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

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Abstrak


Introduction

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

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

Of late, the range of possible counter values and subject matters has expanded so as to include certain rights, which proprietary value and capacity to be valid subject matters of contracts may still be very much debatable. These possible counter values include mostly abstract rights (ḥaqq ma’nawi), such as, the rights to receivables, the rights to future benefits from a concluded contract, and the rights to license and concession. The main issue is, can these rights be traded or sold for a consideration? Can these rights be valid subject matters for an Islamic project-financing contract, which consists mainly of a series of exchange contracts? For example, if a person or com-
pany obtains a license to develop a piece of landed property into an industrial area consisting of factories and other paraphernalia, can the person or company sell the right to others? Alternatively, can the person or company securitize the right in order to get the financing for the project?

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

1.0 Ṣaḥl And Ṣaḥl Mutaqawwam

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

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

Majority of the classical Ḥanafi jurists were in favour of the first approach towards defining ṣaḥl, i.e., limiting it to corporeal matters only. For example, Ibn 'Abidin defined ṣaḥl as "that which human nature inclines, and can be stored for future needs." In other occasions, he described ṣaḥl as "corporeal matter (ʾayn) that is capable of being controlled and acquired", and "... is limited to corporeal matters (a'yān), to the exclusion of usufructs (manāfī')". He then elaborated the definition by explaining the proprietary aspect (milkiyyah) of ṣaḥl, whereby he said, "the proprietary aspect of ṣaḥl is established by the appropriation (ta'mawual) of the property by people". He further said, "the proprietary aspect of ṣaḥl is also established by its worth or value (taqawwum) that allows the lawful enjoyment of the property." Interestingly, Ibn 'Abidin recognized that usufructs can be subjects of ownership (milki), yet, they are not amwāl because they cannot be made specific subjects to dealings and transactions (taṣarruf). In the same line, article 125 of the Majallat al-Aḥkām al-'Adliyyah
defines milk as “a thing of which man has become the owner, whether it be the things themselves (a’yân) or whether it be the use (manâfî’).” Thus, although a usufruct can be owned according to the Hanafîs, it is not property (mâl) in its own right.

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

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

The ‘umrî comprising of the Mâlikî, Shâfi’î and Hanbalî schools took the second approach to the definition of mâl, whereby they considered rights and usufructs as property as long as they are related to property and any assets of value.7 According to the ‘umrî’s view, in order to be mâl mutaqawwam, two essential elements should be present. First, the usufruct of the thing should be legally permissible; and second, it is customarily treated as property or of proprietary value. Almost all contemporary scholars prefer the view of the ‘umrî in the inclusion of rights and usufructs in the meaning of mâl.8 These rights and usufructs can be generally termed as ḥuqûq mâliyyah and manâfî’ mâliyyah. Thus only a property right (ḥaqq mâli), as opposed to a non-proprietary right (ḥaqq ghayr mâli) can be considered as mâl. Similarly, only a financial usufruct (manfa’ah mâliyyah) can be considered as mâl, and not a non-financial usufruct (manfa’ah ghayr mâliyyah).

2.0 Ḥaqq and Some of Its Types

Ḥaqq literally means “an established matter that cannot be denied”9. In al-Miṣbâh al-Munîr, ḥaqq is literally defined as “the truth, as opposed to falsehood (al-ḥâji’un).”10 In
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legal terminology, *haqq* has been defined in many ways. The classical definitions tend to reflect more on the literal meaning of *haqq* and concentrate on the different facets of its meaning. The definitions are also quite general and open-ended, rather than giving a comprehensive and exhaustive definition of the term. For example, Ibn `Abidin defined *haqq* as “the entitlement of a person to a thing” (*mā yastahiqquhu al-ra'jil*). This definition describes *haqq* as what a person is entitled to, thus, implying some kind of a “right”.

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

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

*Haqq* has and can be classified in many categories and types. Kamali, for example, highlights an interesting three-fold division of *haqq* by the jurists; namely: permissible right (*al-haqq al-mubāh*); obtainable right (*al-haqq al-thābit*); and confirmed right (*al-haqq al-mu'akkad*). A permissible right gives the owner the right of either to act or not to act, since the law neither commands nor forbids him to do so. For example, is the individual’s right to own property. Until the right is exercised, it is considered a liberty. A permissible right will only become a confirmed right after the actual acquisition of the property, for example, by way of purchase, gift or inheritance. Once a right is confirmed, it has the force of law and must be respected by others. An obtainable right is in between the permissible right and the confirmed right and occurs when a person can, but is yet to acquire a confirmed right through the exercise of his unilateral wish. For example, when a person is offered to buy merchandise, an obtainable right is created in his favor. If he accepts the offer by buying the merchandise, the obtainable right is now converted into a confirmed right that can be enforced by the law.
According to Kamali, both permissible and obtainable rights are weak because they cannot be sold, inherited, or made a basis of a claim for compensation (damān). On the other hand, a confirmed right entitles the bearer an exclusive advantage that can be inherited and made a basis of a claim for compensation. Kamali however did not clarify whether a confirmed right can be sold for a consideration or not. From the explanation on the three categories of rights and in view of the definitions of right (ḥaqq) as given earlier, it seems that the first two categories are not actual ‘legal rights’ for transaction purposes but rather the pre-cursors to them. The character of a legal right as an exclusive assignment (ikhtīṣāṣ ḥājīz) is mostly evident in the third category, i.e., the confirmed right. The element of exclusive assignment may also be present at a much lesser degree in the obtainable right, which is exercisable at the option of the owner of the right. The apparent existence of some of this element (ikhtīṣāṣ ḥājīz) in al-ḥaqq al-ḥābitu explains the view of the Mālikis who allowed the inheritance of obtainable rights, such as that of ḥiyyār al-qabīl (option of acceptance).

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

3.0 Property Right (Ḥaqq Mālī)

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

Ḥaqq mālī has been defined as a right that is related to property, and its object is property or something valued with property (i.e., of proprietary value). The property right also regulates the financial relationship between one person and the other. It is distinct from the other rights because ḥaqq mālī is capable of being negotiated (tanāzul) and transferred (intīqāl) from one person to the other, and is also capable of being the subject matter of a transaction.
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\(\text{Haqq m\=ali}\) can be further divided into two main types, namely:

a. \(\text{al-}\text{haqq al-m\=ali al-shakh\=s\=i}\) (individual property right); and

b. \(\text{al-}\text{haqq al-m\=ali al-}\text{\='ayn\=i}\) (corporeal property right).

\(\text{Al-}\text{haqq al-m\=ali al-shakh\=s\=i}\) refers to the property right that the law accords to an individual over the other, whereby the object of such right is the performance of an act or obligation, or the abstention from doing an act.\(^{21}\) Thus, an individual property right presupposes the existence of three main elements, i.e., the owner of the right (\(\text{s\=ahib al-}\text{haqq}\)), the object of the right (\(\text{mah\=all al-}\text{haqq}\)) and the person obliged under the right (\(\text{man}\ '\text{alayhi al-}\text{haqq}\)).\(^{22}\)

\(\text{Al-}\text{haqq al-m\=ali al-}\text{\='ayn\=i}\) on the other hand refers to the property right that the law accords to an individual over a specific thing or property (\\textit{shay'} \text{nu} '\text{ayyan bi al-dh\=at}).\(^{23}\) Thus, the corporeal property right presupposes only two constituents, i.e., the owner of the right and the object of the right.\(^{24}\) It should be noted that although both individual property right and corporeal property right have objects of the rights, each is referring to different things. The object of individual property right is the performance of or abstention from certain acts, whilst, the object of corporeal proprietary right is the property or thing itself.

A good example of \(\text{al-}\text{haqq al-m\=ali al-}\text{\='ayn\=i}\) is that of \(\text{haqq al-milikiyyah}\) (ownership right). \(\text{Haqq al-milikiyyah}\) has been defined as "an exclusive assignment" (\\textit{ikhtis\=as h\=ajizi}),\(^{25}\) whereby, the owner of the property has an exclusive and complete control over the property that he owned. Here, the property right of the owner is accorded and recognized by the law, and this right is in relation to the object itself (\(\text{\='ayn}\)), which in this case is the property owned (\(\text{al-milikiyyah}\)). This property right is obviously transferable and can be a valid subject matter of a contract of exchange, although the subject matter is generally represented to be the property itself (\(\text{\='ayn}\)), not the property right or \(\text{haqq milikiyyah}\). For example, when A sells his house to B, the subject matter is represented as mainly the house (\(\text{\='ayn}\)), although in real fact, A is selling also his ownership right (a form of \(\text{haqq m\=ali}\)) to B.

Another example of \(\text{haqq m\=ali}\) is the rights of a shareholder in a company, by virtue of his/her ownership of the shares. This property right in the shares is defined as a general/common proprietary right in the assets of the company including real properties, usufructs, rights, money and debts.\(^{26}\) This is similar to the common proprietary right (\(\text{haqq al-milikiyyah al-sh\=a'i\=ah}\)) to inherited property by a number of legal heirs. A careful analysis of \(\text{haqq m\=ali}\) in shareholding shows that it is again a form of ownership right, though the property owned is more abstract, in the form of shares which represent the actual underlying property in the company. In this case, the sale and transfer of the shares will reflect the exchange of the underlying property. Therefore, all the necessary requirements for the transaction or exchange of the (underlying)
property involved in the common proprietary right should be fulfilled. For example, if the property in the company is in the form of goods: whether they are ribawi or non-ribawi; or whether the exchange is barter or not. If the property in the company is in the form of money, or even debts, the rules to avoid ribâ al-fadîl and ribâ al-nasî’ah in the exchange of money for money will apply. This explains the requirement for stock selection screening to have an appropriate liquid to illiquid assets ratio because liquid assets are regarded as money and if dominant, when traded, must follow the rules for the trading of money. The OIC Fiqh Academy for example, decided that as long as the assets represented by the shares are dominated by real assets, either corporeal or usufructs, as opposed to liquid assets (cash and debts), the shares can be traded.27 implied without triggering the rules against ribâ and sale of debt for another debt (bay’ al-kâlî’ bi al-kâlî’).28

4.0 Tangible Property Right vs Intangible Property Right

An issue that may arise in relation to a corporeal property right (ḥaqeq mālī ‘aynî) is whether its object should always be a material and tangible thing (‘ayn maddî), or, could it also be an abstract and intangible thing (‘ayn ma’navî) as well?

According to al-‘Ibâdi, an abstract right can still be considered as a kind of property right, because it is capable of being valued by property and is giving its owner a proprietary value (qîmah māliyyah) capable of being valued by pecuniary or monetary measures.29 ‘Alî al-Khaﬁf also considered an abstract and intangible property right as a special form of ownership right, i.e., ḥaqeq mālī ‘aynî.30 Al-Duraynî further argues that the object of ownership (mahall al-milkiyyah) may also include abstract rights, and is not necessarily limited to material and tangible things only.31

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

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

- Its nature as a property with special characteristics;
- It has proprietary value according to custom;
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- It can be owned exclusively by its owner, i.e., the owner is free to benefit from the property and prevent others from trespassing or interfering with the property.

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

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

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

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

It is thought that an abstract property right may still be attached to a corporeal matter, such as that of intellectual properties and products. Yet, some other abstract proprietary rights may not be clearly attached to a corporeal matter, and are arguably more in the nature of rights fī al-dhimmah, such as the rights to future receivables in a contract of sale with deferred payment (bayʾ būhman ājil). The issue becomes pertinent in considering the legality of the sale of the right to receivables from sales contracts at a discounting, as it has been practiced, for example in Malaysia, for the creation of some of its Islamic bonds.
In relation to the rights to future receivables arising from a sale contract, there are two main lines of opinion by contemporary scholars. A study of these two lines of opinions shows that the main issue is as to whether the rights are ‘aynī (corporeal) or fi al-dhimmah (in the liability). The first view regards the right to receivables as haqq mālī fi al-dhimmah, thus, more of a debt (dayn) in its nature. This view is the mainstream view, given the support that it receives from classical literature in this regard.

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

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

Another example of an analogous situation where haqq mālī fi al-dhimmah in sale contract becomes an issue is what the Ḥanbalīs describe as bay’ al-mawsūf fi al-dhimmah, i.e., purchase of an ‘abstractly defined good’ in the obligation of the seller. For example, the Ḥanbalīs treat manufacture sale (bay’ al-istisnā`) as a form of bay’ al-mawsūf fi al-dhimmah, with a necessary condition that the buyer must pay in full at once, and is bound by the contract as long as the final product agrees with the contractual description. The condition of spot full payment is essentially to avoid the rule against bay’ al-kālī bi al-kālī. However, due to the practical difficulty in imposing full payment at the time of a manufacture contract, the Ḥanbalīs would alternatively
allow for partial payments or even fully deferred payment using an alternative legal description of the contract. In this case, the contract is not treated as bay‘ al-mawsūf fī al-dhimmah, but rather, a contract of sale of the raw materials (‘ayn), actually delivered, with a condition (shart) that they be constructed into a building, the payment of which may be deferred and made subject to the final product satisfying the contractual description.\(^{35}\) The latter contract, thus, amounts to a sale of ‘ayn for dayn which is allowed, instead of a sale of dayn for dayn which is not allowed.

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

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

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

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

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

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

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

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

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

Sixth, certain property rights may be biased towards liability and debt (fi‘ dhimmah) and should be treated with caution to avoid the prohibition of bay’ al-kāfī bi al-kāfī, and the occurrence of ribā.

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

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

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

End Notes

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

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5. Ibid., 5/51.

6. The article further explains that the sale of non-existent, non-deliverable and non-valuable items (not māl mutagawwim) is void.


8. There is a long list of such scholars, for example, Al-Duraynī, Ḥaqq al-Ibtikār, p. 22-39; Al-Zuhayli, Al-Fiqh al-Islāmi wa Adillatuh, vol. 4, p. 42; and Aḥmad Yūsuf, Al-Māl fī al-Shari‘ah al Islāmiyyah, p. 20-21.


14. This definition has been suggested by Hani Sulayman, Isqāt al-Ḥuqūq wa Tawrīḥuhu fī al-Shari‘ah al-Islāmiyyah, p. 13.

15. Ibid., p. 350-351.

16. Kamāl gives a different translation to the three divisions of rights, i.e., permissive right (al-ḥaqq al-mubah), imperfect right (al-ḥaqq al-thābi) and perfect right (al-ḥaqq al-mu‘akkad).

17. Kamāl noted though that the Mālikīs hold that obtainable rights are inheritable.

18. Yet, it is acknowledged that the permissible right and obtainable right may still be relevant as rights in the context of a discussion of general rights, such as that of human rights.


20. Ibid.

22. Ibid.
23. Ibid.
24. Ibid.
28. The concept of bay' al-kālī' bi al-kālī' and its prohibition is taken from the ḥadīth narrated on the authority of Iblīs 'Umar, indicating the Prophet's prohibition of bay' al-kālī' bi al-kālī'; as quoted in Nāzīh Ḥammād (1986), Bay' al-Kālī' bi al-Kālī' fi al-Fiqh al-Islāmī, Markaz Aḥbāb al-Iqtisād al-Islāmī, Jāmi'ah al-Malik 'Abd al-Azīz, Jeddah, p. 9. Bay' al-kālī' bi al-kālī' has been defined to be the sale of a delayed payment for a delayed payment (bay' al-nasi'ah bi al-nasi'ah), or a deferred debt for another deferred debt. See Ḥammād, ibid., p. 13.
33. The summary is adapted from the discussion by Aḥmad Fāhām Abū Sunnah on the matter, in Bahīth Naẓūrīyyah al-Ḥaqq, p. 184.
35. Ibid.
36. This is generally the view of the Syariah Advisory Council of the Malaysian Securities Commission. It should be noted however, that they normally refer to property right in general term only, i.e., as ḥaqq mālī. When the term ḥaqq mālī is used, it is meant to be a right to property and therefore is māl, and no clear cut differentiation has been made between the right attached to 'ayn and a right in liability (fi dhīmmah).