *shar‘i* whether it is established directly by the *nass* (text) or is established indirectly through extension on the basis of *qiyās* or other rational principles.
2. *‘Urf* does not grant a license to declare anything we practice as legal, just because there is no direct text prohibiting it. Custom is not an independent source even in Western law. It has to pass through the examination of the courts. The courts analyse it in the light of the rest of the law and other conditions and then declare it to be a valid custom that can serve as a basis for a rule. In Islamic law, many things have been declared lawful when their basis has been custom or practice, but they have had to pass through the sieve of Islamic legal principles whether these principles have been stated directly in the texts or have been derived from the various cases laid down in the law. These are what jurists like al-Ghazālī have called the *tasarrufāt* of the *shariah*.
3. Consequently, anything that is declared as valuable by human beings is to be respected, but it has to be examined in the light of all the principles of *shariah* that the jurists have spent centuries in elaborating. Thus, if Ibn ‘Ābidin is stating that a thing is valuable when human beings consider it as lawful, it is merely a statement of a fact. It obviously does not mean that anything that humans consider valuable is to be automatically declared lawful and valuable in the eyes of the *shari‘ah*.
4. As an example, we may quote the opinion of al-Atās¹ relied upon by Justice Taqi Usmani to say that relinquishing the right to construct the top storey in lieu of wealth should be lawful. The argument advanced by al-Atās¹ is that if it is not allowed “this will be injurious for the person having right to

construct the top storey.” If we note the first rule listed in the previous section, the *shariah* has declared that where the right is stipulated for preventing injury to the owner it cannot be sold or relinquished, it should be a primary right. Further, al-Atāsi does not respond to the argument advanced by Imām al-Sarakhsi that it involves *gharar*. We may add to this that here the right of another person is also attached to this and that is the right of the person who owns the lower storey.

5. Finally, the classification is somewhat incomplete as it does not attempt to classify ownership rights pertaining a *‘yān* and *manāfi‘*.

Having said that, it must be acknowledged that the attempt made by Justice Taqī Usmani to justify intellectual property rights for Islamic law is perhaps the only serious attempt. It is to be noted that his father Mufti Shafi held a different view and did not permit the sale of intellectual property. Another attempt by the Federal Shariat Court is a bit superficial.

A Simple Classification

We may now attempt to simplify the classification. The main issue in the above classifications is whether a right can be transferred by way of sale or relinquished by way of settlement or otherwise. We, therefore, say that rights may be divided into those that are:

1. **Fully Transferable:** These are rights associated with the normal lawful corporeal property and the benefits arising from them. Normal sale contracts and contracts of hire cover this. Where no compensation is taken, these rights are transferred through gift, bequest and so on.

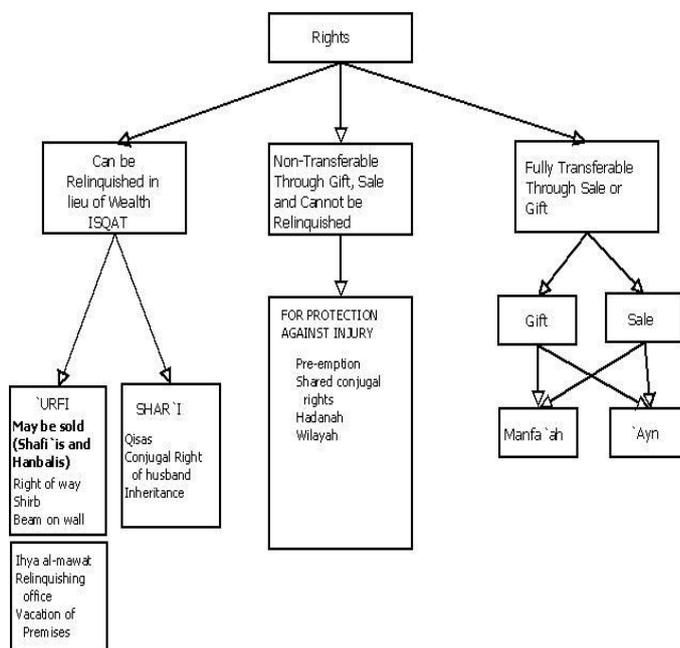


Figure 5.1: Rights in Islamic Law

2. **Rights that can be neither Transferred nor Relinquished:** These are described above as *shar‘i* rights that have been laid down for the protection of the individual against injury. The examples are pre-emption, shared conjugal rights of a wife, *hadānah* (custody of child), and *wilāyah*.
3. **Rights That Can be Relinquished by Agreement and Sold According to Shafi‘e and Hanbala:** These are rights that are attached to the corporeal property and are called pure rights according to the Aanaf. They can be relinquished in exchange for wealth. According to the Shāfi‘e and Hanbali such

rights may be sold. The main point to note is that except for vacation of office, all these rights are attached to some corporeal property. For the illustrations see previous section.

‘Arbun and the Sale of a Pure Right

To the above discussion we may add that *bay‘ al-‘arbūn* has recently been permitted by the Islamic Fiqh Academy. Allowing earnest money means permitting the sale of pure right. The technical meaning is that “goods are bought and a certain sum of money is given to the seller on the condition that if the buyer takes the goods the amount will be included in the price, but if he does not take the goods, the amount belongs to the seller.”³⁶

Sale with earnest money, however, is not permitted by the majority of the jurists, unless the money deposited is returned. This is the view of the Ahanaf, the Māliki, the Shāf‘is and even some Hanbali. They view this transaction to be void.³⁷ This is based upon a tradition that says that the Prophet (S.A.W) prohibited such a sale.³⁸ The tradition has been declared weak by Ibn Hajar, however, it is consistent with the system of *māl* developed by the jurists. It is disallowed due to several reasons. First, it is a sale with two additional conditions: the return of the sold commodity and the gift of the earnest money to the seller. It is also considered the usurpation of wealth through *bāṭil*. In addition to this, it is the stipulation of an amount without compensation for the seller.

The Hanbali permit it on the basis of a single report, which implies that ‘Umar (RA) agreed to such a transaction, thus, Ahmad ibn Hanbal upheld it. The tradition quoted by the majority is considered weak by them; however, al-Shawkāni has preferred that tradition as it is supported by other channels.³⁹ Nevertheless, the Islamic Fiqh Academy has adopted the Hanbali opinion and has resolved that sale with earnest money is permitted.

Adopting such a rule will open the door for payment for pure rights, besides affecting other commercial transactions. It is likely to disturb the system of *māl* adopted by the earlier jurists.

We may conclude this chapter with the following observations:

1. In the general discussion about rights, whether it is the discussion by the jurists, or by Justice Taqi Usmani, it is the discussion of pure rights (*Huqūq mujarradah*) that is most relevant to our study about intellectual property rights.
2. Such pure rights are usually attached to property, like the right of way and access to water. Matters like relinquishing office and *‘arbūn* may be the exceptions.
3. Under pressure from modern needs, matters like *‘arbūn* are already being considered legal.
4. The idea of relinquishing or extinguishing such rights through *isqāt* does not really help us. We are interested in the unhindered disposal of such rights and transactions in them.
5. A major point is that of attaching value to things. This, according to some jurists, is a matter of the practice of the people. Thus, whether a thing is to be assigned commercial value is to be examined in the light of the practice of the people.
6. Attaching value to things on the basis of the practice of the people, even though it is based upon custom or customary practice, cannot be accepted without question; it has to go through the repugnancy test in the light of the *shariah*. Such legal analysis must be based upon sound legal reasoning rather than on mere assertions like injury and *darar*.

³⁶Al-Dardī r, *Sharḥ al-Kab ‘alā al-Mughnani* vol. 4, 58.

³⁷*Al-Mawsū‘ah al-Kuwaytiyyah*, s.v. “‘arbūn.”

³⁸See Abū Dāwūd, *Sunan*, vol. 3, 786.

³⁹Al-Shawkānī, *Nayl al-Awṭār*, vol. 5, 154–55.

Conclusion

It may be concluded from the above discussion that the issue of such rights needs a much deeper analysis, especially the question of the impact that acceptance of pure rights as *māl* will have on the traditional structure erected by the *fuqahā*. Such an analysis is beyond the scope of the present study. It may be suitable for a doctoral dissertation.

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