

**OWNERSHIP IN HUMAN BODY: A
COMPARATIVE STUDY IN PERSPECTIVE OF
SHARĪ'AH & LAW**

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**A dissertation submitted in partial fulfillment of the requirements for the degree of
Masters of Laws (ICL)**



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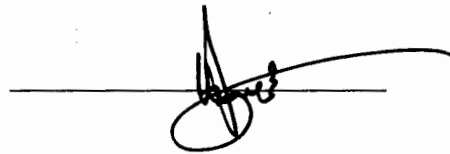
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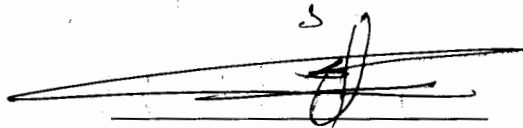
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During the research work, she remained in touch with me and worked with diligence. She carried out her research work under my instructions and supervision. I forwarded this thesis for its submission and evaluation for the awarding of L.L.M (ICL) to her from International Islamic University Islamabad.



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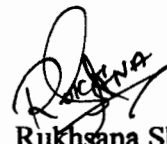
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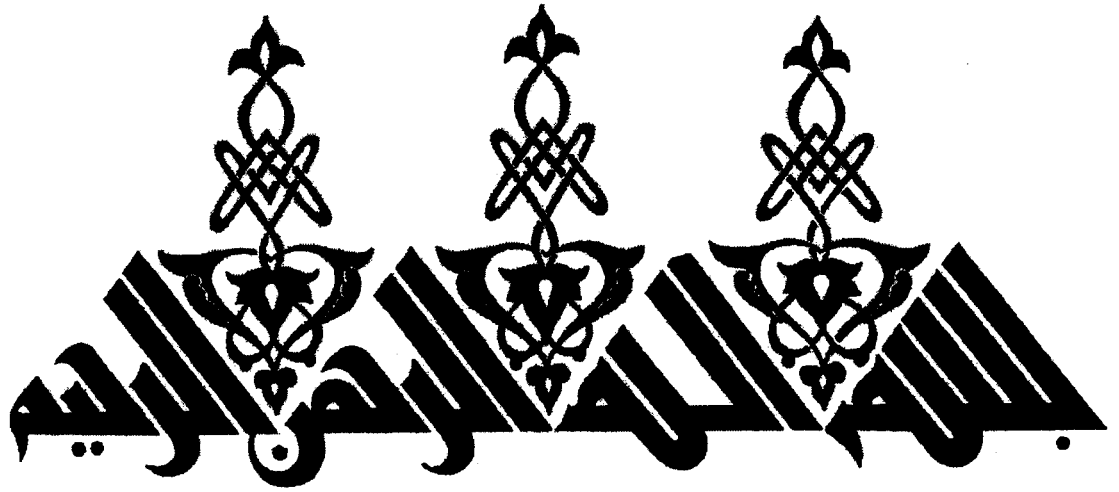
DECLARATION

I, Rukhsana Shaheen, student of L.L.M (ICL), Reg No. 55-SF/LLMICL-08, International Islamic University Islamabad, do hereby solemnly declare that the thesis entitled **“Ownership in Human Body: A comparative Study in Perspective of Shari‘ah and Law”**, is submitted in partial fulfillment of degree of L.L.M (ICL).

It is my original work and has not been submitted before for obtaining any degree from this or any other university or institution.



Rukhsana Shaheen



وَبِرِّسِيَّتَيْنِ

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DEDICATION

Research is dedicated to the great teacher of the world

PROPHET (PEACE BE UPON HIM)

And

To my great parents

Muhammad Riaz Warraich

&

Nazir Begum

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I am grateful to Allah The Exalted for His endless bounties and favors that accompanied me since the start of my existence. His blessings have made me accomplish this task.

I am thankful my parents and siblings who have been great support throughout my studies specially my father and elder sister. I can never pay them back for what they have done for me.

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My hearty gratitude is for my friends Sadia Halima, Mehnaz Perveen, Hafsa Abbasi, Ghazala, Saadia Zahor and Lubna Ahmed Shah who helped and supplicated for me.

May Allah bless them all!

Table 1: Transliteration Table: Consonants¹

Arabic	Roman		Arabic	Roman
ب	b		ط	ṭ
ت	t		ظ	ẓ
ث	th		ع	‘
ج	j		غ	gh
ح	ḥ		ف	f
خ	kh		ق	q
د	d		ك	k
ذ	dh		ل	l
ر	r		م	m
ز	z		ن	n
س	s		ه	h
ش	sh		و	w
ص	ṣ		ء	’
ض	ḍ		ي	y

¹ http://rotas.iiium.edu.my/?Table_of_Transliteration

Table 2: Transliteration Table: Vowels and Diphthongs

Arabic	Roman	Arabic	Roman
اَ	a	اَ، اِ، اِي	an
اُ	u	اُو	un
اِ	i	اِي	in
اَ، اِ، اِي	ā	اَو	aw
اُو	ū	اَي	ay
اِي	ī	اُو	uww, ū (in final position)
		اِي	iyy, ī (in final position)

ABSTRACT

Large number of transplantation surgeries that resulted in the scarcity of organs led the scholars ponder over the current status of human body. Some of the Scholars call for the monetary inducement for the availability of organs for surgeries. Financial gain will increase the supply of 'organs'. This principle is appropriate according to the principles of economics but is it adequate from jurisprudential point of view too? If financial incentive is permitted, that would undoubtedly mean the recognition of 'property' in human body as sale is the outcome of the 'ownership'. An 'object' can't be sold unless it is 'owned'. Jurists started contemplating, debating and arguing this issue all over the world.

Sub issues of Surrogacy and gametes donation are also in lime light. Surrogates have appeared to be a blessing for infertile couples who can't carry and nurture their own off springs in their wombs. But again volunteers for surrogacy are hard to find and monetary attraction is deemed to be the most successful solution.

Those couples are also facing scarcities that are in need of gamete donation and living in those countries where gamete sale is impermissible. This has increased 'medical tourism'. Couples travel to the other parts of the world where gametes are easily available.

All of these issues are being debated, argued and contended in west and Islamic world.

First chapter of this study records the general concept of property and ownership in *Shariah* and Law so that the criteria for any object to qualify as property can be ascertained.

Second chapter dealt with application of the notion of ownership and property over 'human body'. *Shariah* standings were compared with U.K Law and it was found that there is a kind of consensus among *Shariah* Scholars that human organ can't be traded. U.K Law also denied the 'ownership' notion by prohibiting the 'organ trade'. Only 'donation' is bearable for both Laws.

Third Chapter addressed the issues of surrogacy and gamete donation which has proven to be the departure point for both set of rules. U.K Law allowed voluntary surrogacy and gametes donation where as *Shariah* considered it completely intolerable. Sale of gametes or commercial Surrogacy is completely banned though reasonable expenses for loss of earning are recognized. *Shariah* prohibited it not only because of the 'property' issue but because of many other jurisprudential issues. Scholars amount that to 'adultery' and accuse it for mixing of lineage. Therefore they refute it completely

Final Chapter lists the conclusion and marked the findings of the up taken Research study.

INTRODUCTION AND IMPORTANCE OF THE TOPIC

Desire of ownership has been one of the oldest yearnings of man. Man struggled for the ownership since he started his living on this planet. At start, animals and water reserves were his property but with the passage of time and discovery of new things, man started owning other things as well for example metals like gold, silver and copper etc. This process is still on; man continued to add new things in his property. During this process, a time came when humans were owned too by his fellow beings. With the passage of time, many new things were added in the purview of property while many were precluded from its ambit. One among the precluded objects is human being which was excluded with the extinction of slavery.

21st century is the century of discoveries in science and technology which made the jurists ponder over the concept of property again. Man has developed many technologies for the betterment of humanity. There has been a revolution in the automobile industry in this century. Likewise, miracles have been done in the information technology.

Medical Sciences and bio technology weren't left behind. Revolution in medical sciences started with the human corneal transplant in 1906 by Dr. Edward Zim² and there never came any end. Success story of Organ transplantation started from cornea and has now reached to full face transplant.³ This fact has opened a new avenue of discussions in the jurisprudential and legal thoughts regarding property. As every year thousands of transplant surgeries are being performed of course, there has to be organ of some other person available for transplantation. The number of transplantation carried out each year resulted in

² Thomas Schlich, *The Origins of Organ Transplantation: Surgery and Laboratory Science, 1880-1930* (U.K: Boydell & Brewer Limited, 2010), P. 16.

³ First full face transplant surgery was carried out at 20th march 2010 at a hospital in Barcelona by a team of 30 experts. The team had transplanted muscles, nose, lips, maxilla, palate, all teeth, cheekbones, and the mandible of a man injured in a shooting accident by means of plastic surgery and micro-neurovascular reconstructive surgery techniques. See Helen Briggs, "Full face transplant 'a success'," BBC News, April 23rd, 2010, <http://www.bbc.co.uk/news/health> (accessed June , 2010)

shortage of organs. A large number of people are on waiting list for transplantation just because of lack of availability of organs some even die.⁴

This lead the scholars re-think over the status of human body. People did not have that much motivation for donation. Thus some researchers like Lori B. Andrew⁵ and Muireann Quigley⁶ asserted that the availability should be increased through monetary inducements. This is its economic aspect. But jurists are contemplating whether it is a good idea from the legal point of view. What jurisprudence and Law has to say regarding it. Sale is the outcome of the recognition of the property in body. Can the ambit of 'property' be expanded in this dimension too? Do human beings have ownership in their bodies? Can it be given the status of an 'object' so that it can be traded?

The issue is not that simple as it appears. It's not only transplantation where human body is utilized. Apart from transplantation, another main use of human body is done by companies who use human tissue to produce profitable products such as drugs, diagnostic tests and human proteins etc. Many western writers have reiterated this in their research articles. For example Margaret S. Swain and Randy W. Marusyk stated in their article 'An Alternative to Property rights in human tissue':

"Recent developments in biotechnology involving human tissue are sweeping our interactions with this material well beyond the boundaries of existing law. Some of these developments allow profit-oriented companies to use human tissue to generate lucrative products such as drugs, diagnostic tests, and human proteins. The profit obtained elevate the monetary worth of certain types of human tissues, which until recently has had little or no monetary value, to incalculable levels. Such changes require a society to reassess the present and future status of human tissue within the legal system."⁷

⁴ In U.K alone eight thousand people are on the waiting list for the transplant surgery, out of these eight thousand patients five hundred die each year waiting for organ. This number rises by 8 percent a year. <http://www.independent.co.uk/life-style/health-and-families/health-news/sale-of-human-organs-should-be-legalised-say-surgeons-2176110.html>

⁵ Lori B. Andrews, "My body my property," *The Hastings Centre Report* 16. no. 5 (October 1986), 28-38.

⁶ Muireann Quigley, "Property and the body: Applying Honoré." *Journal of Medical Ethics* (November 2007) 33(11): 631-634.

⁷ Margaret S. Swan and Randy W. Marusyk "An Alternative to property rights in Human tissue". *The Hasting Centre Report*, Vol. 20, No. 5(September -October 1990) pp.12-15.

Commercial surrogacy ⁸is a contentious issue too among scholars and researchers like other medico-legal issues mentioned earlier. Surrogates are the blessings for infertile couples who can't carry their own babies. But again volunteers for surrogacy are hard to find and monetary attraction is considered the sought after solution in this matter too. Those couples are also facing shortages that are in the need of sperms and eggs. Gametes availability is also a problem. And people travel to those areas where there is no scarcity of gametes due to monetary incentive. Frozen embryos are a challenge from legal point of view too.⁹ Some of the writers consider embryos as legal persons while some other consider it as property that can be disposed off according to the wishes of owner.

All of these issues are being debated, argued and contended in west. Naturally this debate started in Islamic world too as Muslims were also beneficiaries of most of these technologies. Therefore scholars of Islamic world worked on this question and came up with *Shari'ah* standings. They discussed these question too like do human beings owe their body? Can human body be subject matter of contract of sale, lease, gift and donation? How contemporary genetic issues be dealt by Muslims?

Issues mentioned earlier are mere glimpse of the large number of questions engraved in the topic of ownership in human body To revisit stance of Muslim world and standings of western thoughts regarding all of the issues related to property and ownership concept in human body is complex task at MS level. For this, thesis addresses only the issue of 'trade of the organs and other body parts' for the purpose of transplantation, Surrogacy and gametes sale. The study is aimed to explore the standings of the jurists of both western and Islamic world, the division of groups and their arguments. For comparative look at law, U.K Law is adopted as American Law is quite confused and very insufficiently legislated.

⁸ Surrogacy is the "Practice in which a woman (the surrogate mother) bears a child for a couple unable to produce children in the usual way, usually because the wife is infertile or otherwise unable to undergo pregnancy. In so-called traditional surrogacy, the surrogate mother is impregnated through artificial insemination with the sperm of the husband. In gestational surrogacy, the wife's ova and the husband's sperm are subjected to in vitro fertilization, and the resulting embryo is implanted in the surrogate mother."s Online encyclopedia of Britannica. <http://vlib.interchange.at:2078/eb/article-9070470>,

⁹ Elizabeth Cason Crosby Cheely, Embryo Adoption and the Law, *The Ethics of Embryo Adoption and Catholic Tradition*.vol. 95, p. 275-306.

Commercial Surrogacy and gamete sale is being practiced and there is no prohibition legally though organ sale is banned.

A lot of primary and secondary material is available on the subject. However, I fail to find any comprehensive comparison between *Shari'ah* and Law on the said subject. This study is designed to achieve an understanding of the concepts of west and the standings of *Shari'ah* regarding property in human body and to compare its consequences with respect to reproductive genetics and surrogate mother hood

Researcher has tried her best to include original sources but inspite of all efforts, there would be human mistakes. If there is any good that is from Allah The Exalted but if there is any error that has to be attributed solely to the researcher.

Thesis Statement

The concept of ownership of human body in *Shari'ah* and Law is a complex issue. A comparative study of *Shari'ah* on the issue with Law, with special reference to reproductive genetics and surrogate mother hood is required to be done for exploration of clear standing of *Shari'ah* and Law .

Hypothesis of the Research

1. Shariah concepts of property & ownership in human body are compatible with the notion of law with respect to reproductive genetics and surrogate mother hood.
2. Shariah concepts of property in human body of are not compatible with the notion of Law with respect to reproductive genetics and surrogate mother hood.
3. Shariah concepts of property in human body are compatible with the notions of law to some extent with respect to reproductive genetics and surrogate mother hood.

Objectives of the Research

This research is aimed to gain an understanding of the concepts of west and the standings of Shariah regarding property in human body and to compare its consequences with respect to reproductive genetics and surrogate mother hood.

Research Methodology

Research is an analytical and comparative study. For the purpose of this study, following methods has been employed:

- It has been attempted to revert to the classical sources as much as possible for the understanding of concepts of *Shari'ah*.
- The principles of *Usul al-Fiqh* has been applied
- Rules of jurisprudence are utilized for the application of classical terminologies on current matters.
- U.K Law has been adopted for comparison; however arguments have been adopted from the work of jurists of different countries for better understanding of the legal phenomenon.

Literature Review

The issue of "property and ownership in the human body" is in the air these days. A large number of articles are being written on this topic. Some of the scholars call for this notion while others completely negate the idea. Both groups propound their arguments to justify their stance. There is another group of researchers who are sitting on the fence. They neither support the full ownership nor completely negate it. *Shari'ah* and English Law both are neck & neck in this regard. Some of such articles are cited below:

Lori B. Andrew's article "My Body, My Property"¹⁰ is a comprehensive article on the said subject. He first quoted current situation of Law regarding organ sale. Afterwards he put forward the arguments against property approach in human body and replied each one of them. He suggested Market

¹⁰ Lori B. Andrews, "My body my property," *The Hastings Centre Report* 16. no. 5 (October 1986), 28-38.

approach in the human body to tackle the situation of shortage of organ for transplantation and research. He discussed the issue from the point of view of market's effects on donor, its effect on recipients, on society and on the doctor-patient relationship. He concluded that people should have the autonomy to treat their own parts as their property particularly their regenerative parts. Such an approach is beneficial for all parties' i.e. donors, recipients and society.

Muireann Quigley in her research paper "Property and the body: Applying Honoré"¹¹ adopted the liberal political theory which treats property relations as socially constructed bundles of rights. She selected Tony Honore's list of eleven types of legal relations that is considered to be the major components of the 'full liberal type of ownership' by him. She applied 'Honoré's conception of property' to the realm of the human body and its parts. She has undergone each element and analyzed human body in its light. In this way she has concluded that the self –ownership can be claimed on human body by placing it in the framework of the property theory.

Stephen Wilkinson's in his article "Commodification Arguments for the Legal Prohibition of Organ Sale"¹² scrutinizes the term "commodification" keeping in view the Human Organ Transplant 1989 that criminalized the commercial trading of Human organs. In the light of this scrutiny, he examined the claim that organ sale involves commodification of the human body and persons. He accomplished that although the commodification is a useful ethical concept but this argument has not proved itself persuasive against organ sale. He did not negate other arguments for prohibition but just concentrated on commodification argument and tried to prove that this particular justificatory strategy is failed in this regard.

Aaron D. Levine furnished very useful insight of the practice of oocyte donation in the United States, United Kingdom and Canada in his article "The Oversight and Practice of Oocyte Donation,

¹¹ Muireann Quigley, "Property and the body: Applying Honoré." *Journal of Medical Ethics* (November 2007) 33(11): 631–634.

¹² Wilkinson, Stephen. "Commodification Arguments for the Legal Prohibition of Organ Sale". *Health Care Analysis*, no.2 (2000): 189-201.

United Kingdom and Canada¹³”. He mentioned the current situation of how oocytes are acquired in these three countries and proved that Supply-side policies should be reviewed as these policies have influenced the use of this technology.

Kamāl al- Dīn Bikro’s article “Mada mā yamliku al- Insān min Jismihi,”¹⁴ is a detail account of the relationship of human being with his body according to *Shari‘āh*. He first encountered the question of ownership of human body in the light of Islamic perspective. In next section, he covered the issues regarding the purview and limits of the use of human body in medical researches and surgeries.

Muhammad Naeem Yasin threw light on the types of rights pertaining to the body of the living human being and of the dead in his article “The Rulings for the Donation of the Human Organs in the light of *Shari‘āh* rules and medical facts”¹⁵. He explicated the notions of sales of human organs and its donation according to the rulings of *Shari‘āh*.

Dr. ‘Ismatullah has dealt the issue of sale of human body and its parts by categorizing it in three parts i.e. Sale of Human blood, Sale of Human milk and sale of all human organs and its parts. He investigated in his “Bay‘al-‘Adah wa al-Ajzā al-Bashariya fi al-*Shari‘ah* Al- Islamiyyah”¹⁶ school of thoughts in this regard and presented their arguments. He concluded that the sale of human organs is not allowed.

¹³ Levine, Aaron D. “The Oversight and Practice of Oocyte donation in the United States, United Kingdom and Canada.” *HEC Forum* (2010), <http://www.springerlink.com/content/x776382177026857/fulltext.pdf>

¹⁴ Kamāl al-Dīn Bikro, Mada mā yamliku al- Insān min Jismihi,” *Mujjala al-Majma‘ al-Fiqh al-Islamī*, no. 7, 201-24.

¹⁵ Muhammad Na‘eem Yaseen, “The Rulings for the Donation of Human Organ in the Light of *Shari‘ah* Rules and Medical Facts.” *Arab Law Quarterly*, vol. 5, No. 1 (Feb., 1990), 49-87.

¹⁶ ‘Ismatullah ‘Inayatullah, “Bay‘ al-‘ Adah wa al-Ajzā al-Bashariya fi al-*Shari‘ah* Al- Islamiyyah” . *Al-Dirāsāt al-Islāmīyyah*, vol. 39, no. 2 (April 2003): 165-77.

Outline of thesis:

Thesis is divided into three chapters followed by conclusion and recommendations.

First chapter is further divided into two parts for the reason of its being a comparative study between *Shari'āh* and Law. This portion discusses the general concept of property and ownership both in Law and *Shari'āh*. It explicates its meaning, types, subject, object, modes of acquisition and restrictions.

Second chapter describes the concept of ownership and property in human body with regards to both set of rules. It explicates the division of opinions in relation to the issue and presents their arguments.

Third chapter deals with two sub issues i.e. commercial surrogacy and gametes sale. Firstly, it comprehensively defines these two terms and then it gives the stance of Law regarding commercial surrogacy and gamete sale and present the point of view of *Shari'āh* in this regard. Conclusion throws a comparative glance on the above mentioned issues and provides suggestions and recommendations.

CHAPTER NO. 1

PROPERTY AND OWNERSHIP IN SHARĪ‘AH & WESTERN LEGAL THOUGHT

1. CONCEPT OF PROPERTY AND OWNERSHIP IN WESTERN LEGAL THOUGHT

1.1- NOTION OF PROPERTY

Property is generally recognized as a thing which can be used and sold by its owner¹. An object that belongs to him, a thing whose all rights are owned by him, an article for which use, he is not answerable to anyone. However when a juristic mind ponders over this word, a slight different picture should appear in his brain. Whatever comes in the layman’s mind is the object of property, not the correct concept. According to the true original phenomenon, “Property” is not a thing but a relationship between the person and the thing². This idea has been well propounded by Gray and Symes in their book “Real Property and Real People”. In their view, lawyers and non-lawyers consider property as the thing which is owned. In common parlance, it is harmless but as a legal phenomenon, considering property as a thing creates mal-understanding of the certain features of the term. Property is the state of being ‘proper’ to a particular owner.³

The notion mentioned above, was originally reiterated by Famous Jurist Jeremy Bentham⁴ who tried to clarify the confusion of the idea of property from its object which is not

¹ Olin L. Browder and others, *Basic Property Law* (Minnesota: West Publishing Company, 1984), p. 2.

² K. J. Gray and P.D. Symes, *Real Property and Real Person* (London: Butterworth, 1981), p. 7.

³ Ibid.

⁴ J. Bentham, *An Introduction to the Principles of Morals and Legislations*. ed. W. Harrison (Oxford, Basil Blackwell, 1948), 33.

only amalgamated by non-lawyers but many lawyers and jurists too. For instance, Bryn Perrins is of the view that property stands for the thing owned. He referred to history in this regard and says that in past, when people used to refer their properties, they used to say, "It is the object of my property." But now 'object' is disappeared and it is said that "it is my property". Hence, property is not only the ownership of a thing but the thing itself too.⁵

Jeremy Bentham had criticized this kind of approach in his book "An Introduction to the principles of Morals and Legislation" and observed that in common parlance, the words 'object of' are now deleted and the deficient phrase has to express the entire Legal Phenomenon.⁶

However many writers like Alison Clarke and Paul Kohler in their book "Property Law: Commentary and materials" disapprove this perception and support the consideration of thing as 'Property'⁷. They wrote: "The use of the term property to denote the thing is sometimes frowned upon."⁸

They commented that it is important to differentiate the object in relation to which rights are claimed and the right themselves but describing both as property does not create confusion.⁹

But this conclusion does not seem to be correct as it mingles the philosophy of property with its objects and subjects. Whenever any legal concept is to be understood, it should be done according to its true philosophy, not what the common usage is or what is more convenient to

⁵ Bryn Perrins, *Introduction to Land Law* (London: Cavendish Publishing Limited, 1995), 1.

⁶ J. Bentham, *op.cit.*, p. 337

⁷ Alison Clarke and Paul Kohler, *Property Law: Commentary and Materials* (New York: Cambridge University Press, 2005), 17.

⁸ *Ibid.*

⁹ Clarke and Kohler, *Property Law: Commentary and Materials*, p.17.

realize. Therefore 'Property' should be described as sum of the relationships existing between the subject (identifiable person) and the object (thing).¹⁰

Definitions from some law dictionaries and encyclopedias are useful for comprehension of the nature of this relationship. Black's Law dictionary defines the term 'property' in these words:

In the strict legal sense, an aggregate of rights which are guaranteed and protected by the government. The term is said to extend to every species of valuable right and interest. More specifically, ownership; the unrestricted and exclusive right to a thing: The right to dispose of a thing in every legal way, to possess it, to use it, and to exclude everyone else from interfering with it. That dominion or indefinite right of use or disposition which one may lawfully exercise over particular things or subjects. The exclusive rights of possessing, enjoying and disposing of a thing. The highest right a man can have to anything; being used to refer to that right which one has to lands or tenements, goods or chattels, which no way depends on another man's courtesy.¹¹

International Encyclopedia of Social Sciences describes the term 'property' in this way:

Property is the name for a concept that refers to the rights and obligations and the privileges and the restrictions that govern the behavior of man in any society toward the scarce objects of value in that society. People everywhere desire the possession of things which are valuable by cultural definition and by which this desiring become scarce: sunlight, fresh air. Land, food, rituals, medicine bundles, masks or automobiles. Socially sanctioned customs or police-enforced laws, which define rights and obligations about ownership, control competition for these desired good. What is owned is property.¹²

Thus property are the rights of ownership¹³ that grants exclusive right to possess, use and dispose of the object of that property without intervention from any other person¹⁴. But the rights of ownership are not that simple. Right to use splits up in many different rights and other rights are used in many different senses. The term 'Ownership' calls for some explanation.

¹⁰ Mark E. Roszkowski, *Business Law: principles, cases and policy* (Harper Collin, 1989), p.140.

¹¹ *Black's Law Dictionary* 6th Ed., Bryan A. Garner & Henry Campbell Black Eds., s.v. "property."

¹² *International Encyclopedia of the Social Sciences*, David L. Sills Ed., vol.11, s.v. "property."

¹³ Lawrence C. Becker, *Property Rights* (London: Routledge & Kegan Paul Ltd, 1977), p. 18; Perrins, *Introduction to Land Law*, p. 2.

¹⁴ Corley and others, *Principles of Business Law* (New Jersey: Prentice-Hall, 1986), p. 389; Jane P. Mallor and others, *Business Law and the Regulatory Environment* (New York: Irwin McGraw-Hill, 1998), p. 435.

1.2- Ownership

Ownership consists of an innumerable number of claims, Liberties, powers and immunities with regard to the thing owned.¹⁵ Many writers have rendered their bundles of rights that constitute 'ownership' in their opinion. But Honoré's list of the elements is most comprehensive and mostly referred to.

According to him, full ownership consists of following elements:

i. The right to possess

Ownership grants the exclusive physical control of the thing¹⁶. A thing will be physically possessed, if the actual power over the thing and the ability to hold and make use of it is with the owner in case of its being corporeal¹⁷ while it will be possessed metaphorically if it is incorporeal or intangible.¹⁸ It may be considered as possessed when it will exclude others from using it as in the cases of copy right, patent rights, trade marks or trade names etc.

ii. The right to use

Second right granted by 'ownership' is the right to use the thing owned¹⁹ and its personal enjoyment by the owner.

iii. The right of management

It is the right of owner to decide that by whom and in what manner a thing will be utilized²⁰.

¹⁵ Dias, *Jurisprudence* (London: Butterworth and Co. Ltd, 1976), p. 395.

¹⁶Edward Allen Kent, ed., *Law and Philosophy*, by A.M Honoré (New Jersey: Prentice-Hall, 1970), p. 537; P. J Fitzgerald, *Salmond on Jurisprudence*.12th Ed. (London: Sweet & Maxwell, 1966), p. 246.

¹⁷ Roszkowski, *Business Law: principles, cases and policy*, p. 141.

¹⁸ Becker, *Property Rights*, p. 18.

¹⁹ Kent, ed., *Law and Philosophy*, p 539; Fitzgerald, *Salmond on Jurisprudence*, p. 246; Roszkowski, *Business Law: principles, cases and policy*, p. 140.

iv. The right of income

Right of income grants the owner exclusive right to derive benefits from the thing owned and it is his prerogative to permit others to use it or not²¹.

v. The right to the capital

An owner can waste, modify, destroy or alienate his property. He possesses this power by virtue of being its owner²².

vi. Security

Owned object must be secured and immune from expropriation by any person other than the owner.²³

vii. Transmissibility power

Ownership bestows the owner with the right to bequeath the object whomsoever he wants or devise it in whatever manner he wants²⁴.

viii. The absence of term

Ownership grants these rights for good without any limitation of time.²⁵

ix. The Impermissibility of Nuisance

Ownership does not only grant the rights but also makes the 'owner' bound by some duties. His foremost duty is to avoid any kind of use of property that is harmful for others.²⁶

²⁰Kent, ed., *Law and Philosophy*, p. 539; Becker, *Property Rights*, p. 18.

²¹Kent, ed., *Law and Philosophy*, p. 540; Roszkowski, *Business Law: principles, cases and policy*, p. 141.

²²Kent, ed., *Law and Philosophy*, p. 540; Fitzgerald, *Salmond on Jurisprudence*, 44; Roszkowski, *Business Law: principles, cases and policy*, p. 141.

²³ Kent, ed., *Law and Philosophy*, 541; Becker, *Property Rights*, 18; Roszkowski, *Business Law: principles, cases and policy*, p. 140.

²⁴Kent, ed., *Law and Philosophy*, p. 542; Roszkowski, *Business Law: principles, cases and policy*, p. 141.

²⁵ Kent, ed., *Law and Philosophy*, p. 543; Becker, *Property Rights*, p. 18.

²⁶ Kent, ed., *Law and Philosophy*, p. 544.

x. **Liability to execution**

“Owned object” is subject to be taken away for repayment of debt.²⁷

xi. **Residuary Character**

Residuary character indicates the existence of the rules that governs the reversion of lapsed ownership rights.²⁸

1.3- Subjects of the property

Subjects of the property are the one, who are the beneficiaries of the relationship of the property, who enjoys all the legal consequences of this relationship. The ‘subjects’ of property kept on changing from time to time. One group of people, who were precluded from the category of ‘subjects’ in one era, were later considered competent to hold property in their name and deal with it²⁹. For e.g. there was a time when various different classes of laborer and slaves weren’t legally entitled to be the ‘subjects’ of property.³⁰ Margaret Davies quoted the Kantian philosophy in this regard entities that are moral ends and that are only means are distinguished by Kantian philosophy. Persons can own property, thus they are legal subjects and moral ends. Historically, this distinction was not drawn, when slavery was in practice. In those days, some people were deemed as property rather than person and thus mean rather than end.³¹

²⁷ Ibid.

²⁸ Kent, ed., *Law and Philosophy*, p. 544; Fitzgerald, *Salmond on Jurisprudence*, p. 44; Becker, *Property Rights*, p. 18.

²⁹ Gray and Symes, *Real Property and Real Person*, p. 10.

³⁰ Ibid.

³¹ Margaret Davies, *Property: meanings, histories, theories*, 3rd Ed. (New York: Routledge-Cavendish, 2007), p. 13.

Same was the case with married women in England. As stated by Gray and Symes: “Even until relatively recently in England, the married woman was precluded from the legal capacity to hold property in her own name”.³²

As far as the case of minors is concerned, children are not free to deal with their property in western legal system without the consent of their parents or guardians, though they owe it³³. Likewise, if any major has become incompetent due to any reason, law will deprive him from dealing in his property. His property will be dealt by the guardian appointed by the court³⁴.

Governments, nations and religious organizations have been holding the properties in their names throughout the history.

The list of the ‘subjects’ enormously elongated with the change in the concept of “subject” in the course of time, as other entities, beside ‘real persons’ were added in it. It increased because of the recognition of other entities as ‘person’.³⁵ Different legal entities were created and named as juridical person and granted the capacity to legally hold the property in their names in recent history. They were given the equal status before law regarding ownership of the property. Today, these fictitious legal persons known as ‘corporate owners’ own great number of productive assets as noted by Encyclopedia of Britannica. It remarked, General incorporation Statutes have permitted fictitious legal persons to engage in a wide variety of profit

³² Gray and Symes, *Real Property and Real Person*, p.10.

³³ <http://www.britannica.com/EBchecked/topic/479032/property-law>.

³⁴ Ibid.

³⁵ Ibid.

making activities throughout the west. Now a large number of production assets are the property of fictitious legal person like corporations, *sociétés*, and *Gesellschaften*.³⁶

All of the above- mentioned Subjects have the right to hold the property in their names but these 'subjects' cant own a certain type of the property. For those types, state or community as a whole is a competent subject.³⁷ Water, air and wild animals etc are precluded from private ownership and included in the state or community ownership. Some of them may be appropriated by government like a private property for example government offices etc and some of them may be open to general public like parks etc. 'Property' owned by private individuals can any time be taken back and converted into state owned or community owned.³⁸

1.4- Objects of the property

"People everywhere desire the possession of things which are valuable by cultural definition and by which this desiring become scarce".³⁹ If this idea works in the relationship of property, then 'object' of the property has to change tremendously and frequently for sure as social and cultural norms and interest of the people are changing massively.⁴⁰ For instance, slaves used to be things capable of becoming 'objects' of the property at one time⁴¹. Gray and Symes wrote regarding the 'objects' of medieval times: "In medieval England, the husband was viewed as enjoying proprietary rights in relation to his wife, her domestic services and her productive capacity".⁴²

³⁶ <http://www.britannica.com/EBchecked/topic/479032/property-law>.

³⁷ Ibid.

³⁸ Ibid.

³⁹ *International Encyclopedia of the Social Sciences*, David L. Sills Ed., vol.11, s.v. "property."

⁴⁰ Gray and Symes, *Real Property and Real Person*, p. 11.

⁴¹ Perrins, *Introduction to Land Law*, p. 6.

⁴² Gray and Symes, *op.cit.*, p. 11.

Now these concepts seem very alien to us. Thus the idea of 'object' kept on changing with the changing norms, interest and ethics of the society. A massive shift came in the notion when in 19th and in early 20th century when 'land' was outclassed by company share as paramount object of commercial value.⁴³ Hence the notion of tangible things only capable of becoming the 'object' of the property was abolished. Debts, Patents, copy right, computer software and many other intangibles were added to the list⁴⁴. Goodwill became the property too⁴⁵. Thus with the passage of time, various types of intangible things and rights extended and many new avenues were opened.

Encyclopedia of Britannica noted that the government granted intangible rights widen a lot in the 19th and 20th centuries. Oldest of those rights are those rights which were given by States and international bodies to authors, inventors, manufacturers and tradesman. Copy rights were granted to encourage and safeguard the rights of the authors while patents were given to inventors for their protection and encouragement. Manufacturers and trades man were made contented by granting the protection of trademarks.⁴⁶

As mentioned above, many new avenues opened and many new articles entered in the ambit of "objects". In the same way, some 'objects' were precluded as well from this purview for example natural resources. Natural resources have been ruled out from private ownership in some western legal systems. However they are still considered as 'object' of private property in some other systems.

⁴³ Ibid.

⁴⁴ Bryn Perrins, *Introduction to Land Law*, p. 6.

⁴⁵ *Black's Law Dictionary* 6th Ed., Bryan A. Garner & Henry Campbell Black Eds., s.v. "property."

⁴⁶ <http://www.britannica.com/EBchecked/topic/479032/property-law>.

1.5- Theories of property

There are various schools of thoughts in relation to property rights in political philosophy. Some of these theories tend to justify the institution of private property whereas some of them merely expound the course of event as how property came to be⁴⁷. Some of them are revealed below;

a) Natural Law Theory

Natural Law theory advocates for 'private property'. This theory either starts with the notion of occupation or from the concept of creating property through labor⁴⁸. In view of Grotius, People in society divided things among them by agreement as all objects were originally *res nullius*. Men discovered those things which were not so divided and reduced them into their possession.⁴⁹

According to the idea of creation through labor, work or labor mixing that increases the worth of land, makes the worker lawful owner of that land⁵⁰. John Locke was the jurist who popularized this concept of 'private property' by his writing 'Two Treatises of Government'. He established the natural Law theory of unlimited individual property. Under this theory, one appropriates a thing *res nullius* by one's labor which thereby distinguishes that object from other objects⁵¹. Regarding the Lockean theory, Bjorkman and Hansson wrote:

On Locke's account, man is bound by a duty to God to preserve His creatures (including ourselves). We cannot carry out this duty efficiently without exclusive rights to land and other objects-that is, private property rights. When working, for instance, on a previously unclaimed plot of land or on a piece of wood we mix our labor with the object in question, thus adding value to it. On Locke's view, this

⁴⁷ George Whitecross Paton, *A Textbook of Jurisprudence* (New Delhi: Oxford University Press, 2007), p.539.

⁴⁸ Roscoe Pound, *An Introduction to the Philosophy of Law* (New Delhi: Universal Law publishing limited, 2006), p.114.

⁴⁹ *Ibid.*, p. 115.

⁵⁰ John Locke, *Two Treatise of Government* (London: R. Butler, 1821), p. 209.

⁵¹ *Ibid.*

process makes us the legitimate and exclusive owners of that plot of land or piece of wood.⁵²

Thus according to the said theory, when a person mixes his labor or work on a piece of land that is not claimed by anyone, this process makes him the lawful owner of that piece of land⁵³. In this way, the entitlement of the legal title of ownership transferred to the individuals who mix his labor or work on the unclaimed piece of work.

a) Metaphysical Theories of property

Natural rights theory of seventeenth and eighteenth century was replaced by metaphysical theories.⁵⁴ Kant was the first one who propounded metaphysical notion of property and rationalized his theory of acquisition.⁵⁵ According to this idea, there are three elements of acquisition:

- Prehension of an article that is not owned by any one⁵⁶.
- Interdiction of all others from using that object as theirs by an action of free will.⁵⁷
- Securing a sanction from long practical inviolability⁵⁸ as the supposed owner appropriated it as a permanent acquisition. And that inviolability is attained due to the law making force originated from the principle of reconciling wills according to a Universal law.⁵⁹

⁵² B Bjorkman and S O Hansson, Bodily rights and property rights, *Journal of medical ethics*, vol.32, no.4 (April. 2006), p. 209-214.

⁵³ Kent, ed., *Law and Philosophy*, by John Locke, p. 506.

⁵⁴ Pound, *An Introduction to the Philosophy of Law*, p. 114.

⁵⁵ Pound, *An Introduction to the Philosophy of Law*, p. 114.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Paton, *A Textbook of Jurisprudence*, p. 539.

⁵⁹ Ibid.

Hegel enhanced the Metaphysical theory by excluding the idea of occupation.⁶⁰ He regarded property as realization of the notion of liberty.⁶¹ His theory articulates that individual gives his liberty an external sphere by directing his will upon an external object.⁶² It entails that the actual appropriation of a thing as 'property' give rise to personality: in a sense, a person need property to be self-fulfilled⁶³. Resultantly, the object upon which his will is exercised becomes his.

Hegelian theory makes some control of property mandatory for the proper development of personality. Society has slowly progressed from status to contract and from community property to individual property. Man is freed by control of property, in this way liberty."⁶⁴.He purports, there are three elements to the actualization of property and the parallel formation of the person. Elements are the abstract person, placement of him into external world and the appropriation of a thing as property.⁶⁵

a) Historical Theory

Historical theory entails the course of line through which the institution of property has passed. This theory is mainly based on two concepts. I.e. the institution of private property has gradually and consistently developed from the beginning of the Law and that the individual ownership has stemmed out from the group interests.⁶⁶

Historically, there have been three stages in the History of Law of property with respect to the power of individuals to influence the actions of others in relation to materialistic objects.

⁶⁰Pound, *An Introduction to the Philosophy of Law*, p. 120..

⁶¹ Kent, ed., *Law and Philosophy*, by Morris Raphael Cohen , p. 530

⁶² Pound, op.cit., p. 120.

⁶³ Kent, ed., *Law and Philosophy*, by Morris Raphael Cohen, p.530; Davies, *Property: meanings, histories, theories*, p. 96.

⁶⁴ Paton, *A Textbook of Jurisprudence*, p. 540.

⁶⁵ Davies, *Property: meanings, histories, theories*, p. 97.

⁶⁶ Pound, *An Introduction to the Philosophy of Law*, p. 124.

- First stage was the just physical control of the object without any other element. This stage is called as natural possession or custody.⁶⁷
- Second stage is the protection of Law to hold such property for one's own purposes and this protection entitles the person to claim his property back if someone dispossesses him of it. It is known as Juristic possession.⁶⁸
- Law confers the exclusive or ultimate enjoyment and control of objects at the third and highest grade.⁶⁹

b) Sociological theories

There are many sociological theories, some of which are positivist, some psychological and some socio- Utilitarian. Positivists' theory claims that property is no more considered as private right; instead it is now comprehended in terms of Social function.⁷⁰ While a psychological sociological theory purports that the property is the result of the temptation of humans to gain material possession.⁷¹ Social development made it a social institution. Property is that institution that satisfies maximum number of wants according to the Social- Utilitarian theory.⁷²

B. Bjorkman and S O Hansson in their article "Bodily rights and property rights covered all sociological theories in one heading and called them "social constructivist theory of property"⁷³

⁶⁷Ibid.

⁶⁸Pound, *An Introduction to the Philosophy of Law*, p. 124.

⁶⁹Ibid.

⁷⁰Ibid.

⁷¹Ibid., p. 131.

⁷²Kent, ed., *Law and Philosophy*, by Morris Raphael Cohen, p. 531; Roscoe Pound, *An Introduction to the Philosophy of Law*, p. 124.

⁷³B Bjorkman and S O Hansson, Bodily rights and property rights, *Journal of medical ethics*, vol.32, no.4 (April. 2006), p. 209-214,

This theory proposes that the society should choose that system of property rights that best promotes the social goods, such as justice and economic productivity⁷⁴. Society is free to select any system that is just and beneficial. It is the duty of government that it should formulate such laws that establish a system that works to meet these ends.⁷⁵ This notion can be found in the Utilitarian traditions. Jeremy Bentham articulated his views in these words: “There is no Natural property, property and law are born and must die together. Before the laws, there was no property: take away law, all property ceases.”⁷⁶

Henry Sidgwick was of the same view and wanted property laws to be selected according to the circumstances by taking into account different considerations.⁷⁷

Another Jurist Felix Cohen made some additions to this stance and believed that Law has given birth to property rights. Historically Laws were the expression of those who made and enforced them. According to him, a Law should be judged according to its effectiveness in promotion in good life of people. Thus property rights should be legislated in a manner that it promotes social goals of justice and economic production.⁷⁸

⁷⁴Ibid.

⁷⁵ Ibid.

⁷⁶ Jeremy Bentham, *Principles of Civil Code*, as quoted in B Bjorkman and S O Hansson, Bodily rights and property rights, *Journal of medical ethics*, vol.32, no.4 (April. 2006), p. 209-214.

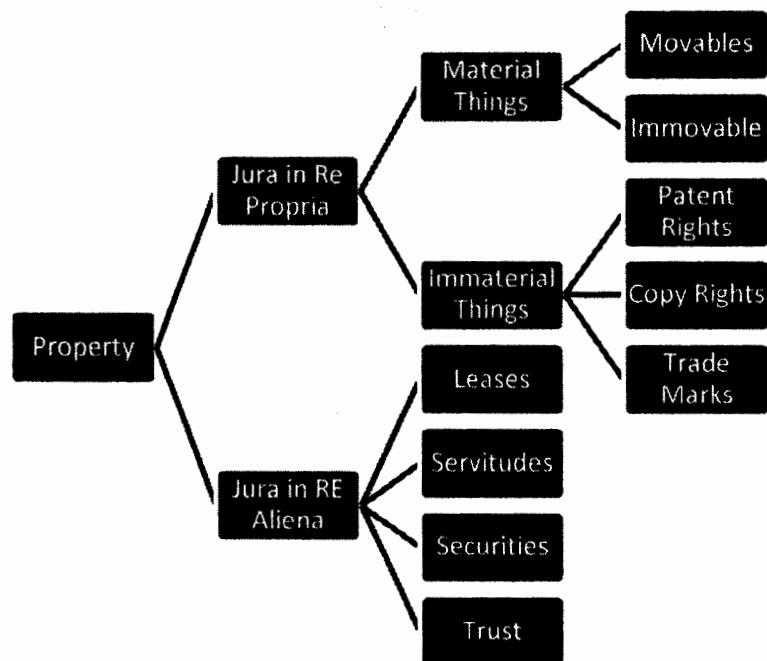
⁷⁷ B Bjorkman and S O Hansson, Bodily rights and property rights, *Journal of medical ethics*, vol.32, no.4 (April. 2006), p. 209-214,

⁷⁸ Cohen Fs, Dialogue on Private as quoted in B Bjorkman and S O Hansson, Bodily rights and property rights, *Journal of medical ethics*, vol.32, no.4 (April. 2006), p. 209-214.

1.6- Classification of property

Property has been classified in various ways in different ways. However, Salmond has divided it in the more understandable and splendid manner. He has divided the property into two types according to ownership of property rights in one owns property or in the property of another.⁷⁹

Property is divided into *Jura in re propria* and *jura in re aliena*



In this chart only land and chattels are corporeal while rest of *Jura in re propria* and all of *jura re aliena* are incorporeal.⁸⁰

i. Jura in Re Propria

All those rights are included in *Jura in re propria* that are free of encumbrances and third party claims⁸¹. In other words, it is the right of one in his 'own' land. It is further divided into two kinds that are material things and immaterial things.

⁷⁹ P. J Fitzgerald, *Salmond on Jurisprudence*, p. 413.

⁸⁰ P. J Fitzgerald, *Salmond on Jurisprudence*, p. 413.

A. Material things

Material things are divided into movable and immovable or Land and chattels.⁸²

Movable and immovable property

English law recognizes movable and immovable properties as 'chattels and lands'. P.J Fitzgerald in his book 'Salmond on jurisprudence' mentioned those elements which land or immovable properties are comprised of⁸³. It states that a land includes following elements:

- a) A determinate piece of the earth's surface is occupied by the land⁸⁴.
- b) An immovable property not only occupies the land on the surface of the earth but also includes the ground below the surface.⁸⁵
- c) *Cuius est solum, eius est usque ad caelum et ad inferos* is a principle of property law which means that for whoever owns the soil, it is theirs up to Heaven and down to Hell but in English law, now it is explicitly stated in the Statute that owner or occupier of the land will not have the right to object if an aircraft flies over the land at a reasonable height. Moreover, the right to air and light of neighbors curtails this right too. Therefore, the maxim is no longer in practice in its true spirit.⁸⁶
- d) Things which lie on the surface of the earth or beneath are considered to be a part of that land if they are placed in their natural state. For examples minerals, crops and vegetation.⁸⁷

⁸¹ Imran Ahson Nyazee, *Jurisprudence* (Islamabad: ALSI, 2007), p. 232.

⁸² Fitzgerald, *op.cit.* 413.

⁸³ P. J Fitzgerald, *Salmond on Jurisprudence*, p. 413.

⁸⁴ Ibid.

⁸⁵ Ibid..

⁸⁶ P. J Fitzgerald, *Salmond on Jurisprudence*, p. 416.

⁸⁷ Ibid.

- e) All those articles which are attached to the land as a result of human effort, those articles will be considered a part of the land if they had been attached with the intention of permanent annexation for example walls and roofs etc but if the intention was temporary then it will be included in immovable for example carpets etc.⁸⁸
- f) The division of movable or immovable is not only limited to material things but law also applies them to the rights as well. If the rights are over movables then the rights will be considered as movables similarly rights will be considered as immovable if they are over immovable. All those rights will also be deemed as movable if they don't have any material object at all.⁸⁹

B. Immaterial Things

As *Jura in re propria* includes those types of rights that are free from all kind of encumbrances and any kind of claim from any third party⁹⁰. Thus all those properties are included in this category which is the outcome of human brain. Whatever a person creates anything, the right to use and benefit from that creation should be exclusively his. There are almost five kinds of *jura in re propria* in immaterial things as given below:

a) Patents right

A patent right is a grant of the exclusive right to make, use and sell an invention for a term of years.⁹¹ This right is granted by the government and it usually lasts for almost 17 years effecting from the date when it was first filed.⁹² Government grants this right for

⁸⁸ Ibid.

⁸⁹ Ibid..

⁹⁰ Imran Ahson Nyazee, *Jurisprudence* (Islamabad: ALSI, 2007), p. 232.

⁹¹ Roszkowski, *Business Law: principles, cases and policy*, p. 703.

⁹² Ronald A. Anderson, *Business Law* (Ohio, South-Western Publishing co., 1980), p. 272;
<http://www.lectlaw.com/def2/p014.htm>

the encouragement of the full disclosure of invention that will eventually be accessible for general public.⁹³ Machines, a process,⁹⁴ chemical composition of matter or such things can be patented but the ways of carrying on the business, scientific principles or such things cannot be patented unless there is some corporeal thing that is based upon them⁹⁵. This property right endows with the exclusion that no other person can manufacture, utilize, sell or offer to sell that invention which is the patented one as long as the term of the patent is in effect.

b) Copyrights

Copy rights are granted to authors so that they have the exclusive right to possess, prepare, publish and sell their work and they can authorize others to do the same.⁹⁶

Copyright related to literary work

As the name indicates the subject matter of this right is literary work⁹⁷ that is the literary expression of facts or thoughts.⁹⁸ The person who employed his labor and skill as the exclusive right of reproducing, publishing, selling or distributing that literary expression of ideas, notions, thoughts or facts as it is his property.⁹⁹ Owner of the copy right can seek injunction, damages, accounts and other options conferred by law if his said is infringed by any one.¹⁰⁰

⁹³ Roszkowski, *Business Law: principles, cases and policy*, p. 703.

⁹⁴ Thomas J. Harron, *Business Law* (Boston: Allyn and Bacon, 1981), p. 479.

⁹⁵ Anderson, *Business Law*, p. 273.

⁹⁶ Harron, *Business Law*, p. 479.

⁹⁷ Roszkowski, *Business Law: principles, cases and policy*, p. 706.

⁹⁸ Nyazee, *Jurisprudence*, p. 316.

⁹⁹ Fitzgerald, *Salmond on Jurisprudence*, p. 416; <http://www.merriam-webster.com/dictionary/copyright>

¹⁰⁰ S.K Dasgupta, *Mercantile Law* (New Delhi, Capar and Company, 190), p. 546.

Copy right related to artistic work

Artistic copy right operates over artistic design in all its forms¹⁰¹ such as painting, drawing, sculpture, photography etc. but the object of this law is not the thing created itself but the form which is impressed on it. A painting or a photograph when it is sold becomes the property of the buyer but the form on it only belongs to the creator¹⁰². No person can copy it without his permission as it his property.

Copyright related to music and drama

No person is authorized to copy the musical or dramatic work, musical compositions,¹⁰³ pantomime and chorographic work of any artist or playwright without his permission.¹⁰⁴ He alone has got the exclusive right of its depiction or performance and any unauthorized performance will have to face the charge. He has got his proprietary rights as it is his property.

c) Trade-names, trade- marks and Commercial good- wills

Last type of *jura in re-propria* in immaterial things is the proprietary rights of trade-names, trade- marks and commercial good wills. "It is any word, name, symbol, or device or any combination thereof adopted and used by the manufacturer or merchant to identify and distinguish his goods, including a unique product, from those manufactured or sold by others and to indicate the source of goods."¹⁰⁵ A trade name represents or signifies the reputation of a person's business, vocation or occupation as a whole, whereas a trademark/mark

¹⁰¹ Nyazee, *Jurisprudence*, p. 316.

¹⁰² Fitzgerald, *Salmond on Jurisprudence*, p. 422.

¹⁰³ Harron, *Business Law*, p. 479.

¹⁰⁴ Roszkowski, *Business Law: principles, cases and policy*, p. 706.

¹⁰⁵ *Ibid.*, p. 707.

symbolizes a person's goods or services¹⁰⁶. The person who establishes a business by employment of his skill and labor, gains an interest in the good will of it.¹⁰⁷ Trade mark is any symbol, design or any word that identifies a product or a service.¹⁰⁸

ii. Jura in Re Aliena

Jura in re-aliena are those rights which are not free from the claims of third party; rather they are encumbered by their claims.¹⁰⁹ This right is owned by the third party who has the claim who prevents the owner of the property from transferring the property to any other person.¹¹⁰

a. Leases

As *jura in re aliena* symbolizes the right of someone over the property of another, therefore 'lease' has the right to fall in this category as the contract of lease provide the right to possess and utilize the property which is owned by some other person¹¹¹. A person will be entitled to be called as lessee if he possesses rightfully a land that is not in his ownership. Similarly lessor will be the one who is owner of the property but not possessing it. He has transferred his right to possess and use the property through the contract of lease for consideration known as 'rent'.¹¹²

b. Servitudes

By the lease a person gets the right to possess and utilize the property whereas in servitudes a person does not possess a piece of land but gets a right to the limited use of it¹¹³ for example

¹⁰⁶ <http://www.lectlaw.com/def2/t037.htm>

¹⁰⁷ Fitzgerald, *Salmond on Jurisprudence*, p. 422.

¹⁰⁸ Anderson, *Business Law*, p. 274.

¹⁰⁹ Anderson, *Business Law*, p. 274.

¹¹⁰ Ibid.

¹¹¹ Paton, *A Textbook of Jurisprudence* (New Delhi: Oxford University Press, 2007), p. 473; Roszkowski, *Business Law: principles, cases and policy*, p. 751; Mallor and others, *Business Law and the regulatory Environment*, p. 494.

¹¹² Roszkowski, *Business Law: principles, cases and policy*, p.751.

¹¹³ Ibid.

easement rights¹¹⁴. An easement is an interest in land that is owned by someone else which grants the owner of easement a limited and specified use or enjoyment of the land of other.¹¹⁵

There are two types of servitudes. Servitude is called a private servitude if it is allocated to a specific person only. It is named as real servitude in English Law.¹¹⁶ For example only a neighbor is entitled and he can claim the right to the passage of air and light to the house whereas a public servitude is the one where right to limited use has been granted to a large number of people or indeterminate persons. For example, right of the public to pass through a particular field or house.¹¹⁷

c. Securities

Securities serve the purpose of ensuring the enjoyment of some other right. Security right and the other right whose enjoyment is ensured are vested in the same person¹¹⁸. Mortgages and liens are the two types of the securities¹¹⁹. These two terms are defined in the 'Salmond on jurisprudence' in these words:

"A mortgage, it is sometimes said, is a security created by the transfer of the debtor's property to the creditor, while a lien is merely an encumbrance of some sort created in favor of the creditor over property which remains vested in the debtor; a mortgagee is the owner of the property, while a pledge or other lienee is merely an encumbrancer of it."¹²⁰

¹¹⁴ Anderson, *Business Law*, p. 684.

¹¹⁵ Browder and others, *Basic Property Law*, p. 512; Roszkowski, *Business Law: principles, cases and policy*, p. 791.

¹¹⁶ George Whitecross Paton, *A Textbook of Jurisprudence*, p. 524.

¹¹⁷ Nyazee, *Jurisprudence*, p. 428.

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ Fitzgerald, *Salmond on Jurisprudence*, p. 431.

The encumbrance of the mortgage can be created by any kind of right which is transferable or that may be sold or conveyed.¹²¹ Shares, debts, leases, patents, copyrights, leases, servitude, shares, land or chattels; these entire can be mortgaged.¹²²

Debtor remains the equitable or beneficial owner of the property though he assigns his property to creditor. He possesses the right of redemption.¹²³ On the other hand, mortgagor has no beneficial interest in the mortgaged property. He has only the right to hold that in trust unless his debt is paid.¹²⁴

Another type of security is lien. A person has the right to retain the 'property' of someone else as 'lien' until his claims are satisfied by the owner of that property.¹²⁵ Artisans, common carriers and innkeepers had the right to retain the property as lien at common law because they had enriched benefitted the property in some way¹²⁶. Salmond calls the 'lien' as true form of security. He remarked that lien grants the creditor the rights of sale and possession which bestows the creditor enough protection.¹²⁷

d. Trust

"A trust is a legal relationship where a person is bound by a duty to have the legal title to the property and use it for the benefit of another person.¹²⁸ The creator of this legal obligation is called a 'donor, settler or author' and the subject for whom it is created is called

¹²¹ Anderson, *Business Law*, p.736.

¹²² Fitzgerald, op.cit. p.431.

¹²³ Anderson, op.cit. p. 736.

¹²⁴ Fitzgerald, op.cit., p. 431.

¹²⁵ Paton, *A Textbook of Jurisprudence*, p. 24.

¹²⁶ Harron, *Business Law*, p. 534.

¹²⁷ Fitzgerald, *Salmond on Jurisprudence*, p. 431.

¹²⁸ Mallor and others, *Business Law and the regulatory Environment*, p. 525.

'beneficiary'¹²⁹, while the person for whose benefit the institution of 'trust' is created is called 'beneficiary' and 'trustee' is the name of the person to whom property is transferred in trust.¹³⁰

Trustee possesses the legal title of the trust property¹³¹ while beneficiary enjoys the equitable title of the property¹³². It can be said that the real owner of the trust is beneficiary as it is him for whose benefit, trust has been created.¹³³

Laws are different for the property of 'trust' as property rights are divided into two different individuals¹³⁴. Some of the rights are vested in the 'trustee' where as some rights go to the 'beneficiary'. Thus 'property rights' are split up. Trustee administers and manages the property. Whereas all the benefits and fruits of the trust go to the 'beneficiary' while they have no right to claim the 'title'.¹³⁵

1.7- Modes of Acquisition of Property

i. Possession

First mode of acquisition of 'property' is its possession. Title of material object is acquired by its possession.¹³⁶

If a person acquires possession of an object and that object was not in the ownership of anyone before his possession,¹³⁷ in this case the acquisition of possession awards the title which

¹²⁹ Mallor and others, *Business Law and the regulatory Environment*, 525;

<http://www.reference.com/browse/trust>

¹³⁰ Anderson, *Business Law*, p. 736.

¹³¹ Ibid.

¹³² Mallor and others, *Business Law and the regulatory Environment*, p. 525.

¹³³ Ibid.

¹³⁴ Anderson, *Business Law*, 738.

¹³⁵ Ibid.

¹³⁶ Fitzgerald, *Salmond on Jurisprudence*, p. 434.

¹³⁷ Paton, *A Textbook of Jurisprudenc*, p. 489; Mallor and others, *Business Law and the regulatory Environment*, p. 436.

proves good against the entire world. For example, a bird in the sky or a fish in the ocean and a wild animal in a jungle will become the property of the one who first obtains possession of it.¹³⁸ This title will be good against the whole world. Thus property can be acquired through possession.¹³⁹

If an object possessed by a possessor, is owned by someone else then said object will have two owners. True owner's ownership will be perfect and absolute whereas possessor's ownership will be imperfect. The ownership of a possessor will be called 'possessory ownership'.¹⁴⁰ Possessor's title is good against the entire world but not in front of the true owner. If anyone other than the true owner dispossesses the possessor from the object, he can recover that object as his title is good against the whole world except the true owner. His title is superior to all persons except the true owner. But his title has no value against the true owner.¹⁴¹

ii. Prescription

Second mode of acquisition of property is 'prescription'. Prescription is actually the consequence of lapse of time.¹⁴² Sometimes the lapse of time creates the rights. Prescription creates the 'ownership right' if it is accompanied with the possession¹⁴³. A person who acquires the possession of a land and enjoys it for the term proposed by the limitations will at the end of the statutory period acquire the legal title¹⁴⁴. For example a person starts owning an easement right if he possesses that for twenty years.¹⁴⁵ But for this mode of ownership, continuous exercise and

¹³⁸ Anderson, *Business Law*, p. 280; Mallor and others, *Business Law and the regulatory Environment*, p. 436.

¹³⁹ Anderson, *Business Law*, p. 272.

¹⁴⁰ Fitzgerald, *Salmond on Jurisprudence*, p. 434.

¹⁴¹ Fitzgerald, *Salmond on Jurisprudence*, p. 435.

¹⁴² Nyazee, *Jurisprudence*, p. 317.

¹⁴³ Fitzgerald, *op.cit.*, p. 435.

¹⁴⁴ Corley and others, *Principles of Business Law*, p. 418.

¹⁴⁵ *Ibid.*

enjoyment of that right is necessary¹⁴⁶. Prescription does not only create rights but also extinguish it. It is called as 'negative or extinctive prescription'¹⁴⁷. If a 'debt' becomes payable and the creditor does not sue for it for six years, in that case his right will be destroyed. Thus prescription has two opposite kinds of effects.

iii. Agreement

Agreement involves all those kinds of contract by which ownership of a 'property' is transferred from one party to another.¹⁴⁸ For example sale that is the most common way by which title and ownerships are transferred.¹⁴⁹ Assignment and grant are its two types. In assignment those rights are transferred that were already existent whereas in grant new rights are born through encumbrance.¹⁵⁰ In sale, a party alienates its property for a consideration to another party, whereas 'gift' is given without any consideration.

iv. Inheritance

When a person dies, his inheritable rights devolve upon his personal representatives¹⁵¹. Property will be divided among heirs according to the will made by the deceased and if no such will is present, in such case assets will be distributed according to the laws of intestacy.¹⁵² If a will has been left by deceased, it must meet the official requirement of will.¹⁵³ It must be made in writing, shall be signed by testator or any other person who will sign in deceased presences and by his directions¹⁵⁴. Signature of testator will be witnessed by two witnesses who will attest the

¹⁴⁶Roszkowski, *Business Law: principles, cases and policy*, p. 793.

¹⁴⁷Nyazee, *Jurisprudence*, p. 317.

¹⁴⁸Fitzgerald, *Salmond on Jurisprudence*, p. 439.

¹⁴⁹ Robert N. Corley and others, *Principles of Business Law*, p. 3410.

¹⁵⁰Fitzgerald, *op.cit.* p. 439.

¹⁵¹ <http://www.reference.com/browse/inheritance>

¹⁵² Mallor and others, *Business Law and the regulatory Environment*, p. 522.

¹⁵³ Browder and others, *Basic Property Law*, p. 696.

¹⁵⁴Roszkowski, *Business Law: principles, cases and policy*, p. 814; Anderson, *Business Law*, p.720.

will in his presence¹⁵⁵. If the beneficiaries acquire property according to the will, in this case his acquisition will be termed as testamentary succession¹⁵⁶ but if no such will was present and the property was distributed and the said acquirer acquired the property according to law in this case it will be known as intestate succession¹⁵⁷. English Law of intestate commands the grant of 1/3 of the property to surviving spouse if there were children.¹⁵⁸ In case there are no children then he or she will get 1/2. Children will get 2/3 if there is surviving spouse otherwise they will get entire estate¹⁵⁹. Thus inheritance is a mode of acquisition by which beneficiaries acquire the 'property'.¹⁶⁰

2. CONCEPT OF OWNERSHIP AND PROPERTY IN SHARĪ'AH

The Islamic concept of property asserts that Allah The Exalted is the owner of everything. Everything that is in the heaven and earth belongs to him as Various *Quranic* verses proclaimed. For instance, Qur'ān says:

“To Allah belongeth the ownership of the heavens and the earth and all that is between”¹⁶¹

He has created all these things for mankind. Everything in the universe is meant to serve the human race. Allah The Exalted made the mankind his viceroy on the earth and made all

¹⁵⁵ Browder and others, *Basic Property Law*, p. 693.

¹⁵⁶ Roszkowski, *op.cit.* p. 810.

¹⁵⁷ Roszkowski, *Business Law: principles, cases and policy*, p. 810; Mallor and others, *Business Law and the regulatory Environment*, p. 522.

¹⁵⁸ Browder and others, *Basic Property Law*, p. 689.

¹⁵⁹ *Ibid.*

¹⁶⁰ Fitzgerald, *Salmond on Jurisprudence*, p. 119-20.

¹⁶¹ Al-Qur'ān 5:17

creatures subject to him. Earth is one among those creatures. A human being is the owner of a property as a metaphor for being a trustee and vice-gerent in charge of the property¹⁶².

Allah said in the Glorious Quran: “And spend out of that whereof He has made you heirs”¹⁶³.

Thus real ownership of everything belongs to Allah The Exalted but a certain form of property ownership¹⁶⁴ is granted to mankind by Him. Therefore all rights that are related to the property are bestowed and regulated by *Shari'ah*.

Islam permits mankind to own property without any limitation of quantity .Human beings can own a small amount of property or can enjoy great assets. Islam does not fence in the extent. During the life time of Prophet Muhammad (P.B.U.H), there were many companions who were billionaires and owned huge properties. Prophet (P.B.U.H) neither objected nor despised it.

Despite the great freedom of ownership, Islam put certain restriction as well. For example Islam excludes some of the properties from individual ownership and includes them in public ownership. Likewise, Islam does not urge for the equality of wealth and property between people but it also does not like the retention and impediment of wealth in few hands.

Though ownership confers upon the owner exclusive rights over an object to use it, enjoy it and dispose of the way he likes, yet certain boundaries have been drawn regarding its creation, use and disposal. Thus Islam bestows a large freedom of ownership but with a system of check and balance.

¹⁶²Dr. Wahbah Al-Zuhayli, *Al-Fiqh Al-Islami wa Adillatuh*, trans. Mahmoud A. El-Gamal (Damascus, Dār al-Fikr, 2002), p.443.

¹⁶³Al-Qur'ān 57:7

¹⁶⁴ Explanation of the peculiar notion of human ownership will be dealt in the definition portions.

2.1- Property

The term that is used for property in *Sharī'ah* is “*Māl*”. According to its literal meaning, anything that is owned is considered as “property”.¹⁶⁵

i. *Māl* in the Opinions of Jurists

• Hanfī School of Thought

Hanfīs have given a number of definitions regarding property. One of them is: “property is something towards which human nature is attracted and which is storable to be used at the time of need”.¹⁶⁶

Classical Hanfīs did not furnish any comprehensive definition of “*Māl*” but they stipulated two conditions to be fulfilled by any article to be entitled to be called as “*Māl*”.

Those two conditions are given below:

a) *Al-Aynia*

Object should have a corpus or it must have some physical existence so that it can be stored and possessed. In this way, they exclude usufruct of property¹⁶⁷, debt, right of pre-emption, right of

¹⁶⁵ *Al-Qamoos Al-Muheet*, Muhammad bin Yaqoob Al-Firouzabadi vol #4, Baab “ laam”, fasal “Al-Meem” s.v. mal.

¹⁶⁶ Zain al- dīn ibn Nujaim, *Al- Baher al- Rā'iq sharh Kanz al- Daqā'iq*, vol. 5 (Quetta: Al-Maktabah Al-Majdiyyah), p. 256 ; Muhammad Amin Ibn Ābidīn, *Radd al-Muhtār*, vol. 4 (Beirut: Dār al-Fikr, 2006) , 502; Dr. Muhammad Tahir Mansoori, *Islamic Law of contracts and business transactions* (Islamabad: Shari'ah Academy, International Islamic University, 2005), p. 190.

¹⁶⁷ For example Ibn Ābidīn excluded Usufruct from the ambit of ‘property’ and justified this exclusion on the ground that “property” is that which is storable for the use at a time of need. See Ibn Ābidīn, *Radd al-Muhtar*, vol. 4 (Beirut: Dār al-Fikr, 2006), p. 502.

passage, right to flow of water and intellectual property rights from the realm of the term “property”.¹⁶⁸

b) *Al-Tamawul*

Thing ought to have some worth among people in order to be qualified as ‘property’. If an object does not have any monetary value among people, that object will not be regarded as ‘property’ though it may have a corpus and may be stored. flies, mosquitoes or a drop of water are some of its examples.¹⁶⁹

• **Jamhor**

Mālikī School of Thought

In the words of Shātibī: ‘Property’ is something upon which ownership is exercised and owner can seize his property back if some other grabs it.¹⁷⁰

Shāfi‘ī School of Thought

According to Imam al-Shāfi‘ī an article anything with a value according to which it may be Sold, and for which a transgressor must compensate the owner, to the exclusion of items discarded by all people. He elucidates that an object is valuable if it has some benefit in it, whereas it will lack monetary value if it has no boon in it.¹⁷¹

¹⁶⁸ Ahmed faraj hussain, *al-Milkiyyah wa Nazariyyah al'aqd fi al-Sharī'ah al-Islamiyyah*, (M'uassissā al-Saqafah Al- Jami'ah), p. 7.

¹⁶⁹ Ibn Nujaim, *Al- Bahr al- Rā'iq*, vol. 5, p. 256.

¹⁷⁰ Abū Ishāq al- Shātibī, *Al- Muwaffaqāt*, vol. 2 (Beirut:Dār- al Ma'rifah), p. 17.

¹⁷¹ Muhammad al-Khatīb Shirbīnī, *al-Mughnī al-Muhtāj*, vol.1 (Beirut, Dār al-Fikr), p. 394.

As Shāfi'īs have only conditioned that it should be of some benefit and should have some value in order to be called as property therefore according to them, benefits of a corpus are property too independent of the corpus.

Hanbali School of Thought

In the sight of Hanbalīs an object should meet two stipulations in order to be declared 'property'.

The criterion for becoming 'property' is:

- It should be permitted by *Sharī'ah*.¹⁷²
- It should be beneficial¹⁷³.

In this way, wine, dead and pork are excluded from the purview of 'property'. Those items are also not properties which are only allowed in dire necessity or emergency like eating meat of dead animals. Likewise, useless and non-beneficial insects or animals cannot become the subject matter of property.¹⁷⁴

Summary of Opinions of Jamhor

According to Jamhor Jurists property is something:

- That has some monetary value among people.
- The value should be the result of some benefit permitted by *Sharī'ah*.

¹⁷² Abū Umer Muhammad Ibn Ahmed Ibn Qudāmah, *al-Sharh al-Kabīr*, vol. 4 (Dār al-Kitāb al-'Arabi), p. 7.

¹⁷³ Ibn Qudāmah, *al-Sharh al-Kabīr*, vol. 4, p. 13

¹⁷⁴ Ibid.

Hence Jamhor don't require any thing to have a physical presence whose storage and preservation can be possible. Their concept of 'property' permits the expansion of the ambit of property and includes those things which were not known in past such as intellectual property rights.

ii. Classification of Property in Sharī'ah

Property has been classified in various ways. Some of them are listed below.

a. Non- Marketable and Marketable Properties

Things whose use has been permitted by *Sharī'ah* in the ordinary circumstances and that can be converted in the private property are called Marketable things or "*Mutaqawwam*"¹⁷⁵. Wheat, barley, fruit trees, goat, sheep etc are all *Mutaqawwam*. Whereas those things which are not convertible into private property or can be but impermissible by *Sharī'ah* is called non-marketable things. They are "*Ghair Mutaqawwam*" for Muslims¹⁷⁶. Therefore fish in the ocean and bird in sky, wine or pork are non-marketable things. A Muslim is not allowed to transact in non-marketable things. Contracts made by Muslims are not valid if *Ghair Mutaqawwam* objects are the subject matter or consideration of the contract.¹⁷⁷

b. Moveable and Immovable

According to Jamhor jurists, moveable property is something which can be moved or shifted from one place to another place whether in original form and shape like animals, automobiles or in distorted form and shape as buildings become raw material when moved¹⁷⁸.

¹⁷⁵ Imran Ahsan Khan Nyazee, *Outlines of Islamic Jurisprudence* (Islamabad: ALSI, 2005), p. 218.

¹⁷⁶ Dr. Abd al-Salam Dawūd al-Ibadī, *al-Milkiyyah fi al-Sharī'ah al-Islamiyyah* (Omman, Maktabah al-Aqsa, 1974), p. 189.

¹⁷⁷ Nyazee, *Outlines of Islamic Jurisprudence*, p. 218.

¹⁷⁸ Abū Zahrah, *al-Milkiyyah wa Nazariyyah al-'Aqd* (Cairo: Dār al-Fikr al-'Arabī, 1999), p. 56; Hussain, *al-Milkiyyah wa Nazariyyah al-'aqd fi al-Sharī'ah al-Islamiyyah*, p. 16.

Mālikīs differed from Jamhor in this matter and argued that moveable property is only that thing which can be shifted from one place to another in its original form or shape.¹⁷⁹

Whereas immoveable property is the property which cannot be shifted from one place to another and that is only 'land' in the opinion of Hanfīs *and* Jamhor¹⁸⁰ jurist but according to Mālikīs buildings, trees etc are immoveable properties.¹⁸¹

The right of pre-emption and *bay'ul wafa* is not applicable on moveable property. It can only be applied in immoveable.¹⁸²

c. Fungible and Non-fungible:

Things for which a substitute can be found by weight, measure or quality in the market are called 'fungible' or '*Mithlī*'.¹⁸³ For example wheat or canes of specific quality are fungible. Whereas those articles are called 'non-fungible' or '*Qimī*' if the like of it is not available in the market and have their own value for example antiques, dresses of designer or paintings of artist, etc.¹⁸⁴

At the time of the contract, if the subject matter is fungible then only referring to it by weight, measure or quality would be enough. Whereas *mithlīyat* or non fungibles good's worth has to be determined by valuation. Therefore they are required to be examined at the time of the contract.¹⁸⁵

¹⁷⁹ Abū Zahrah, *al-Milkiyyah wa Nazariyyah al-'Aqd*, p. 60.

¹⁸⁰ *Ibid.*, 59.

¹⁸¹ Hussain, *al-Milkiyyah wa Nazariyyah al'aqd fi al-Sharī'ah al-Islamiyyah*, p. 17.

¹⁸² Nyazee, *Outlines of Islamic Jurisprudence*, p. 218.

¹⁸³ Mansoori, *Islamic Law of Contracts and Business Transactions*, p. 191.

¹⁸⁴ Hussain, *al-Milkiyyah wa Nazariyyah al'aqd fi al-Sharī'ah al-Islamiyyah*, p. 21; Nyazee, *Outlines of Islamic Jurisprudence*, p. 219.

¹⁸⁵ Nyazee, *Outlines of Islamic Jurisprudence*, p. 219.

d. Consumable and Non- Consumable

Consumable properties are those properties which are consumed when they are utilized like food. Whereas non consumable properties are those which are not consumed by its utilization for example house, automobiles etc.¹⁸⁶

2.2- Ownership

Milkiyah or *milk* is the word that is used for 'ownership' in *Sharī'ah*. Ownership (al-milkiyyah) is an Islamic Legal relationship between a human being and property, which renders the property specially attached to him, and which gives the owner the right to deal in that property unless there is a legal impediment to a specific dealing¹⁸⁷

i. Subject Matter of Ownership:

Non- beneficial objects can't become the subject matter of ownership as ownership is meant to have some usufruct or benefit. If the object is of no benefit then it will have no value among the people and that defeats the very purpose of ownership. For example flies, mosquitoes and insects etc can't be owned.¹⁸⁸

But with the passage of time if these things become beneficial for example if due to some scientific research it is proved that some useful medicine can be manufactured from the juice of an insect then it's status will be changed, consequently it may become the subject matter of ownership.¹⁸⁹

¹⁸⁶ Ibid.

¹⁸⁷ Al-Zuhaylī, *Al-Fiqh Al-Islāmī wa Adillatuh*, trans. Mahmoud A. El-Gamal, p. 443.

¹⁸⁸ Ibn Nujaim, *Al-Ashbāh wa Al- Nazā'ir*, vol.3 (Karachi, Idārah al-Qur'ān wa-al-'Uloom al-Islamiyyah, 1987), p. 256.

¹⁸⁹ Hussain, *al-Milkiyyah wa Nazariyyah al'aqd fi al-Sharī'ah al-Islamiyyah*, p. 204.

Objects that are prohibited by *Shari'ah* can't become subject matter for example wine, pig¹⁹⁰ and musical instruments etc. Jurists have agreed that these objects can't be owned by a Muslim.

Things that come within the rights of Allah can't be owned by any individual such as Mosques, *Bait-ul- Maal*, and Trusts etc.¹⁹¹

There are some objects which by nature deny being in individual property. Roads, rivers and ocean etc are its few examples. All people share the right of benefiting from them. That is the reason, why it is prohibited to give them in individual property.

ii. Types of Ownership:

Scholars of Islamic jurisprudence has classified 'ownership' in various ways on the basis of different conditions

A. Classification Based on Complete and In complete Ownership:

Four types of ownership come under this classification:

• Absolute Ownership

Absolute ownership constitutes the ownership of both the corpus and usufruct.¹⁹² It bestows the owner the right to carry out all lawful transactions like sale, gift and lend etc¹⁹³. He can benefit from the object without any limitation of time¹⁹⁴. His property is in his absolute ownership.

¹⁹⁰ Abū Bakr Muhammad ibn abū Sahl al-Sarakhasī, *Al- Mabsūt*, Vol. 24, (Beirut: Dār al-Ma'rifah, 1978), p. 46.

¹⁹¹ Abū Zahrah, *al-Milkiyyah wa Nazariyyah al-'Aqd*, p. 67.

¹⁹² Abū Farj Abd al-Rahmān ibn Rajab, *Al-Qawā'id* (Cairo: Maktabah al-Kūlliyyat al-Azhariyyah, 1971), p. 208.

¹⁹³ Al-Ibadī, *al-Milkiyyah fī al-Sharī'ah al-Islamiyyah*, p. 232.

Other three are different forms of incomplete ownership

- **Ownership of Corpus Only**

Shari'ah has no objection if a person owns only corpus of an object without owning its usufruct¹⁹⁵. For example if a testator bequeaths usufruct of a thing to one person by the way of bequest and the corpus to someone else or usufruct to one person and leave corpus for heirs.¹⁹⁶

- **Ownership of Usufruct Only**

Ownership of usufruct can be acquired by various modes in *Shari'ah*¹⁹⁷. Hire (*Ijāra*), loan (*I'arah*), Charitable Trust (*waqf*) and bequest¹⁹⁸ (*wasīyah*) are some of the transactions through which usufruct can be transferred.¹⁹⁹

- **Ownership of Intifa'**

Ownership of *Intifa'* is quite different from ownership of usufruct (*manfa'a*). *Intifa'a* only grants the right to benefit by himself.²⁰⁰ This right is not created by any contract. Residence in the hostel of educational institution, benefiting from Mosques, markets and public places are few illustrations of it²⁰¹. He cannot transfer this right or exchange it.

¹⁹⁴ Abū Zahrah, *al-Milkiyyah wa Nazariyyah al-'Aqd*, p. 33.

¹⁹⁵ Al-Ibadī, *al-Milkiyyah fi al-Shari'ah al-Islamiyyah*, p. 235.

¹⁹⁶ Ibn Rajab, *Al-Qawā'id*, p. 208; Abū Zahrah, *al-Milkiyyah wa Nazariyyah al-'Aqd*, p. 69.

¹⁹⁷ Ibn Rajab, *Al-Qawā'id*, p. 208; Al-Ibadī, *al-Milkiyyah fi al-Shari'ah al-Islamiyyah*, p. 236.

¹⁹⁸ Abū al-walīd Muhammad ibn Ahmad ibn Muhammad ibn Rushd al-Hafīd, *Bidāyat al-Mujtahid wa Nihāyat al-Muqtasid*, vol. 2 (Beirut: Dār al-Fikr), p. 273.

¹⁹⁹ Al-Ibadī, *al-Milkiyyah fi al-Shari'ah al-Islamiyyah*, p. 237.

²⁰⁰ Ibn Rajab, *Al-Qawā'id*, 209; Al-Ibadī, *al-Milkiyyah fi al-Shari'ah al-Islamiyyah*, p. 238.

²⁰¹ Hussain, *al-Milkiyyah wa Nazariyyah al-'aqd fi al-Shari'ah al-Islamiyyah*, p. 91; Abū Zahrah, *al-Milkiyyah wa Nazariyyah al-'Aqd*, p. 71.

Whereas ownership of *Manfa'a* is acquired through contract whether with consideration like *ijārah* or without consideration like *i'arah*.²⁰² He can enjoy this object by himself and can let out to other persons as well.

B. Classification Based on Owner

- Private Ownership

Ownership will be purported as 'private ownership' if an object is owned by an individual of a society or by a group of persons by the way of joint ownership as it is owned by some persons of society.²⁰³

- Communal ownership

Public roads, rivers, air, grass, water and fire etc are the objects which are jointly owned by the whole community and thus they come under public or communal ownership²⁰⁴. Every individual of the community has the equal right to employ these things and no one has the right to exclude others from benefiting these things as Prophet (P.B.U.H): "All mankind are partners in three things: fodder, water and fire."²⁰⁵

²⁰² Abū Zahrah, *al-Milkiyyah wa Nazariyyah al-'Aqd*, p. 71.

²⁰³ Mamoud A. Gulaid, *Land Ownership in Islam*, (Jeddah: Islamic Research and Training Institute, 2001), p. 19.

²⁰⁴ Nyazee, *Outlines of Islamic Jurisprudence*, 214; Al-Ibadī, *al-Milkiyyah fi al-Sharī'ah al-Islamiyyah*, p. 245.

²⁰⁵ Sulaymān ibn al-Ash'ath al-Sijistānī Abū Dāwūd, *Sunan*, Kitāb al-Buyū', Bā fi man' al-Maā, vol.3 (Beirut: Dār al-Hadīth, 1971), p. 751.

- State Ownership

Government has the right to transact in all those things which are state owned. State has the right to carry out all those transactions which are in public interest.²⁰⁶

2.3- Modes of Acquisition of Property in Sharī'ah

i. Capturing Mubāh Objects

Ownerless properties may be acquired and reduced into private ownership²⁰⁷. Surveillance and capturing of ownerless permitted objects, makes the capturer rightful owner²⁰⁸. Those things are considered *Mubāh* in *Sharī'ah* that are not property of anyone and are convertible into private property for example barren or life less lands, fish in ocean, bird in air, trees, mineral or metal in the interior or exterior of the earth. Some of these are discussed below:

Reclamation of the barren lands:

Barren lands are those lands that are not owned and benefitted from by anyone²⁰⁹. The ruling for such land is that whoever enlivens them will become its owner.²¹⁰ As enshrined in the following tradition of The Prophet (P.B.U.H) said: **“Whoever rehabilitates the barren land, it becomes his property”**.²¹¹

Thus revival of the lifeless land is a source of ownership but with two conditions. Those are:

²⁰⁶ Al-Ibadī, *al-Milkiyyah fi al-Sharī'ah al-Islamiyyah*, p. 275.

²⁰⁷ Ibn Nujaym, *Al-Ashbāh wa al-Nazā'ir*, vol. 3, p. 461.

²⁰⁸ Abū Bakr ibn Mas'ūd al-Kāsānī, *Badā'i' al-Sanā'i' fi Tartīb al-Sharā'ī'*, vol.6 (Beirut: Dār al-Kitāb al-'Arabī, 1982), p. 193.

²⁰⁹ Ibn Ābidīn, *Radd al-Muhtār*, vol. 6, p. 432.

²¹⁰ Ibn-Qudamā, *Al-Mughnī*, vol. 8 (Cairo: Hajar, 1999), p. 146; Ibn Ābidīn, *Radd al-Muhtār*, vol. 6 (Beirut: Dār al-Fikr, 2006), p. 431.

²¹¹ Muhammad ibn Ismā'īl Bukhārī, *Sahīh*, trans. Muhammad Abdullah, vol.1 (Lahore: Idārah Islamiyat, 2005), Bāb Fazl al-Zar' wa al-Ghars, Hadith no.2172, p. 984.

- **First Condition**

The land should lie far away from urban areas²¹². If the land is located near city, town or village, in that case, it will not be considered a dead land hence; its ruling will not be invoked.²¹³ Possession of such land will be interdicted as inhabitants of nearby population have the prior right to utilize such land for their benefit²¹⁴.

- **Second condition**

Legal permission from the leader of the state is second requirement for ownership of land acquired through reclamation but Jurists are divided regarding this stipulation.

Imam Abū Hanīfa has stipulated the term of legal permission from the leader of Muslim as all Muslims own the land jointly therefore it is not permitted for anyone to make it exclusively his without the permission of ruler²¹⁵ while Mālikīs ruled in this regard that the ruler's authorization is mandatory if the land is close to inhabited areas, but not for those far away²¹⁶. He narrated the tradition of Prophet (P.B.U.H) where he stated: "***A man is only rightful in which his leader is agreeable***".²¹⁷

²¹² Al-Kāsānī, *Badā'i' al-Sanā'i' fi Tartīb al-Sharā'i'*, vol.6, p. 194.

²¹³ Ibid.

²¹⁴ Ibn Ābidīn, *Radd al-Muhtār*, vol.6, p. 432.

²¹⁵ Muhammad bin Ali bin Muhammad Showkāni, *Nail al- Awtār* vol. 6 (Beirut, Dār al-Jail, 1973), p. 45.

²¹⁶ Showkāni, *Nail al- Awtār* vol. 6, 45; Abū al-Barkāt Syed Ahamad al-Dārdīr, *Al-Sharh al-Kabīr*, vol. 4 (Beirut: Dār al-Fikr), p. 69.

²¹⁷ Al-Kāsānī, *Badā'i' al-Sanā'i' fi Tartīb al-Sharā'i'*, vol.6, p. 195.

However, Imam Abū Yūsuf, Imam Mohammad²¹⁸, Imam al-Shāfi'ī²¹⁹ and Imam Ahmed ibn Hanbal²²⁰ differed in this regard. In their views, if first condition is met then there is no need of permission of leader as the traditions of Prophet (P.B.U.H) related to land reclamation don't stipulate any such condition²²¹.

Nowadays these rules are not applicable as all land is owned by state if it is not owned by any one.²²²

ii. Acquiring Possession of Ma'ādin and Kunoz

• Ma'ādin

The word *ma'ādin* is used for those minerals and natural resources, which Allah the exalted has placed on the surface of the earth or beneath it²²³. Diamond, silver, lead, petrol etc are some of its examples.²²⁴ Blessings of Allah the exalted that are present in the depth of ocean like pearls and corals are also included in *ma'ādin*.²²⁵

²¹⁸ Ibid.

²¹⁹ Shirbīnī, *al-Mughnī al-Muhtāj*, vol.2, p. 361.

²²⁰ Abū 'Abdullah Shams Al-dīn Mohammad Bin 'Abdullah al-Zarkashī al-Hanbalī, *Sharh al-Zarkashi 'ala Mukhtasir al-Kharkī* (Maktaba al-Abīkān), p. 270.

²²¹ Al-Kāsānī, *Badā'i' al-Sanā'i' fi Tartīb al-Sharā'ī'*, vol.6, p. 194.

²²² Nyazee, *Outlines of Islamic Jurisprudence*, p. 305.

²²³ Al-Kāsānī, *Badā'i' al-Sanā'i' al-Sanā'i'*, trans. Maūlānā Zafarullah Shafiq (Lahore: Markaz Tahqeeq Diyāl Singh Library trust, 1993), p. 203; Shirbīnī, *al-Mughnī al-Muhtāj*, vol.1, p. 394; Ibn Ābidīn, *Radd al-Muhtār*, vol.2, p. 318.

²²⁴ Shirbīnī, *al-Mughnī al-Muhtāj*, vol., p. 394.

²²⁵ Ibn Ābidīn, *Radd al-Muhtār*, vol. 2, p. 318.

Ruling for *Ma'ādin*

What if these *Ma'adin* are found in the private property of an individual?

Jamhor Jurists Hanbalīs²²⁶, Shāfi'is and Hanfīs²²⁷ are of the opinion that these *ma'ādin* will be deemed the property of the owner of land, whether these *ma'ādin* are present on the face of the earth or they are in the interior of earth.

Mālikīs have differed in this case. According to them, *ma'ādin* will not be owned by the owner of the property, Instead all Muslims are joint owner of these blessings of Allah The Exalted. Hence, Imam or leader of Muslims will have the right to transact in it the way he considers better in the interest of Muslims.²²⁸

If these *ma'ādin* are present in *mubah* land, in this case whoever will acquire the possession of some quantity of it will become the owner of that *ma'ādin* to that extent. For example if someone acquires the possession of some coal from the mine that is not owned by anyone, it will become his property with a fifth to be paid to the treasury.²²⁹

Today, *ma'ādin* can't be purported by any individual as all minerals belong to the state.

- **Kunoz**

Kunoz are those treasures which are buried by human beings beneath the earth. They can be called treasures-trove. For e.g. coins, jewels, weapons and other precious things.²³⁰

²²⁶ Ibn Qudāmah, *Al-Mughni*, vol.8(Cairo: Hajar, 1999), p. 132.

²²⁷ Ibn Ābidīn, *Radd al-Muhtār*, vol. 2, p. 321.

²²⁸ Hussain, *al-Milkiyyah wa Nazariyyah al'aqd fi al-Sharī'ah al-Islamiyyah*, p. 43.

²²⁹ Al-Zuhaylī, *Al-Fiqh Al-Islāmī wa Adillatuh*, p. 409.

²³⁰ Kāsānī, *Bādā'i' al-Sanā'i'*, p. 203.

Ruling for *Kunoz*

If it is depicted by circumstances that these treasures are of pre- Islamic era and no *dhimmi* or Muslim is its owner then it will be the property of finder if he finds that in his property or from the land which has no owner. If those treasures are found in the land of the state, in that case state will be its owner.

If these coins are of Islamic period and circumstances expound that it was owned by any Muslim or *dhimmi*, then it will be considered a “*Luqtah*” (found property) and the ruling of “*Luqtah*²³¹” will be applied on it²³².

iii. Hunting

Hunting may refer both to taking physical possession of a captured aniMāl, bird, or fish, or through virtual capturing by means of nets or trained hunting aniMāls and birds.²³³ Permission for hunting is enshrined in following verse of Holy Quran:

They ask you what is lawful to them (as food). Say: Lawful unto you are all things good and pure, and what you have taught your trained hunting animals to catch in the manner directed to you by Allah: Eat what they catch for you, but pronounce the name of Allah over it, and fear Allah, for Allah is swift in taking account”.²³⁴

²³¹ *Luqtah* is a term in Islamic Shariah That denotes to the property of a Muslim that has been lost by him. There are detailed rules on this topic in the books of *fiqh*.

²³² Muhammad ‘Alāuddīn Al- Haskaft, *Al- Durr al-Mukhtār* (Beirut: Dār-ul-Fikr, 1386H), p. 322; Kāsānī, *Bādā’i’ al-Sanā’i’*, vol 4, p. 189; Burhānuddīn Marghinānī, *Al- hidāyah Sharh Bidāyah al- Mubtadī*, vol. 1 (Maktaba al-Islamīyyah), p. 114.

²³³ Al-Zuhaylī, *Al-Fiqh Al-Islāmī wa Adillatuh*, p. 407.

²³⁴ Al-Qur’ān 5: 4.

Fish, animals, water and grass etc can also be acquired in the individual ownership through possession²³⁵. Tress and fruits are also included in the category if they are in no one's land. According to the tradition of Prophet (peace be Upon Him) mankind is equal in three things: water, grazing grass and fire.²³⁶

Hunting is impermissible in the private property of someone or in the land owned by the state.²³⁷

Oceans, Rivers, Lakes and such huge reservoirs of water cannot be converted into private property but every individual has the right to acquire the water for his use and irrigation. Water that is acquired and saved from the reservoirs becomes the private property. Same ruling applies on the grass and water.

iv. Transfer of Property through Contract

Second mode of acquisition of property is its transfer through a valid contract²³⁸. This transfer can be with or without consideration. Sale²³⁹, gift²⁴⁰, Bequest²⁴¹ are some modes through which property can be acquired. Rules of a valid contract will be applicable for a valid legal transfer and acquisition of property.

²³⁵ Al-Sarakhsī, *Al-Mabsūt*, Vol. 11, p. 220.

²³⁶ Abū Dāwūd, *Sunan*, vol.3, p. 751.

²³⁷ Kāsānī, *Bādā'i' al-Sanā'i'*, p. 193-94.

²³⁸ Ibn Nujaim, *Al-Bahr al-Rā'iq*, vol. 5, p. 258.

²³⁹ Kāsānī, *op.cit.* vol. 6, p. 233.

²⁴⁰ Al-Sarakhsī, *Al-Mabsūt*, vol. 11, p. 220; Kāsānī, *Bādā'i' al-Sanā'i'*, vol. 6, p. 203.

²⁴¹ Kāsānī, *Bādā'i' al-Sanā'i'*, vol. 7, p. 385.

v. Inheritance

Property is acquired and transferred from one person to another through inheritance²⁴². Blood relatives are entitled to receive the property as heirs. Allah the exalted has ordained the ruling of inheritance in Surah Nissa. *Sunnah* has further explained the laws of inheritance. The distinctive feature of this type of transfer of property is that the consent of owner is not essential part of this mode of transfer of property. Whether he desires or does not aspire so, it has to be divided the way Allah The Exalted has commanded.²⁴³

vi. Production of Property

Fruits of property, off springs of cattle and other production of one's property are owned by the owner.

vii. Compensation

Shari'ah has fixed monetary compensation for some crimes. For example if a person injures other, impairs any organ or commits the tort. He will have to transfer some of his property as *diyah*²⁴⁴ or damages if committed tort. Victim will be entitled to be granted that much property. It may become a mode of acquisition of property for him.

2.4- Restrictions on the Rights of Property and Ownership

There are different types of restrictions on property and ownership rights. Some of them are briefly mentioned below:

²⁴² Ibn Nujaym, *Al-Ashbāh wa al-Nazā'ir*, vol. 3, p. 461

²⁴³ Hussain, *al-Milkiyyah wa Nazariyyah al-'aqd fi al-Shari'ah al-Islamiyyah*, p. 145.

²⁴⁴ Ibn Nujaym, *op.cit.* vol. 3, p. 462.

i. Restrictions Related to the Creation of Ownership

• Usury

Islamic *Sharī'ah* has forbidden usury in all his types and all forms. Allah The Exalted has ordained in Quran:

الَّذِينَ يَأْكُلُونَ الرِّبَا لَا يَقُومُونَ إِلَّا كَمَا يَقُومُ الَّذِي يَتَخَبَّطُهُ الشَّيْطَانُ
مِنَ الْمَسِّ ذَلِكَ بِأَنَّهُمْ قَالُوا إِنَّمَا الْبَيْعُ مِثْلُ الرِّبَا وَأَحَلَّ اللَّهُ الْبَيْعَ
وَحَرَّمَ الرِّبَا فَمَنْ جَاءَهُ مَوْعِظَةٌ مِّن رَّبِّهِ فَادْتَمَنَ فَلَهُ مَا سَلَفَ وَأَمْرُهُ
إِلَى اللَّهِ وَمَنْ عَادَ فَأُولَئِكَ أَصْحَابُ النَّارِ هُمْ فِيهَا خَالِدُونَ ﴿۲۷۵﴾

“But those who devour interest become like the one whom Satan has bewitched and maddened by his touch. They have been condemned to this condition because they say, “Trade is just like interest”, whereas Allah has made trade lawful and interest unlawful. Henceforth, if one abstains from taking interest after receiving this admonition from his Lord, no legal action shall be taken against him regarding the interest he had devoured before; his case shall ultimately go to Allah. But if one repeats the same crime even after this, he shall go to Hell, where he shall abide forever. Allah deprives interest of all blessing and develops charity; and Allah does not like an ungrateful, sinful person²⁴⁵

Prophet Peace be upon him had cursed upon the one who eats usury, who pays it, who become witness and the one who records it. And then declare that all of them are equal.²⁴⁶

Therefore in *Sharī'ah*, usury can't become the source of ownership of property or wealth.

²⁴⁵ Al-Qur'ān 2: 275.

²⁴⁶ Abū Zakariyah Yahya bin Sharf al-Nawawi, *Sahīh Muslim bi Sharh al-Nawawi*, Kitāb al-Buyū', Bāb al-Ribā, vol. 11 (Beirut: Dār Āhyā al-Turāth, 1392), p. 26. Hadith no. 1598; Abū Abdullah Ahmed Bin Muhammad Bin Hanbal, *Musnad Ahmed Bin Hanbal*, vol. 1 (Beirut: 'Alam al-Kutab, 1998), p. 63. Hadith no.635; Abū Abd al-Rehmān Ahmed ibn Shu'āib Nasā'i, *Sunan Nisā'i*, vol. 3 (Beirut: Dār al-Kutub al-'ilmia, 1991), p. 326, Hadith 5532; Abū Dāwūd Sulayman ibn al-Ashas al-Sijistani, *Sunan*, Bāb al-Ribā vol. 3 (Beirut: Dār al-Kutub al-'Arabi), p. 249. Hadith no. 3335.

- **Monopoly**

Storage of commodity and obstructing its supply to market to raise its price is completely impermissible in Islam as it creates difficulties for the people. Prophet (Peace Be Upon Him) said, "Monopoly is done only by the one who deliberately intends so"²⁴⁷. Thus a Muslim is not allowed to earn money through the means of monopoly.

- **Bribery**

Prophet (Peace Be Upon Him) has cursed the one who takes money as bribery, who pays it and upon the one who become a link between them for this purpose.²⁴⁸

- **Gambling**

Gambling is impermissible in *Shari'ah* in all its forms and shapes as stated in Quran:

يَتَأْتِيهَا الَّذِينَ ءَامَنُوا إِنَّمَا الْخَمْرُ وَالْمَيْسِرُ وَالْأَنْصَابُ وَالْأَزْلَامُ رِجْسٌ مِّنْ

عَمَلِ الشَّيْطَانِ فَاجْتَنِبُوهُ لَعَلَّكُمْ تُفْلِحُونَ ﴿٩٠﴾

O ye who believe! Strong drink and games of chance and idols and divining arrows are only an infamy of Satan's handiwork. Leave it aside in order that ye may succeed.²⁴⁹

²⁴⁷ Al-Nawawi, *Sahih Muslim bi Sharh al-Nawawi*, vol. 11, p. 43. Hadith no. 1661.

²⁴⁸ Abū Dāwūd, *Sunan*, Bāb fī Kirāhiya al-Rishwa, vol. 3, p. 326. Hadith no. 3582.

²⁴⁹ Al-Qur'an, 5:90.

- **Trading in Forbidden Objects**

A Muslim cannot earn money by trading forbidden (how about unlawful) articles like wine, heroine and swine etc. He cannot make invest in the areas which lead to the disobedience of Allah The Exalted. For example, a Muslim cannot invest in the music industry or in modeling or the movies, which spread and promotes vulgarity and nudity in society.

Allah The Exalted has ordained in the Quran:

إِنَّ الَّذِينَ يُحِبُّونَ أَنْ تَشِيعَ الْفَاحِشَةُ فِي الَّذِينَ آمَنُوا لَهُمْ عَذَابٌ أَلِيمٌ
فِي الدُّنْيَا وَالْآخِرَةِ وَاللَّهُ يَعْلَمُ وَأَنْتُمْ لَا تَعْلَمُونَ ﴿١٦﴾

Lo!

those who love that slander should be spread concerning those who believe, theirs will be a painful punishment in the world and the Hereafter. Allah knoweth. Ye know not.²⁵⁰

- **Usurpation**

Usurpation of others property is completely forbidden. A Muslim does not become owner of the thing usurped. Islam does not accept such ownership.

- **Debasement, Fraud, & Cheating**

Mixing of impurities in pure things, deception, fraud, cheating and all such ill ways are forbidden in Islam. Earning wealth through the above mentioned means are not allowed in Islam.

²⁵⁰ Al- Qur'ān, 24:19.

ii. Restrictions Related to the Use of Ownership

There are different conditions in relation to the use of ownership. Owner is not free to utilize his property the way he wants. His freedom is curtailed by various stipulations.

▪ First Condition

Property should be utilized in the best possible manner and its wastage, destruction or use in non-beneficial things should be avoided. *Sharī'ah* recognizes the rights of owner but recommends him to use moderately. Allah The Exalted verbalized this notion in Quran:

وَعَاتِ ذَا الْقُرْبَىٰ حَقَّهُ وَالْمِسْكِينَ وَابْنَ السَّبِيلِ وَلَا تُبَذِّرْ تَبْذِيرًا ﴿٢٦﴾

“And render to the kindred their due rights, as (also) to those in want, and to the wayfarer: But squander not (your wealth) in the manner of a spendthrift.”²⁵¹

For this Islam orders the restriction of spendthrifts and lunatics from financial transactions of their properties so that they do not destroy or waste it.²⁵²

▪ Second condition

Sharī'ah encourages an owner that he should employ the money i.e. invest in some business or in any thing which benefits him. Islam does not appreciate the freezing of property.

²⁵¹ Al-Qur'ān 17: 26.

²⁵² Kāsānī, *Bādā'i' al-Sanā'i'*; vol. 6, 86), p. 129; Al-Sarakhsī, *Al-Mabsūt*, Vol. 11, p. 156; Ibn Qudāma, *al-Mughnī*, vol. 8, p. 146; Ibn Rushd, *Bidāyah al-Mujtahid*, vol. 2, p. 227.

- **Third condition**

Investment of money should be according to *Sharī'ah*. A Muslim can invest his property in different sectors like agriculture, industries, trade etc for earning money.

In these lawful sectors, a Muslim is supposed to take care of boundaries of *Sharī'ah*. He should not transgress its premises. For example, trade should be the result of consent of both parties and a contract should be free from usury, gambling, fraud, misrepresentation and deception. Neither the consideration nor subject matter should be comprised of prohibited articles.

- **Forth condition:**

An owner is bound to use the property in such a way that it does not harm any other person. He should be cautious in the use and must not cause nuisance to anyone.

iii. Conditions Related to the Transfer of Property

General principle for the transfer of property is that property can only be transferred from the owner to another person by free will and consent. Owner can sell, donate, gift or lease to any person he wishes. However, in some cases there are certain restrictions on the transfer of property in order to safeguard the rights of certain people. For example, a person on the deathbed will be denied of granting bequests, donations, charities and endowments more than the one third of his whole property so that the rights of heirs may be protected²⁵³. Likewise, if he is completely surrounded by debt, in this case, he will not be allowed any kind of charity safe guarding the

²⁵³ Showkāni, *Nail al- Aowtār* vol. 6, 153; Ibn Qudāmah, *al-Mughnī*, vol. 6, p. 593; Ibn Rushd, *Bidāyah al-Mujtahid wa Nihāyat al-Muqtasid*, vol.2, p. 273; Ibn Ābidīn, *Radd al-Muhtār*, vol.6, p. 148.

rights of creditors²⁵⁴. If the debt of creditors can be satisfied from some of his property, then he will be permitted to alienate to from remaining portion.

Similarly according to general principle, No rightful owner can be deprived of their properties by coercion but there are some instances where *Shari'ah* allows such coercion for example, if pre-emption right is provoked by a neighbor or co-sharer, in this case, new owner will be compelled to return the property²⁵⁵. Likewise, property of defaulter will be sold in order to satisfy the debts of creditors²⁵⁶. Same is the case with the pledged or mortgaged property.

Sometimes the owner is compelled to give up his property for public interest for example foodstuff will be seized from monopolist when people are in need of that or land will be taken for the extension of the mosques. Government can also take the property for building of roads, parks, airports etc.

3- Comparison

Shari'ah and Law have almost same concept of ownership and property. As far as the rights are concerned granted by ownership and property are concerned, English Law and *Shari'ah* are neck and neck. For example right to use, right to benefit from and dispose off and the duties such as the duty to avoid any such use that is harmful for others. An Almost complete similarity can be found in the modes of acquisition of property as well. However, the point of dissimilarity is found with regard to the some restriction imposed by *Shari'ah*. These restrictions are regarding the creation, use and alienation of the property. In *Shari'ah*, those objects can't be owned and

²⁵⁴ Ibn Qudāmah, *al-Mughnī*, Kitāb al-Mufīṣ, p. 537; al-Dārdīr, *Al-Sharh al-Kabīr*, vol. 3, p. 262.

²⁵⁵ Ibid.

²⁵⁶ Shīrbīnī, *al-Mughnī al-Muhtāj*, vol.2, p. 150.

used that are prohibited by explicit text of al-Qur‘ān and Traditions of Messenger of Allah (P.B.U.H). Pork and wine are some of its example. Whereas it is perfectly alright to own and use these things in western legal system. *Shari‘āh* does not allow Muslims to invest their properties in the prohibited areas like in vulgar movies and modelling. Likewise, *Shari‘āh* has not given free hand of alienation of property. An owner can’t bequest his property the way he wants. He cannot bequest in the favor of legal heirs. Moreover, he will be restricted to 1/3rd in this regard.

CHAPTER No. 2

OWNERSHIP OF HUMAN BODY IN SHARĪ‘AH & LAW

1-Ownership of Human body according to Law

Advancement in medical sciences has opened new avenues of debate and concepts in the notions of property and ownership. Human body and its parts have started to be used like it was never before. Success story of Organ transplantation started from cornea²⁵⁷ and has now reached to full face transplant.²⁵⁸ IVF is providing the blessing of off springs to infertile couples. Various inventions are being made using human tissues. Patent rights are being claimed for these inventions and millions of dollars are earned. This situation has not only initiated a new debate in the ‘ownership’ and ‘property’ regimes but also instigated people to have a share in the monetary benefit from what is being invented using their body parts. Thus ‘human body’ is in lime light as a need has arisen for the reassessment of the status of human body and its various parts.

As far as the laws are concerned Law of United Kingdom completely prohibited any kind of sale which takes place for the transplantation. It is an offence to engage in commercial dealings in bodily material, such as organs or tissue, for the purposes of transplantation under

²⁵⁷ Thomas Schlich, *The Origins of Organ Transplantation: Surgery and Laboratory Science, 1880-1930* (U.K: Boydell & Brewer Limited, 2010), P. 16.

²⁵⁸ First full face transplant surgery was carried out at 20th march 2010 at a hospital in Barcelona by a team of 30 experts. The team had transplanted muscles, nose, lips, maxilla, palate, all teeth, cheekbones, and the mandible of a man injured in a shooting accident by means of plastic surgery and micro-neurovascular reconstructive surgery techniques. See Helen Briggs, “Full face transplant ‘a success’,” BBC News, April 23rd, 2010, <http://www.bbc.co.uk/news/health> (accessed June , 2010)

section 32 of the Human Tissue Act 2004 ²⁵⁹. A person that who is proved to be guilty of commission of this offence under section 32 is liable to imprisonment for up to a year and/or a fine.²⁶⁰

This thesis addresses the issue of 'trade of the organs and other body parts' for the purpose of transplantation. Analysts have divided the scholars and jurists in three schools of thoughts or groups of opinion regarding the ownership of human body these days. Some of the scholars completely negate the notion of property in human body likewise some of them are in the favor of full ownership of human body, whereas there is a group of scholars who are in the middle. They advocate for the limited property rights with regards to human body and its parts.²⁶¹

Every group propounds their arguments for their belief. Some of their arguments are summarized below:

i. Arguments of those Who Negate Ownership in Human Body

Authors who belong to this group not only pose their own arguments for refutation of 'ownership in human' body but also furnish counter arguments to the supporters of Property in body. Their arguments are recapitulated below:

²⁵⁹ Human tissue Authority, <http://www.hta.gov.uk/>

²⁶⁰ Ibid

²⁶¹ Henk Have and others, *Ownership in the human body: philosophical Consideration on the Use of Human Body & its Parts in Health Care* (Netherland: Kluwer Academic Publisher, 1998), p. 3; Jonathan herring and P.L Chau, "My body, Your body , Our body". *Medical Law Review*, (spring 15, 2007). P. 34.

One of their arguments is that considering 'body' as 'property' is demeaning, disgracing and dishonoring. It's against the dignity of human beings.²⁶² Equalizing body with some object that can be traded is degradation of body.²⁶³ Professor Skene of University of Melbourne writes: "Organs should not be commodified because that involves 'an affront to our fundamental notions of human dignity'. Sale and property need not go together. One can have property interests that fall short of a 'commercial' interest."²⁶⁴

Researcher Alan B. Wagner comments: "If the human body is owned by the persona which it embodies, it becomes a subordinate object or res having something less than full human dignity."²⁶⁵

- Another argument given against the ownership of body is economic. Some researchers contend that it will hinder the scientific research and teaching.²⁶⁶ Researchers and

²⁶² Paul Ramsey, who was a Christian theologian, wrote against the commercialization of the human body. He is against the commercialization of human body parts, especially against the Commodification of the vital organs. He used the logic of irrevocable connection of the human body to the person. In his opinion, there is sacredness in the human body in the biological order. This sacredness demands human beings to treat human body with respect. Thus in his opinion, the commercialization of human body is a contradiction to the morality. Paul Ramsey, the *Patient as Person* (New Haven, CT: Yale University Press, 1970).As quoted in U.S. Congress, Office of Technology Assessment, *New Developments in Biotechnology: Ownership of Human Tissues and Cells—Special Report, OTA-BA-337* (Washington, DC:U.S. Government Printing Office, March 1987), p. 133.

Likewise another scholar, Leon Kass wrote against the sale of human organs. In his opinion, this practice of buying and selling of human flesh should not be encouraged. He denied the concept of separating human body from what gives human body their dignity. He invites the thinkers to look carefully at what body means. In this way they will learn a great deal about human dignity and moral conduct. Leon Kass, *Toward a More Natural Science* (New York: Free Press, 1985).As quoted in U.S. Congress: *Ownership of Human Tissues and Cells*, p. 134.

²⁶³ Leone Skene, "Arguments Against People Legally "Owning" Their Own Bodies, Boy Parts and Tissue," *Macquarie Law Journal* (2002), <http://www.austlii.edu.au/au/journals/mqlj/2002/7.html> ; Jonathan Herring and P.L .Chau, "My body, your body, our bodies.," p. 34-61

²⁶⁴ Leone Skene, "Arguments Against People Legally "Owning" Their Own Bodies, Body Parts and Tissue. "

²⁶⁵ Allen B. Wagner, "Human Tissue research; Who Owns the Results." *Santa Clara Computer and High-Technology Law Journal*, vol. 3 (1987): p. 231-257.

²⁶⁶ Ibid.

scientists will have to buy body parts for their research²⁶⁷ or they will have to agree for a share in the profit if acquired after invention. In the words of Professor Wagner: “An implied reservation of interest in research tissue would cloud the researcher's dominion over the research material and the research results. Such uncertainty would chill the exchange of research materials, limit research options and synergistic exchanges between scientists, and discourage attempts to transfer research results.”

Therefore it will increase the cost of scientific researches, thus hindering the good that can be achieved for humanity through scientific studies.²⁶⁸

- Regarding protection of the body, this group maintains that the Laws already protect the Human body and its part in very well manner. Law of tort is the area which protects the human body from invasion. It amounts to battery²⁶⁹ in law to invade any one's body or to remove any thing from it without any lawful justification or without person's consent.

²⁶⁷ U.S Congress report states in this regard: “In the specific case of human biological materials donated for research to nonprofit institutions (e.g., university-based biomedical research), the shift from a gift to a market basis could have damaging consequences in the cost and availability of such materials, public perception of and generosity toward biomedical researchers, and increased suspicion of health providers”. U.S. Congress: *Ownership of Human Tissues and Cell*, p. 137.

²⁶⁸ According to researchers, if payments are allowed against the human organs or any part of body, it will increase the two types of costs. Firstly, the source will have to be paid off. Secondly, the cost of administering the whole program that is the transaction costs. Both will be increased. This will make the research a very heavy budget program. Thus it will hinder the researches, which aim to improve the quality of human life and pray for the betterment of human life.

²⁶⁹ According to Encyclopedia of Britannica, “Battery is the unlawful application of physical force to another and assault is an attempt to commit battery or an act that causes another reasonably to fear an imminent battery. These concepts are found in most legal systems and together with manslaughter and murder are designed to protect the individual from rude and undesired physical contact or force and from the fear or threat thereof. No minimum degree of force is necessary to constitute a battery. A mere touch is sufficient. And force need not be applied directly. It is battery if one strikes a person's cane or horse, administers poison or drugs, or communicates a disease. An accident or ordinary negligence that results in injury is not criminally punishable as battery unless it occurred during the commission of another unlawful offense. Generally, one does not commit battery unless one acts with intent to harm or with gross criminal negligence involving a high degree of carelessness. Even then such action may be justified if it is for the purpose of the defense of others or of property, or if it is in self-defense. Reasonable force may be used in the performance of duty, as, for example, by a police officer, without constituting battery”. Online Encyclopedia of Britannica, <http://vlib.interchange.at:2078/eb/article-9070470>; Allen B. Wagner, “Human Tissue research; Who Owns the Results.”, p. 231-257.

Law of negligence is the field of 'Law' that grants the right of information to the patients. Under this law, Physicians or medical specialists are duty bound to reveal all the pro and cons of the medical procedure they have to undergo. This law is already protecting people's body and its parts from any type of assault.²⁷⁰ Privacy and non-discrimination laws are the one which can better deal with the concern of revelation of personal or genetic information of a person. Professor Wagner maintains:

"In situations involving human existence, the law depends on concepts of liberty and personal tort, not private property. To distinguish them, recall that property is the disposable, exclusive, possessory interest over its subject in the tangible realm. That is, property is a bundle of rights in rem appurtenant to a res. In contrast, liberty includes the constitutional rights of action, association and expression, that is, rights in personam appurtenant to our precepts of individuality. While liberty restrains governmental action affecting living persons, state personal tort law regulates analogous interpersonal interferences such as assault, battery, false imprisonment and privacy".²⁷¹

Offence of desecration of a corpse is the offence which is there to protect the human dead body from illegal desecration of body and its part. Thus this group maintains that law already guards the "human body and its parts" but if those are considered to be weak or insufficient in safe guarding the human body then they must be strengthened rather creating a property paradigm in body.²⁷²

- One argument is posed for the favor of property paradigm that the body and its parts has to be 'property' as no concept can exist for the bequeathing unless there is a property. One cannot bequeath from something which is not owned by him. This group contradicts with this argument by saying that the basis of the legislation of human transplant Act is the consent of authorization to use his body and its parts in a certain manner. Thus it is

²⁷⁰ Allen B. Wagner, "Human Tissue research; Who Owns the Results."p. 231-257; Leone Skene, "Arguments Against People Legally "Owning" Their Own Bodies, Boy Parts and Tissue," *Macquarie Law Journal* (2002), <http://www.austlii.edu.au/au/journals/mqlj/2002/7.html>.

²⁷¹ Allen B. Wagner, "Human Tissue research; Who Owns the Results", p. 231-257.

²⁷² Leone Skene, "Arguments Against People Legally "Owning" Their Own Bodies, Boy Parts and Tissue,"

not actually the gift of body that one bestows when he agrees the access to his body or its part. It's the use of his personal right that he can permit other to employ his body in a certain manner.²⁷³

- Commercialization of human body parts will impede the altruistic donation of human organs. Why people will want to donate it freely when they will be able to draw a good earning from it. People will not only find it an easy way to attract money, but will also instigate them to end the life of those who are on life support system or don't have much days to live medically. Moreover, it will threaten the life of weak classes of society. Women, children and minor will be very easy targets of the exploitative classes of society.

II. Arguments of those Who Call for Property Paradigm in Body

Scholars and researchers, who are in favor of full property paradigm²⁷⁴, put forward various arguments for their perception of ownership and property in human body. Some of the researchers have rationalized on the basis of jurisprudential discussions and thoughts of property²⁷⁵ whereas others have argued on the anthropological and economic basis.

²⁷³ Ibid.

²⁷⁴ There is a third minority group as well who neither favor complete negation of ownership in human body nor demands full ownership. This group admits that a human being can't be the full owner of his entire body. Thus can't proclaim the right to sell and dispose of but claims that the limited property rights can be granted to human beings in relation to their bodies for there is a similarity between body parts and ownable objects. See for more details: Henk Have and others, *Ownership in the human body: philosophical Consideration on the Use of Human Body & its Parts in Health Care*, p.3.

²⁷⁵ For example "H. Tristram Engelhardt, Jr. cites the philosophers Hegel and Locke to develop his claim that the human body is the quintessential example of property. He then argues that we have a right to trade our bodies commercially. In fact, he argues that, if anything, our right to trade other material objects is inferiorto and less clear than our right to trade our bodies" Engelhardt, H.T., *The Foundations of Bioethics*

Muireann Quigley in her research paper "Property and the body: Applying Honoré" adopted the liberal political theory which treats property relations as socially constructed bundles of rights. She selected Tony Honore's list of eleven types of legal relations that is considered to be the major components of the 'full liberal type of ownership' by him. Two other writers B Bjorkman and S O Hansson adopted the same approach and methodology in their research.²⁷⁶ Furthermore, they gave five principles of bodily rights. Here Quigley's analysis is encapsulated as she has gone through each element of Property and applied that on Human body. Quigley comments that 'Honoré' has arrived to 11 rights, duties and other elements that constitute ownership. He did this through deep scrutiny and contemplation in jurisprudence.²⁷⁷

She applied 'Honoré's conception of property' to the realm of the human body and its parts. She has undergone each element and analyzed human body in its light. Her observation is summarized below:

- **Right to possess:**

Regarding first right of property, that is the right to possess, she comments that individuals acquire more and more control over their bodies as they grow and get the permission to do more and more.²⁷⁸

(New York: Oxford University Press, 1986) as quoted in U.S. Congress: *Ownership of Human Tissues and Cells*, p. 135.

²⁷⁶ B Bjorkman and S O Hansson, Bodily rights and property rights, *Journal of medical ethics*, p. 209-214.

²⁷⁷ Muireann Quigley, "Property and the body: Applying Honoré." *Journal of Medical Ethics* (November 2007) 33(11): p. 631-634.

²⁷⁸ Ibid.

▪ **The right (liberty) to use:**

In her opinion two interpretations of “the right to use”, identified by Honoré readily applies to human bodies. The first, broad, interpretation that is “management” and “income” and the second, narrower, interpretation which is the “owner’s personal use and enjoyment of the thing owned”.²⁷⁹

▪ **The right (power) to manage**

She applies this element of ownership on human body by saying that owner may put any restriction regarding the term of usage of his body.²⁸⁰

▪ **The right (claim) to the income of the thing:**

According to her, the right to the income of the thing occurs:

“Whenever we go to work and are paid for our labor”.

She further articulates that it may occur if someone sells his or her body parts (Though illegal) or in her opinion prostitution can be one example of selling/renting of whole body.²⁸¹

▪ **The right to capital:**

Honoré had classified two aspects of this right:

- ✓ the *power* to alienate and
- ✓ the *liberty* to consume or destroy the object

Quigley rejects the opinion of those who says that this is one of the incidents that is missing with regard to the body as propounded by munzer²⁸². She refutes this statement

²⁷⁹ Ibid.

²⁸⁰ Ibid.

²⁸¹ Ibid.

and counter-argues that there are many instances where human beings do alienate their body organs or parts. She quotes the examples of hair cut, nail clip, blood donation and organ donation such as kidney to a stranger. Extreme form of such alienation is the suicide. in these words.²⁸³

▪ **The right to security:**

The compensation for wrongful death, to the next of kin or relatives of the deceased made for the interest that they had in his body and any income he might have produced through his labor is example of the right to security.²⁸⁴

▪ **The rights of transmissibility:**

Quigley applied this right to the body in the fashion that human beings do transfer their rights regarding their bodies. For example on a small scale, patients give the control of decision making to doctors in relation to their bodies.²⁸⁵

▪ **The right to absence of term:**

While this is the owner's right to an indeterminate length of ownership, its application to the human body is very obvious. A person's right to own his or her body cannot be taken away by anyone.

²⁸² Munzer S R. *A Theory of Property*. (Cambridge: Cambridge University Press, 1990) as quoted in Muireann Quigley, "Property and the body: Applying Honoré." *Journal of Medical Ethics* (November 2007) 33(11):p. 631–34.

²⁸³ Muireann Quigley, "Property and the body: Applying Honoré." p. 631–634.

²⁸⁴ *ibid*

²⁸⁵ *ibid*

▪ **The duty to prevent harm:**

It's a person's duty not to harm others by his body. He is bound by law that his or her body should not be employed in a manner that create mischief, impair or hurt anyone.

▪ **The liability to execution:**

Liability to execute human body is evident in the cases where human beings are imprisoned for non-payment of fines following a court order or for contempt of court in the opinion of said writers.²⁸⁶

▪ **Residuary character (liability):**

“In relation to the self, this expiration of rights seems, most notably, to occur at death. Here our rights with regard to the self must necessarily cease, as we can no longer be deemed capable of possessing any rights. The rights regarding our body then become vested in another—usually our next of kin. However, some of the rights may become vested in the state, as when a coroner's postmortem is required”.

These are the words of Muireann Quigley through which she has related the last element of property with the human body.

In this way she has concluded that the self-ownership can be claimed on human body by placing it in the framework of the property theory. In her words:“So it seems that when it comes to my body, I can say, with the support of the most complete theory of property that we have, that “I

²⁸⁶Ibid.

own that” or “that is my property”. We can each claim to have “full liberal ownership of our bodies”, and to have property rights in our own bodies.”²⁸⁷

Some other researchers have scrutinized human body as property from social and market point of view and assessed its result. **Lori B. Andrews** is one of such researcher who has analyzed the human body and property concept and concluded that there should be full ownership in human body.²⁸⁸

According to him, Property approach best protects the right and interests of people regarding their body in all those stances where privacy, autonomy or assault do not when improper deeds are done with extracorporeal bodily materials.²⁸⁹

Lori B. Andrews rejected the argument of poor selling their organs for ban on the ground that society has not provided any benefit to poor by disallowing organ sale. The person who is in dire need of money to feed his children, for him selling organ is much better option. There is no practical benefit of banning organ sale unless poor are granted means to escape or avoid their hunger or dire need.²⁹⁰

He further goes on and decrees that the criticism is even much less justified in the issues of regenerative bodily products like blood, sweat and semen which are easily removable from human body safely.²⁹¹

²⁸⁷ Ibid.

²⁸⁸ Lori B. Andrews, “My body my property,” *The Hastings Centre Report* 16. no. 5 (October 1986), p. 28-38,

²⁸⁹ Ibid.

²⁹⁰ Ibid.

²⁹¹ ibid

He rejects the justification for the prohibition on the ground that it will raise the quality of donation and prevent the situation where body parts will only be affordable by rich. He contends that for quality control, tests are available to check the fitness of donor and quality of his body parts. Affordability by rich is quite weak argument to him as there are many medicines which are being manufactured and sold on a very high price, much higher than the reach of poor or there are physicians who refuse to treat the patient on the ground that the latter can't afford it.

In his opinion, the argument of banning selling of body parts on the ground that it will diminish altruism is implausible. Necessities of life like food, shelter and health care are being sold yet people donate goods to needy people, devote time and spend money. Instead in view of some scholars Market system is the best mechanism to solve the shortage problem²⁹².

2- Ownership of Human body According to Sharī'ah

Regarding human body, Scholars are divided into two groups. One of them completely negates the ownership or property concept in human body whereas the other group allows it. Each one of them has its arguments for its belief.

i. Majority Group

According to the popular accepted view regarding human body, Man's body is owned by Allah The Exalted. He created human souls, then entrusted them with bodies and ordered them to employ it only in the way which is good. All those things which are in the heaven and earth are made under the disposal of man and at his service. Allah only is the owner of each and every

²⁹² Martin Wilkinson Ethics expert at Keele University writes in his article that the demand for organ donors has far outstrips the supply. In his opinion if organ sale is allowed, it will cut waiting list. Martin Wilkinson, "sell organs to save lives". www.bbc.co.uk/news/health

particle that is present in the whole universe. Thus man being His viceroy is owner of the things other than the man. Two types of texts can be presented to support this view.²⁹³

Firstly: All those texts, which explain the kingdom of Allah The Exalted. These texts enshrines that Allah is the owner of every ting that is in the heaven and the earth²⁹⁴. No one else is partner in his kingdom. He alone owns everything .These Verses maintain that Allah is the owner of all created things, thus owner of the man too, therefore impliedly proving that Allah is the owner of human body, not the man himself.

Few examples from such Verses are given below:

قُلْ اَدْعُوا الَّذِيْنَ زَعَمْتُمْ مِّنْ دُوْنِ اللّٰهِ لَا يَمْلِكُوْنَ
مِثْقَالَ ذَرَّةٍ فِى السَّمٰوٰتِ وَلَا فِى الْاَرْضِ وَمَا لَهُمْ فِیْهَا مِنْ
شَرِكٍ وَمَا لَهُ مِنْهُمْ مِّنْ ظٰهِرٍ ﴿۲۲﴾

Say:

(O Muhammad to those polytheists, pagans, etc.)"Call upon those whom you assert (to be associate gods) besides Allah, they possess not even the weight of an atom (or a small ant), either in the heavens or on the earth, nor have they any share in either, nor there is for Him any supporter from among them²⁹⁵

²⁹³ 'Ismatullah 'Inayatullah, *al Intifa'a bi Ajzā al-Ājza al-Ādamī* (Lahore: Maktbah Chirāgh Islām, 1993), p. 55.

²⁹⁴ Ibid.

²⁹⁵ Al- Qur'ān, 34: 22.

“And to Allah belongs the heritage of the heavens and the earth; and Allah is Well-Acquainted with all that you do”.²⁹⁶

إِنَّا نَحْنُ نَرِثُ الْأَرْضَ وَمَنْ عَلَيْهَا وَإِلَيْنَا يُرْجَعُونَ ﴿٤٠﴾

Verily! We will inherit the earth and whatsoever is thereon. And to Us they all shall be returned.²⁹⁷

قُلْ مَنْ يَرْزُقُكُمْ مِنَ السَّمَاءِ وَالْأَرْضِ أَمَّنْ يَمْلِكُ السَّمْعَ وَالْأَبْصَارَ وَمَنْ يُخْرِجُ الْحَيَّ مِنَ الْمَيِّتِ وَيُخْرِجُ الْمَيِّتَ مِنَ الْحَيِّ وَمَنْ يُدَبِّرُ الْأَمْرَ فَسَيَقُولُونَ اللَّهُ فَقُلْ أَفَلَا تَتَّقُونَ ﴿٤١﴾

Say

(O Muhammad): "Who provides for you from the sky and from the earth? Or who owns hearing and sight? And who brings out the living from the dead and brings out the dead from the living? And who disposes the affairs?" They will say: "Allah." Say: "Will you not then be afraid of Allah's Punishment (for setting up rivals in worship with Allah)?"²⁹⁸

الَّذِي لَهُ مُلْكُ السَّمَوَاتِ وَالْأَرْضِ وَلَمْ يَتَّخِذْ وَلَدًا وَلَمْ يَكُن لَّهُ شَرِيكٌ فِي الْمُلْكِ وَخَلَقَ كُلَّ شَيْءٍ فَقَدَرَهُ تَقْدِيرًا ﴿٤٢﴾

He to

Whom belongs the dominion of the heavens and the earth, and Who has begotten no son

²⁹⁶ Al-Qur'ān, 3:180.

²⁹⁷ Al-Qur'ān, 19: 40.

²⁹⁸ Al-Qur'ān, 10: 31.

(children or offspring) and for Whom there is no partner in the dominion. He has created everything, and has measured it exactly according to its due measurements.²⁹⁹

وَقُلِ الْحَمْدُ لِلَّهِ الَّذِي لَمْ يَتَّخِذْ وَلَدًا وَلَمْ يَكُن لَّهُ شَرِيكٌ فِي الْمَلِكِ وَلَمْ
يَكُن لَّهُ وَلِيٌّ مِنَ الدُّلِّ وَكَبْرَهُ تَكْبِيرًا ﴿٣١﴾

All

the praises and thanks be to Allah, Who has not begotten a son (nor an offspring), and Who has no partner in (His) Dominion, nor He is low to have a *Wali* (helper, protector or supporter). And magnify Him with all the magnificence, [*Allahu-Akbar* (Allah is the Most Great)].³⁰⁰

All these verses are impliedly proving that Allah The Exalted is the owner of human body.

Secondly: All those texts which instruct human body to be used in a certain specified manner and prohibits from harming and damaging, they prove that human beings are not at liberty to utilize this blessing the way they want. They have to accomplish the purpose of living and benefitting from the body within the limits that Allah has prescribed.³⁰¹

Allah commanded in Holy Quran:

وَلَا تَقْتُلُوا أَنْفُسَكُمْ ۚ إِنَّ اللَّهَ كَانَ بِكُمْ رَحِيمًا

And do not kill yourselves (nor kill one another). Surely, Allah is Most Merciful to you".³⁰²

²⁹⁹ Al-Qur'ān, 25: 2.

³⁰⁰ Al-Qur'ān, 17:111.

³⁰¹ 'Ismatullah 'Inayatullah, *al 'Intifa'a bi Ajzā al-Ajza al-Adami*, p. 55.

³⁰² Al-Qur'ān, 4:29.

There are several sayings of the Holy Prophet (Peace Be Upon Him) on the said topic. Some of them are mentioned below;

1. Abu Hurayrah (may Allah be pleased with him) narrated that the Prophet (Peace Be Upon Him) said, "He who commits suicide by throttling shall keep on throttling himself in the Hell-Fire (forever) and he who commits suicide by stabbing himself shall keep on stabbing himself in the Hell-Fire."³⁰³
2. It was narrated from Thābit ibn al-Dahhāk (may Allah be pleased with him) that the Messenger of Allah (peace and blessings of Allāh be upon him) said: "And whoever commits suicide with a piece of iron will be punished with the same piece of iron in the Hell-fire."³⁰⁴
3. Narrated Jundab (may Allah be pleased with him) said: "The Messenger of Allah (peace and blessings of Allah be upon him) said: "A man was inflicted with wounds and he committed suicide, and so Allāh said: My slave has caused death on himself hurriedly, so I forbid paradise for him."³⁰⁵
4. From these Verses and Traditions it is clear that human body is "trust" with human being. He has to use this trust the way its real owner wants. He is not free to employ it beyond the limitations prescribed by the 'owner'. He must protect and safeguard this trust. *Sharī'ah* has made the protection of human body and soul one of the objectives of

³⁰³ Abū 'Abdullah Muhammad ibn Ismā'il ibn Ibrahim Bukhārī, *Sahīh*, trans. Dr. Muhammad Mohsin Khan, vol. 2 (Riyadh: Dār al-Salām, 1997), p. 258. Hadith no. 1365.

³⁰⁴ Ibid., 257. Hadith no. 1363.

³⁰⁵ Ibid., p. 257. Hadith no. 1364.

Sharī'ah. That is the reason why Allah The Exalted has commanded *Qisās* and *Hudood*.³⁰⁶

Therefore human body is not owned by human being himself but owned by Allah The Exalted. Man is entrusted with his body by Allah Al-mighty as stated by Mr. Munawar Aneess in his article "Islamic Bioethics Perils and promises":

"For a Muslim, Body is a trust from God; it is neither a solely owned property nor a disposable commodity. Hence the interdiction against suicide is ordained. The temporary possession of the body does not imply its ownership by the possessor. The ritual prayer one recites at the death of a person comes as a vivid reminder. "He alone grants life and deals death; and unto him you all must return."³⁰⁷

He further quoted verses of Quran:

يَتَأْتِيهَا النَّاسُ إِنْ كُنْتُمْ فِي رَيْبٍ مِّنَ الْبَعْثِ فَإِنَّا خَلَقْنٰكُمْ مِّن تَرَابٍ ثُمَّ
مِّن نُّطْفَةٍ ثُمَّ مِّن عَلَقَةٍ ثُمَّ مِّن مُّضْغَةٍ مُّخَلَّقَةٍ وَغَيْرِ مُخَلَّقَةٍ لِّنُبَيِّنَ لَكُمْ
وَنُقِرُّ فِي الْأَرْحَامِ مَا نَشَاءُ إِلَىٰ آجَلٍ مُّسَمًّى ثُمَّ نُخْرِجُكُمْ طِفْلًا
ثُمَّ لِنُبَلِّغُوهَا أَشَدَّكُمْ وَمِنْكُمْ مَّن يَتَّقُوا وَمِنْكُمْ مَّن يُرَدُّ إِلَىٰ أَرْدَلِ
الْعُمُرِ لِكَيْلَا نَعْلَمَ مَن بَعْدَ عِلْمٍ شَيْئًا وَتَرَىٰ الْأَرْضَ هَامِدَةً فَإِذَا
أَنْزَلْنَا عَلَيْهَا الْمَاءَ اهْتَزَّتْ وَرَبَتْ وَأَنْبَتَتْ مِنْ كُلِّ زَوْجٍ بَّهِيحٍ ﴿٥﴾

O mankind! if ye are in doubt concerning the Resurrection, then lo! We have created you from dust, then from a drop of seed, then from a clot, then from a little lump of flesh shapely and shapeless, that We may make (it) clear for you.

³⁰⁶Kamāl al-Dīn Bikro, Mada mā yamliku al- Insān min Jismihi," *Mujjala al-Majma' al-Fiqh al-Islamī*, no. 7, 201-24.

³⁰⁷ Munawar Aneess, "Islamic Bioethics- Perils and Promises,"

http://www.scienceislam.net/article.php3?id_article=709&lang=en. (accessed July 2010).

And We cause what We will to remain in the wombs for an appointed time, and afterward We bring you forth as infants, then (give you growth) that ye attain your full strength. And among you there is he who dieth (young), and among you there is he who is brought back to the most abject time of life, so that, after knowledge, he knoweth naught. And thou (Muhammad) seest the earth barren, but when We send down water thereon, it doth thrill and swell and put forth every lovely kind (of growth).”³⁰⁸

Another verse says:

﴿٢٧﴾ أَلَمْ يَكُنْ نُطْفَةً مِّن مَّنِيِّ يُمْتَنُ

“ was

he not once a [mere] drop of sperm that had been split,³⁰⁹

﴿٢٨﴾ ثُمَّ كَانَ عَلَقَةً فَخَلَقَ فَسَوَّىٰ

and

thereafter became a germ-cell-whereupon He created and formed [it] in accordance with what [it] was meant to be,³¹⁰

﴿٢٩﴾ فَجَعَلَ مِنْهُ الذَّكَرَ وَالْأُنثَىٰ

and

fashioned out of it two sexes, the male and female?”³¹¹

³⁰⁸ Al-Qur’ān, 22:5.

³⁰⁹ Al-Qur’ān, 75: 37.

³¹⁰ Al-Qur’ān, 75: 38.

Allah Almighty has ordained the punishment of *hadd* for drinking wine though he is only transgressing against his own mind and he does not really transgress against any one. This clearly indicates that the mental health is related to the right of Allah.³¹⁵ That is a reason why Shātībī stated that the life of people and completion and perfection of mind and body is right of Allah not the right of people.³¹⁶

Right of individual is very clear as a person is entitled to monetary compensation if someone causes bodily harm or injury and *diyyah* to the heirs of victim if *qisās* is abandoned or not mandated for some reason.³¹⁷

From the above discussion it is clear that the human beings don't owe their bodies. It is the trust of Allah The Exalted and therefore a thing cannot be property of someone who doesn't owe that.

ii. Human Being as a Subject of Property

Besides the concept of ownership, this matter can be analyzed, from a different aspect, i.e. whether the human body can become a "subject" of property or not. If we throw a glance at the definitions of "property", we come to the conclusion that the definitions of the property don't fit on the human body. As far as Hanfīs are concerned they clearly and explicitly exclude the "human being" from the ambit of property³¹⁸ whereas Jamhūr has a little different definition but as a whole they require two conditions for a thing to qualify as a property.

- It must have some usefulness in reality³¹⁹.

³¹⁵ Al-Shātībī, *Al-Mūwafaqāt*, vol. 3, p. 376.

³¹⁶ Ibid.

³¹⁷ Al-Izz ibn Abd al-Salām, *Qawā'id al-Ahkām fī Masāleh al-Anām*, vol. 1 (Beirut: Dār al-Ma'ārif), p. 163.

³¹⁸ Ibn Nujaim, *Al-Baḥar al-Rā'iq*, vol. 5, p. 277.

³¹⁹ Shirbīnī, *al-Mughnī al-Muhtāj*, vol.1, p. 394; Ibn Qudāmah, *al-Sharḥ al-Kabīr*, vol. 4, p.7.

He wrapped up the discussion by saying:

“From the moment of birth to the point of death, the entire cycle is a Divine act. The human kind is simply an agent, a trustee of God and the body a trust from God.”³¹²

From above discussion and arguments another conclusion is also drawn that there are two types of rights in human body. One is the right of Allah and the other is the right of human being. Allah’s right in human body clearly appears in the *Shari’ah* rulings mentioned above. Texts prohibiting suicide and harming oneself in any way and drinking proves the right of Allah The Exalted. A person is punished and is sinful because he is transgressing the right of Allah Almighty. Shātibī maintained in his book: “It is not rightful for anyone to kill himself or destroy any part of his body. Life, mental health and bodies of human beings are among the right of Allah. Not the right of human beings. For this reason, they don’t have the authority to demolish them.”³¹³,

Muhammad Naeem Yaseen commented on this *Shari’ah* ruling in his research paper “The rulings for the donation of the human organs in the light of *Shari’ah* Rules and Medical facts” in this way: “There is also the Scholars’ prohibition of any one harming him in any way; they forbid any one from cutting one of his organs or injuring himself without a reason. If the individual had full rights of his body he would not have been forbidden from doing so.”³¹⁴

³¹¹ Al-Qur’ān, 75:39.

³¹² Munawar Anes, “Islamic Bioethics- Perils and Promises,” http://www.scienceislam.net/article.php?id_article=709&lang=en. (accessed July 2010).

³¹³ Al-Shātibī, *Al-Mūwafaqāt*, vol. 2 , p. 376.

³¹⁴ Muhammad Na’eem Yaseen, “The Rulings for the Donation of Human Organ in the Light of *Shari’ah* Rules and Medical Facts.” *Arab Law Quarterly*, vol. 5, No. 1 (Feb., 1990), p. 49-87.

- Legislator should have permitted its “use” in life without necessity or compulsion³²⁰.

When the human body and its parts are scrutinized through this yard stick, it becomes obvious that in ancient time at the time of Jurisprudence Scholars, Science and Technology was not that advanced and Jurists were unaware of the utility of human body and its parts as we are today. Therefore, in their sight human body and its parts did not meet the first criterion as stated by Ibn Qudāmah; “Sale of human body organs that have been cut or amputated is forbidden because such organs cannot be utilized”³²¹

Second criterion is quite formidable to meet i.e. did legislators allow the use of body parts in ordinary situation.

Shari'ah Scholars consider that legislators have not allowed the use of body parts of other human beings in normal circumstances. They give the example of blood in order to support their claim. Allah The Exalted forbade use of blood. He mentioned blood among forbidden things and forbade all kinds of benefits that can be drawn out of it. Following Verses are evidence of it

إِنَّمَا حَرَّمَ عَلَيْكُمُ الْمَيْتَةَ وَالدَّمَ وَلَحْمَ الْخِنْزِيرِ وَمَا أُهِلَّ بِهِ لِغَيْرِ اللَّهِ
فَمَنْ اضْطُرَّ غَيْرَ بَاغٍ وَلَا عَادٍ فَلَا إِثْمَ عَلَيْهِ إِنَّ اللَّهَ غَفُورٌ رَحِيمٌ ﴿١٧٢﴾

He hath only forbidden you dead meat, and blood, and the flesh of swine, and that on which any other name hath been invoked besides that of Allah. But if one

³²⁰ Ibn Qudāmah, *al-Sharh al-Kabīr*, vol. 4, p. 7.

³²¹ Ibid.

is forced by necessity, without wilful disobedience, nor transgressing due limits, - then is he guiltless. For Allah is Oft-forgiving Most Merciful³²².

قُلْ لَا آجِدُ فِي مَا أُوْحِيَ إِلَيَّ مُحَرَّمًا عَلَى طَاعِمٍ يَطْعَمُهُ إِلَّا أَنْ
يَكُونَ مَيْتَةً أَوْ دَمًا مَّسْفُوحًا أَوْ لَحْمَ خِنْزِيرٍ فَإِنَّهُ رِجْسٌ أَوْ فِسْقًا
أَهْلٌ لِغَيْرِ اللَّهِ بِهِ فَمَنْ اضْطُرَّ غَيْرَ بَاغٍ وَلَا عَادٍ فَإِنَّ رَبَّكَ غَفُورٌ
رَّحِيمٌ ﴿١٤٥﴾

Say: "I find not in the message received by me by inspiration any (meat) forbidden to be eaten by one who wishes to eat it, unless it be dead meat, or blood poured forth, or the flesh of swine,- for it is an abomination - or, what is impious, (meat) on which a name has been invoked, other than Allah.s". But (even so), if a person is forced by necessity, without wilful disobedience, nor transgressing due limits,- thy Lord is Oft-forgiving, Most Merciful³²³.

³²² Al-Qur'ān, 2: 173.

³²³ Al-Qur'ān, 6: 145.

حُرِّمَتْ عَلَيْكُمْ الْمَيْتَةُ وَالِدَمُّ وَلَحْمُ الْخِنزِيرِ وَمَا أُهِلَّ لِغَيْرِ اللَّهِ بِهِ
وَالْمُنْخَنِقَةُ وَالْمَوْقُوذَةُ وَالْمُتَرَدِّيَةُ وَالنَّطِيحَةُ وَمَا أَكَلَ السَّبُعُ إِلَّا مَا
ذَكَّيْتُمْ وَمَا ذُبِحَ عَلَى النُّصُبِ وَأَنْ تَسْتَقْسِمُوا بِالْأَزْلَمِ ذَٰلِكُمْ فِسْقٌ
الْيَوْمَ يَئِسَ الَّذِينَ كَفَرُوا مِنْ دِينِكُمْ فَلَا تَخْشَوْهُمْ وَاخْشَوْنِ الْيَوْمَ
أَكْمَلْتُ لَكُمْ دِينَكُمْ وَأَتَمَمْتُ عَلَيْكُمْ نِعْمَتِي وَرَضِيْتُ لَكُمُ الْإِسْلَامَ دِينًا
فَمَنْ اضْطُرَّ فِي مَخْمَصَةٍ غَيْرَ مُتَجَانِفٍ لِإِثْمٍ فَإِنَّ اللَّهَ غَفُورٌ رَحِيمٌ ﴿٣﴾

Forbidden unto you (for food) are carrion and blood and swine-flesh, and that which hath been dedicated unto any other than Allah, and the strangled, and the dead through beating, and the dead through falling from a height, and that which hath been killed by (the goring of) horns, and the devoured of wild beasts, saving that which ye make lawful (by the death-stroke), and that which hath been immolated unto idols. And (forbidden is it) that ye swear by the divining arrows. This is an abomination. This day are those who disbelieve in despair of (ever harming) your religion; so fear them not, fear Me! This day have I perfected your religion for you and completed My favour unto you, and have chosen for you as religion Islam. Whoso is forced by hunger, not by will, to sin: (for him) lo! Allah is Forgiving, Merciful.³²⁴

Tradition of Prophet (Peace Be Upon Him) also verifies it. Prophet (peace be upon him) said that Allah the Exalted has denounced or curse the one who joins the hairs of a woman to that

³²⁴ Al-Qur'ān, 5:3.

of another so as to make her hairs appear long and He The Exalted has also cursed the women with whose hairs such hairs joined.³²⁵

These texts prove that Allah The Exalted didn't allow the employment of body organs or its parts in ordinary circumstances.

iii. Sale of Body Organs

There are many direct and indirect texts which either expressly or impliedly forbade the sale of human body and its parts. Some of them are mentioned below:

1. Allah The Exalted has forbidden the blood in several Verses as mentioned earlier, Allah The Exalted has not only interdicted the use of blood but also disallowed its sale Following Verses prove it;

- It is related from 'Awn ibn Abi Juhayfa, "I saw my father purchase a cupper. He ordered his cupping tools to be broken. I asked him about that and he said, 'The Messenger of Allah, may Allah bless him and grant him peace, forbade the proceeds from the sale of blood and the proceeds from the sale of dogs, the earnings of a slave girl through prostitution and he cursed both the tattooer and the tattooed, and taking and paying usury, and he cursed the one who makes images."³²⁶
- Hadith Ibn Abbas (may Allah be pleased with him) said: I saw Prophet (peace be upon him) sitting near the black stone (or at a corner of the ka'bah). He said: (the Prophet) raised his eyes towards the heaven, and laughed, and he said: May Allah curse the Jews!

³²⁵ Sulaymān ibn al-Ash'ath al-Sijistānī Abū Dāwūd, *Sunan*, vol.2 (Beirut: Dār al-Fikr), p. 476. Hadīth No. 4168.

³²⁶ Al-Bukhārī, *Sahīh*, trans. Subhan Mahmood and others, vol. 1 (Lahore: Idarāh Islāmiyyat, 2005), p. 941. Hadith no. 2085

He said this three times. Allah declared unlawful for them the fats (of the animals which died natural death); they sold them and they enjoyed the price they receive for them. When Allah declared eating of a thing forbidden for people, he declares its price also forbidden for them.”³²⁷

- Prophet (P.B.UH) said “Verily, when Allah prohibits from eating something, he forbids its price too.” And there is a consensus of *ummah* that it is prohibited to eat human beings or his any part of body. Thus while Allah The exalted has forbidden the eating of human being, he has disallowed its sale as well.³²⁸ Only exception to this rule is milk of woman which is a matter of disagreement of opinion among Fuqaha.

2. Allah The Exalted has honored “man” as mentioned in the Holy Qur’ān:

♦ وَلَقَدْ كَرَّمْنَا بَنِي آدَمَ وَحَمَلْنَاهُمْ فِي الْبَرِّ وَالْبَحْرِ وَرَزَقْنَاهُمْ
مِّنَ الطَّيِّبَاتِ وَفَضَّلْنَاهُمْ عَلَى كَثِيرٍ مِّمَّنْ خَلَقْنَا تَفْضِيلًا ﴿٧٠﴾

“We

have honored the sons of Adam; provided them with transport on land and sea; given them for sustenance things good and pure; and conferred on them special favors, above a great part of our creation”.³²⁹

³²⁷ Abū Dāwūd, *Sunan*, Book of sale, trans. Ahmed Hassan, vol.2 (Lahore, Sh. Muhammad Ashraf, 1984), p. 992. Hadith # 3481.

³²⁸ ‘Ismatullah ‘Inayatullah, “Bay’ al-‘ Adah wa al-Ajzā al-Bashariya fi al-Sharī‘ah Al- Islamiyyah” . *Al-Dirāsāt al-Islāmiyyah*, vol. 39, no. 2 (April 2003): p. 165-77.

³²⁹ Al-Qur’ān 17: 70.

Selling human organs will disgrace him as asserted by Marghinānī; “It is not permitted to sell a ‘Human being’s hairs or utilize it in any way, because the human are highly dignified, therefore no part therefrom should be undignified or demeaned.”³³⁰

Al-Kasānī expressed the same notions when he said: “Human bones and hairs should not be permitted to be sold, not because of their uncleanliness, as such parts are determined to be clean in the prophetic tradition, but out of respect for human organs; the demeaning of such human organs through their sale is a form of humiliation.”³³¹

Shirbīnī was of the same view as he said: “It is forbidden to exploit any part of the human body because of its dignity and worth.”³³²

3. And Prophet Peace be upon him said “ verily, when Allah prohibits from eating a thing, he forbids its price too”³³³ and there is a consensus of *ummah* that it is prohibited to eat human being or his any part of body, therefore can’t be sold with the only exception of ‘milk’.³³⁴
4. It is related from ‘Abdullah ibn Mas‘ūd that on the day of Badr the leaders of Quraysh be thrown into one of dirty stone wells of Badr. This Tradition of Prophet

³³⁰ Abū Bakr ibn Abd al-Jalīl al-Marghinānī, *Al-Hidāyah Sharh Bidāyah al-Mubtadī*, vol. 3(al-Maktabah al-Islamiyyah), p. 34.

³³¹ Al-Kāsānī, *Bādā'i' al-Sanā'i'*, vol. 5, p.142.

³³² Al-Shirbīnī, *Mughnī al-Muhtāj*, vol. 1, p.191.

³³³ Abū Dāwūd, *Sunan*, Book of sale, trans. Ahmed Hassan, vol.2 (Lahore, Sh. Muhammad Ashraf, 1984), p. 992. Hadith # 3481.

³³⁴ Malaki, Shafai and hanbali scholls of jurisprudence permit the sale of maternal milk if it is milked from mother on the ground that it is clean and beneficial and legislator had permitted the drinking of maternal milk even under condition where there is no compulsion or duress whereas Hanfis have prohibited it on the point that it is a part of human being, which is dignified and worthy entity therefore no part of them should be demeaned and humiliated. See Marghinānī, *Al-Hidāyah*, vol. 3, 45.

(Peace Be Upon Him) indicates that he didn't give them to people of Makkah for money.³³⁵

5. It is related that Jabir ibn 'Abdullah said that he heard the Messenger of Allah, may Allah bless him and grant him peace, say on the Day of the Conquest while he was in Makka, "Allah and His Messenger have made the sale of wine, carrion, pigs and idols unlawful."³³⁶

This Tradition indicates that Muslims are not allowed to sell the dead. Therefore they are not allowed to sell the dead bodies or any part of them.

Those jurisprudence scholars who forbid the sale of human body and its parts, besides quoting texts, they give logics as well to strengthen their view point. Some of them are mentioned below:

- Sale of body organ will open the new pathways of corruption if allowed as poor will start selling their organs in order to satisfy their needs.³³⁷
- Wicked people will remove the body organs of the people either by force or by fraud as it is being practiced in our country by evil doers. Permission of sale of body organs will endanger the weak class, children and insane. People may start bribing doctors and surgeons to remove the organ of their patients for money.³³⁸

³³⁵ Al-Bukhārī, *Sahīh*, vol. 5, p. 236. Hadith no. 420.

³³⁶ *Ibid.*, p. 941. Hadith no. 2083.

³³⁷ 'Ismatullah 'Inayatullah, *Bay' al-' Adah wa al-Ajzā al-Basharīya fi al-Sharī'ah Al- Islamiyyah*, p. 165-177.

³³⁸ *Ibid.*

iv. Donation Paradigm

Various Dār al-Ifta and *Fiqh* academies have allowed the donation of human body and its parts.

Some declaration and resolutions are mentioned below:

- The Supreme Council of Ulama in Riyadh has allowed organ donation in case of necessity.³³⁹
- The council of Islamic *Fiqh* Academy of the Muslim world league, Makkah in its 8th session permitted organ donation and transplantation and resolved that it is permissible to remove the organ from the body of one person and transplant into the body of another in order to save his life or to assist in stabilizing the normal functioning of the basic organs of that person³⁴⁰. It has prescribed some conditions for the donation which are as follows:
 - ✓ Organ removal will not harm the donor's life in any way.
 - ✓ Donor is donating organ voluntarily and there is no coercion behind it.
 - ✓ Transplantation is the only solution to improve the condition of patient.
 - ✓ Success rate of transplantation is quite high.
- The *fiqh* academy of the organization of the Islamic conference, Jeddah³⁴¹ and the Mufti of Egypt dr. Sayyed At- Tantawi permitted the use of body organs of a person

³³⁹Supreme Council of Ulema in Riyadh in their Resolution no. 99 dated 6 dhilqadah 1402 see <http://en.allexperts.com/q/Islam-947/islamic-rule.htm>.

³⁴⁰ The Fiqh Academy of the Muslim World League, Makkah permitted the donation of organs and transplantation in its 8th session held between 28 Rabi'ul Thani - 7 Jumadal Ula, 1405. See for details: <http://en.allexperts.com/q/Islam-947/islamic-rule.htm>.

³⁴¹ It was decided in the fourth conference of Islamic Fiqh Council: Organisation of Islamic Conference held between 6-11 February 1988 in Jeddah, for details <http://www.islam-qa.com/en/ref/107690>.

that has died in an accident if there is a dire need to save a patients' life provided that a competent Muslim physician is the one who took this decision of transplantation.

- The Islamic *Fiqh* Academy of India, at its first *Fiqh* seminar (Delhi, March 1989), passed the resolutions that it is allowed for a healthy person, in the light of medical experts, to donate one of his/ her kidneys to an ailing relative.³⁴²

Here a question arises why do scholars permits the donation of human organs while a person can't donate what he doesn't owe.

Scholars answer this query on the basis of necessity. They contend that whatever is forbidden in *Sharī'ah*, it becomes permissible when there is a situation of necessity and compulsion.³⁴³ Allah himself allows those actions in the dire need which are prohibited otherwise. For example, in following verses Allah The Exalted has ordained that there is no sin over a person who is compelled to do a certain prohibited deed:

إِنَّمَا حَرَّمَ عَلَيْكُمُ الْمَيْتَةَ وَالدَّمَ وَلَحْمَ الْخِنْزِيرِ وَمَا أُهِلَّ بِهِ لِغَيْرِ اللَّهِ
فَمَنْ أَضْطُرَّ غَيْرَ بَاغٍ وَلَا عَادٍ فَلَا إِثْمَ عَلَيْهِ إِنَّ اللَّهَ عَفُورٌ رَحِيمٌ ﴿١٧٢﴾

“He hath only forbidden you dead meat, and blood, and the flesh of swine, and that on which any other name hath been invoked besides that of Allah. But if one is forced by necessity, without wilful disobedience, nor transgressing due limits,- then is he guiltless. For Allah is Oft-forgiving Most Merciful”.³⁴⁴

³⁴²Second Fiqh Seminar was held between 8th to 11th December, 1989 in New Dehli in India on the topic of organ Transplantation. For detailed Fatwa see <http://www.iol.ie/~afifi/Articles/organ2.htm>.

³⁴³ Khālid Saifullah Rehmānī, “Transplantation of Human Organs”, *Contemporary Medical Issues In Islamic Jurisprudence*, ed. Qazi Mujāhid al-Islam Qāsmī (New Dehli: Islamic Fiqh Academy), p. 22.

³⁴⁴ Al-Qur’ān, 2: 173.

قُلْ لَا أَجِدُ فِي مَا أُوحِيَ إِلَيَّ مُحَرَّمًا عَلَى طَاعِمٍ يَطْعَمُهُ إِلَّا أَنْ
يَكُونَ مَيْتَةً أَوْ دَمًا مَسْفُوحًا أَوْ لَحْمَ خِنزِيرٍ فَإِنَّهُ رِجْسٌ أَوْ فِسْقًا
أُهِلَّ لِغَيْرِ اللَّهِ بِهِ فَمَنْ اضْطُرَّ غَيْرَ بَاغٍ وَلَا عَادٍ فَإِنَّ رَبَّكَ غَفُورٌ
رَّحِيمٌ ﴿١٤٥﴾

Say: "I find not in the message received by me by inspiration any (meat) forbidden to be eaten by one who wishes to eat it, unless it be dead meat, or blood poured forth, or the flesh of swine,- for it is an abomination - or, what is impious, (meat) on which a name has been invoked, other than Allah.s". But (even so), if a person is forced by necessity, without wilful disobedience, nor transgressing due limits,- thy Lord is Oft-forgiving, Most Merciful.³⁴⁵

إِنَّمَا حَرَّمَ عَلَيْكُمُ الْمَيْتَةَ وَالدَّمَ وَلَحْمَ الْخِنزِيرِ وَمَا أُهِلَّ لِغَيْرِ اللَّهِ بِهِ
فَمَنْ اضْطُرَّ غَيْرَ بَاغٍ وَلَا عَادٍ فَإِنَّ اللَّهَ غَفُورٌ رَّحِيمٌ ﴿١١٥﴾

He has only forbidden you dead meat, and blood, and the flesh of swine, and any (food) over which the name of other than Allah has been invoked. But if one is forced by necessity, without wilful disobedience, nor transgressing due limits,- then Allah is Oft-Forgiving, Most Merciful.³⁴⁶

³⁴⁵ Qur'ān, 6:145.

³⁴⁶ Qur'ān 16:115.

Thus those things become permissible in the state of compulsion which are prohibited otherwise³⁴⁷.

Purpose of organ transplantation is to save human life and saving human life is one of the objectives of *Sharī'ah*.³⁴⁸ Many verses of Quran enunciated this message as stated by this verse:

يَتَأْتِيهَا الَّذِينَ ءَامَنُوا لَا تَأْكُلُوا أَمْوَالَكُم بَيْنَكُم بِالْبَاطِلِ إِلَّا أَنْ
تَكُونَ تِجَارَةً عَنْ تَرَاضٍ مِّنكُمْ وَلَا تَقْتُلُوا أَنْفُسَكُمْ إِنَّ اللَّهَ كَانَ بِكُمْ

رَحِيمًا ﴿٢١﴾

“O ye who believe! Eat not up your property among yourselves in vanities: But let there be amongst you Traffic and trade by mutual good-will: Nor kill (or destroy) yourselves: for verily Allah hath been to you Most Merciful”³⁴⁹

There are many juridical rules which confirm this notion. For example:

- ✓ Necessity makes unlawful permissible.³⁵⁰
- ✓ When two interest conflicts let the one which will bring greater benefit take precedence.
- ✓ If forced to choose, choose the lesser of the two evils.³⁵¹

³⁴⁷ Dr. Muhammad Tahir Mansoori, *Sharī'ah Maxims on Financial Transactions* (Islamabad: International Islamic University, 2007), 80.

³⁴⁸ Al-Shātibī, *Al-Mūwafaqāt*, vol. 3, 47.

³⁴⁹ Al-Qur'ān 4: 29

³⁵⁰ Mansoori, *Sharī'ah Maxims on Financial Transactions*, p. 81.

³⁵¹ Ahmed Zarqa, *Sharh Al-Qawā'id al-Fiqhiyyah*, vol. 1 (Damascus: Dār al-Qalam, 1989), p. 203.

There have been such examples in the writing of jurists which bear the same stance for example:

Ibn Qudāmah quoted this example in his book “Al- Mughnī” that *Sharī’ah will* allow the cutting of the abdomen of the pregnant woman so that the fetus can be removed if his life is confirmed through the detection of any movement.³⁵²

It wasn’t allowed to cut the belly of dead person as mutilation is not allowed but it becomes permissible because the life of fetus is greater interest and his safety superseded the dead.

Thus it is allowed for a person to donate his body organ if: Transplantation is the only form of treatment possible. There is no danger to the life of the donor because of this donation.³⁵³

So much so that person can do *wasīyah* as well for this as declared by the resolutions of the council. These resolutions are given below:

- The council of the Islamic Fiqh Academy of the Muslim world league, Makah at its eighth working sessions (1405 AH/1985), resolved that it is permissible in *Sharī’ah* to remove an organ from a dead person and transplant it into a living recipient, on the condition that the donor was sane and had wished it so.³⁵⁴
- The Islamic Fiqh Academy of the Organization of the Islamic conference (OIC) , during its fourth session held in Jeddah, (1988) resolves that it is permissible from the *Sharī’ah* point of view to transplant an organ from the body of a dead person if it is

³⁵² Ibn Qudāmah, *Al- Mughnī*, vol. 2, p. 551.

³⁵³ Muhammad Naeem Yaseen, “The Rulings for the Donation of Human Organ in the light of *Sharī’ah* Rules and Medical facts,” p. 49-87.

³⁵⁴ Qararaat Majma’ al-Fiqh al-Islami, <http://www.islam-qa.com/en/ref/2117/organ%20donation>.

essential to keep the beneficiary alive, or of it restores a basic function to his body, provided it has been authorized by the deceased or by his heirs after his death or with the permission of concerned authorities if the deceased has not been identified or has no heirs.³⁵⁵

v. **Minority View Point**

Though majority of the *Shari'ah* Scholars and council of Islamic Fiqh, are of the opinion that human beings don't owe their body therefore they can't sell it but there is a small group of scholars who are in minority and holds the opinion that human beings can sell their body parts or human parts can be bought and sold.

They have based their ruling on following principle:

1. They contend that classical jurists had found no benefit in body parts after separation from body, when they had forbidden the sale of body parts. It is discussed earlier that Fuqaha has mentioned two criteria for any object to qualify as property one of which is that it should be of some benefit. At the time of *Fuqaha*, this reason for denial of sale of body parts was sound but in contemporary world when medical science has become so advanced, this notion needs to be reviewed when organ transplantation has proved itself a 'real success' and saved many lives. Now it has met this criterion thus it should be allowed to sell the body parts³⁵⁶

³⁵⁵ Resolutions and recommendations of the fourth session of the council of the Islamic Fiqh Academy (1408 AH/ 1988) p 52-53: ³⁵⁵ Islamic Fiqh Academy of India has differed in this matter with other two Fiqh Councils, which stated in its second Fiqh seminar That if a person directed that after his death, his organ should be used for the purpose of transplantation, it would not be considered as will according to Shariah. (Islamic Fiqh Academy of India, 8-11 dec, 1989, New Dehli) see for details: <http://www.iol.ie/~afifi/Articles/organ2.htm>

³⁵⁶ Mufid al-Rahmān, "Bay'al- 'Adā'a al- Basha'riyah fi Meezān al-Sharī'ah al-Islāmīyyah". *Al-Ba'th al-Islāmī* (January 2006), p. 36-46.

Counter argument from majority group: It is not us who have to decide whether a thing is beneficial for human beings or not. Ruling of *Sharī'ah* can't be changed on the apparent benefit of an object. Had it been left to us, *Ribā* (Usury) would have been beneficial. Many forms of immorality and corruption may appear beneficial, but that does not make them so.

Another argument given was that selling of body parts disgraces humanity while Allah The Exalted has honored it. This minority group rejects this opinion on two bases:

Firstly, if human organs are sold for the purpose of profit, business, circulation or trade or any other material gain then this may be humiliating human dignity but if the human organs are sold only for the purpose of utilization in saving human lives and only for which they were created by Allah Almighty and not for the purpose of trade and material gain then it is not harming human dignity.³⁵⁷

Secondly, if selling human body or human body parts demean, disgrace and dishonor the human beings then why did *Sharī'ah* not prohibit the slavery? Human beings used to be sold and bought like commodities in the market. If it was disgracing humanity, why *Sharī'ah* continued this practice and did not rule out.

Counter argument from majority group: this argument is responded by the majority view by saying that in slavery it was not the man who were bought and sold, it was actually their services.³⁵⁸

³⁵⁷ Mufīd al-Rahmān, "Bay' al- 'Adā'a al- Bashariyah fi Meezān al-Sharī'ah al-Islāmiyyah", p. 36-46.

³⁵⁸ 'Ismatullah 'Inayatullah, *al 'Intifa'a bi Ajzā al-Ajza al-Adamī*, p. 60.

Counter argument from minority group: If it is the case how can *Sharī'ah* allow buying of the service of female slaves for sexual intercourse. *Sharī'ah* can't allow the buying and selling of womb.

2. Ownership of human body is denied on the point that the owner is granted all sorts of rights of disposal, exploitation, sale, donation, mortgage, lending or anything of that sort whereas human beings lack this element. Human beings can't dispose off their body the way they want as proved earlier, suicide is forbidden³⁵⁹. This argument is responded in this way that this situation of restrictions is not exclusively with human body but it is extended to all kinds of objects. Ownership bestows the right of deriving benefit the way law has prescribed. If a person owns cattle or animals, he can't kill them without a justifiable reason. A person is not free to dispose off his grapes by selling it to a person which he knows that he will use him in extracting wine.³⁶⁰ The benefit of eating can't be derived from a donkey if it is owned by a person. Similarly he can't sell the donkey to one which he knows, will use for eating or selling as meat for people.³⁶¹ Besides these instances, owners are many times denied of their free will and choice of disposal of property by *Sharī'ah*. A person can't make the will of his property more than 1/3rd³⁶², lunatic or stupid are disallowed from transacting in their properties³⁶³; insolvents can no

³⁵⁹ Bukhārī, *Sahīh*, vol. 5, p. 619. Hadith no. 1274.

³⁶⁰ Ibn al-Qayyim al-Jawziyyah, *Zād al-Ma'ād fī Hadyī Khaīr al-'Ibād*, vol. 5 (Beirut: Mu'assasah al-Risālah, 1994), p. 757.

³⁶¹ *Ibid.*

³⁶² Showkāni, *Nail al-Awtār* vol. 6, p. 153; Ibn Qudāmah, *al-Mughnī*, vol. 6, p. 593; Kasānī, *Badā'i' al-Sanā'i'*, p. 129; Ibn Rushd, *Bidāyah al-Mujtahid*, vol. 2, p. 273; Ibn Ābidīn, *Radd al-Muhtār*, vol. 6, p. 148.

³⁶³ Al-Sarakhasī, *Al-Mabsūt*, vol. 11, p. 156; Ibn-Qudāmah, *Al-Mughnī*, vol. 8, p. 146; Ibn Rushd, *Bidāyah al-Mujtahid*, vol. 2, p. 227.

- more manage in their properties.³⁶⁴ A person can neither build a casino or pub on his land nor can he sell it to a person which he knows that he will build such things there. Thus many times property rights are curtailed by different kinds of restrictions by *Sharī'ah*. On this basis human body can't be denied of being capable of ownership and property.
3. Analogy established in relation to a free man is incorrect and "*Qiyās ma'aa al-fariq*" in the sense that a person does not lose anything of his freedom if he sells part of his tissue or kidney.³⁶⁵
 4. There is no explicit text which states that Human beings don't own their bodies in any sense. And that their bodies are 'Trust' with them.
 5. Verses that are quoted for ownership of body are so general that they cover every particle of the universe. If those verses are the arguments then everything is owned by Allah only. Human beings should be denied of all kinds of ownership and property in this earth.
 6. Analogy on the Hadith: "verily, when Allah prohibits from eating a thing, he forbids its price too³⁶⁶", too doesn't seem appropriate here. *Sharī'ah* has forbidden eating flesh of dead and wild animals but their skin is permitted to be utilized by the Muslims after the process of '*dibaghah*³⁶⁷'.
 7. Proscription of blood sale can't prove the interdiction of sale of other body parts. It is not permissible to sell the blood of a "goat" but it is allowed to sell its meat.

³⁶⁴ Ibn Qudāmah, *al-Mughnī*, Kitāb al-Muflīs , p. 537; Al-Dārdīr, *Al-Sharh al-Kabīr*, vol. 3, p. 262.

³⁶⁵ Mufīd al-Rahmān, "Bay'al- 'Adā'a al- Bashaṛiyah fī Meezān al-Sharī'ah al-Islāmīyyah", 36-46.

³⁶⁶ Abū Dawūd, *Sunan*, Book of sale, vol.2, p. 992. Hadith # 3481.

³⁶⁷ It is related from 'Abdullah ibn 'Abbas that the Messenger of Allah, may Allah bless him and grant him peace, once passed by a dead sheep and said, "Why do you not benefit from its hide?" They said, "It is carrion." He said, "It is eating it that is *haram*." (Bukhārī, Book of Sales Hadith no. 2108); Ibn Rushd, *Bidāyah al- Mujtahid*, vol. 1, p. 68; Abū 'Abdullāh Muhammad ibn Idrees al- Shāfi'ī, *al- Umm*, vol.1 (Beirut: Dār al-Fikr, 1983), p. 22.

3. Third Proposition

From the detailed analysis and scrutiny of arguments of both groups, it can be concluded that both the groups are advocating for their standings with some weak arguments and some strong points. None of them is holding very strong position for the defense of their stance.

As far as the first group is concerned, their perspective on the 'ownership' of human body is quite weak but the arguments for impermissibility of use of body organ are strong. Whereas arguments of minority group for ownership of human body are persuasive and convincing but they lack strength as far as the issue of use of body organ is concerned.

None of the opinion can be preferred; instead a third proposition can be deduced from the arguments of both groups which can be said to be safe in comparison to the both sides. The proposition states as follows:

Human body is owned by human beings in the way all other things are owned in this world on the behalf of Allah The Exalted. Human beings are vicegerents of Him and thus transacts in all objects as authorized and directed. Owner of the land is Allah but humans buy it, sell it and own it. Likewise, Human body is owned and benefitted from. He will question human beings regarding human body as he will inquire about all other worldly articles possessed and owned by human beings.

But as far as the Trade of organ is concerned, it can't be permitted on some other ground. When the organ is dislocated from the human body, it becomes soul less and amounts to carrion (*maytah*) as mentioned in '*Bidāyah al- Mujtahid*'. It States: "Everyone has agreed on it that it amounts to carrion if any part of cattle is amputated while the animal was alive as stated by

Prophet Muhammad Peace Be Upon Him where he said: "Whatever is amputated from a cattle while he was alive is carrion".³⁶⁸

And it is prohibited in *Shari'ah* to eat³⁶⁹ or sell³⁷⁰ carrion as mentioned earlier in detail. Thus when body organ is removed from human being who is alive, it is carrion and thus not allowed to trade in. It is not allowed to use such organs except when there is a dire necessity of saving human life on the ground of necessity makes impermissible permissible. As Imam Abu Hanīfah, al-Shāfi'ī and some Mālikīs state that a person is only allowed to eat carrion to the extent that can only save his life. It is not allowed for him to satisfy his motive of hunger to full as mentioned earlier³⁷¹. Same is the case with the use of Human organs. It can be only given voluntarily for saving human life. No money can be earned in return.

4. Fate of Transplanted Organ

Is human organ "consumed" by the body when it is transplanted? The reply to this issue is in two parts. Firstly, meaning of the word "consume" has to be assessed and then the whole technique of "Transplantation" has to be scrutinized. These two steps will enable to conclude whether "organ" is consumed when it is transplanted in the body.

³⁶⁸ Ibn Rushd, *Bidāyah al-Mujtahid*, vol. 1, p.78.

³⁶⁹ Shirbīnī, *Mughnī al-Muhtāj*, vol. 1, p. 338.

³⁷⁰ Sarakhasī, *Al-Mabsūt*, vol. 24, p. 46; Kasānī, *Badā'i' al-Sanā'i'*, vol. 11, p. 88.

³⁷¹ Ibn Rushd, *Bidāyah al-Mujtahid*, vol. 1, p. 384.

Dictionary meaning of the word “consume”

According to Merriam-Webster dictionary,³⁷² word “consume” has got following meanings:

Transitive Verb:

1. to do away with completely : **DESTROY** .
2. to spend wastefully : **SQUANDER b : USE UP**
3. to eat or drink especially in great quantity: to enjoy avidly : **DEVOUR**
4. to engage fully : **ENGROSS** <consumed with curiosity
5. to utilize as a customer <consume goods and services

Intransitive verb:

6. to waste or burn away : **PERISH**
7. to utilize economic goods.

Operative Technique of Transplantation:

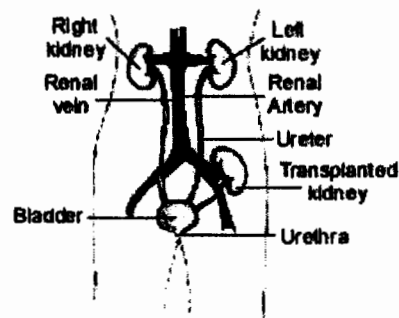
Transplantation Technique can be well-Illustrated through the operative technique of “Kidney transplant”. Kidneys are those sophisticated reprocessing machines that process about 200 quarts of blood to sift out about 2 quarts of waste products and extra water daily. The wastes and extra water become urine, which flows to the bladder through tubes called ureters which later on is released through urination.³⁷³

³⁷² <http://vlib.interchange.at:2078/dictionary?va=consume+&query=consume+>

³⁷³ <http://kidney.niddk.nih.gov/Kudiseases/pubs/yourkidneys/>

End-stage kidney disease occurs when the kidneys no longer remove wastes and excess fluids, and manage electrolytes (such as sodium and potassium) and minerals³⁷⁴. They also no longer make hormones that keep the bones strong and blood healthy. As a result, harmful wastes build up in the patient's body.³⁷⁵ Blood pressure may rise, and body may hold on to excess fluid and not make enough red blood cells.³⁷⁶

In this operative technique of transplantation, kidney is obtained from the donor along with its artery, renal vein and part of donor's ureter. New kidney is placed inside lower belly. The artery and vein of the new kidney are connected to the artery and vein in the patient's pelvis³⁷⁷. As shown in this figure:



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Before reperfusion (re-establishment of blood supply to the kidney), the patient's blood pressure should be maintained to ensure optimal blood supply to the transplanted kidney, if the patient's urine output is well established post operatively and the patient's volume and acid base

³⁷⁴ <http://drugster.info/ail/pathography/59/>

³⁷⁵ Ibid.

³⁷⁶ Ibid.

³⁷⁷ Ibid.

³⁷⁸ http://www.dilipraja.com/images/faq_kidney_transplantation.jpg.

status is maintained it is indicative of the acceptance of the donor's kidney and the adequate function of allograft.³⁷⁹

Blood flows through the new kidney, which makes urine just like patient's own kidneys did when they were healthy. The tube that carries urine (ureter) is then attached to the bladder.

Patient's own kidneys are left in place, unless they are causing high blood pressure, infections, or are too large for your body. The wound is then closed.

From the bird eye view of this technique, it is evident that kidney is placed in the human body through transplantation and it starts its function as it was done by the failed kidney. It operates like a machine or tool in the body. It is not consumed by the body in any sense as it is mentioned earlier that the word "consume" means to destroy or expend by use; to eat or drink up; devour, to destroy, as by decomposition or burning; to spend (money, time, etc.) wastefully; to absorb or engross: consumed with curiosity.³⁸⁰ Human body does not destroy, eat or absorb the transplanted human organ in any way rather it performs its function like it was performed by the original organ earlier.

5-Comparison

It is construed from the analysis and scrutiny of the issues related to the 'ownership of human body in the light of *Shari'ah* and Law' that U.K Law and Islamic Law are more or less identical to each other in this matter.

³⁷⁹ Mary E. King-Smith and others, *The Washington Manual of Surgery* (New Delhi: Wolters Kluwer, 2009), p. 400-02.

³⁸⁰ <http://dictionary.reference.com/browse/CONSUME>; <http://www.thefreedictionary.com/consume>

Regarding the main issue of recognition of 'property' in the human body and organs, U.K Law has declared the same verdict what majority of Islamic Scholars or councils of Islamic *Fiqh* have asserted. Section 32 of the Human Tissue Act 2004³⁸¹ completely bans any kind of commercial dealings in Human body for the purpose of transplantation. Same is the declaration of Councils of Islamic *Fiqh* and Scholars.³⁸²

However when the researches are explored, it is observed that there is a disparity of the supporters and opponents of both between the two. A substantial majority of the Islamic Scholars negates the concept of 'ownership and property' in human body and minority group of i researchers support the said notion. However the conclusion of this research calls for ownership but that doesn't lead to the permission of sale. Human body is owned by human beings in the way all other things are owned in this world on the behalf of Allah The Exalted. Human beings are vicegerents of Him and thus transacts in all objects as authorized and directed. Owner of the land is Allah but humans buy it, sell it and own it. Likewise, Human body is owned and benefitted from. He will question human beings regarding human body as he will inquire about all other worldly articles possessed and owned by human beings.

But as far as the Trade of organ is concerned, it can't be permitted on some other ground. When the organ is dislocated from the human body, it becomes soul less and amounts to carrion (*maytah*) and it is prohibited in *Shari'ah* to eat³⁸³ or sell³⁸⁴ carrion. Thus when body organ is removed from human being who is alive, it is carrion and thus not allowed to trade in. It is not

³⁸¹ Human Tissue Authority. <http://www.hta.gov.uk/>.

³⁸² Muhammad Naeem Yaseen, "The Rulings for the Donation of Human Organs in the Light of Shari'ah rules and Medical Facts"; 'Ismatullah 'Inayatullah, *al 'Intifa'a bi Ajza al-Ajza al-Adami*;; Kamāl al-dīn Bikro, "Mada mā Yamlik al-Insān min Jismihi."; Fatwa issued to Islamic medical association of South Africa by Dār al-Iftā, Riyadh Saudi Arabia, www.alfurqanonline.net/files/organ

³⁸³ Shirbīnī, *Mughnī al-Muhtāj*, vol. 1, p. 338.

³⁸⁴ Sarakhasī, *Al-Mabsūt*, vol. 24, p. 46; Kasānī, *Badā'i' al-Sanā'i'*, vol. 11, p. 88.

allowed to use such organs except when there is a dire necessity of saving human life on the ground of necessity makes impermissible permissible. On the other hand, insignificant number of material is being written against this concept nowadays in Law whereas substantial number of pieces of writings can be found in support of this concept.

They have supported the notion of property regime in human body on different grounds and from different perspectives.

For Example Muireann Quigley in her article 'Property and the body: Applying Honoré' has placed the human body within a coherent property framework³⁸⁵. She applied 'Honoré's conception of property' to the realm of the human body and its parts and tried to prove that Human body qualifies to be considered as property.

Another researcher Stephen Wilkinson chose Commodification Argument³⁸⁶ to debate and tried to prove that the Commodification argument cannot be used to justify the legal prohibition of organ sale.

Likewise, some researchers have chosen 'consent regime' to prove that it bears the implied recognition of 'property' in body. While some other has urged its recognition on economic rule of supply and demand and the distribution of benefits. And the list goes on.

Work that is being done nowadays to negate the idea of ownership and property is mostly based on counter argument to the supporter's arguments as done by Loane Skene. Perhaps the reason is that they done have to work really as their aspiration has already been realized by the

³⁸⁵ Muireann Quigley, "Property and the Body: Applying Honoré," p. 631–634.

³⁸⁶ Stephen Wilkinson, "Commodification Arguments for the Legal Prohibition of Organ Sale," *Health Care Analysis* (2000), 189-201.

ban on the trade in body organ. The other side's work is to prove it incorrect and made legislators amend according to their belief.

In Short, Trade in Human organs for the purpose of transplantation is not permitted both in *Shari'ah* and Law. Whereas donation has been allowed for the transplantation, thus altruistic way of has been opted for the purpose of saving human lives in both Muslim countries³⁸⁷ and western countries.³⁸⁸

³⁸⁷ As according to clause 11 of the Transplantation of Human Organs and Tissues Act, 2010 of Pakistan, whoever is involved in commercial dealings in human organs will be subjected to ten years imprisonment and fine which may extend to one million rupees. This Act completely prohibits the sale while it allows donation if it is donated voluntarily, genuinely motivated and without any duress and coercion. See for details; The Transplantation of Human Organs and Tissues Act, 2010.

³⁸⁸ Supreme Council of Ulema in Riyadh in their Resolution no. 99 dated 6 dhilqadah 1402 see <http://en.allexperts.com/q/Islam-947/islamic-rule.htm>.

CHAPTER No. 3

GAMETES SALE AND SURROGACY IN SHARĪ'A AND LAW

1-Commercial Surrogacy and Gametes Sale According to U.K Law

i. Commercial surrogacy

Commercial surrogacy ³⁸⁹is a contentious issue too among scholars and researchers like other medico-legal issues mentioned earlier. Researchers are divided into groups in this matter i.e. supporters and opponents. Arguments of each group are recapitulated in following lines. Opponents' are mentioned earlier

▪ Arguments of opponents:

Researchers writing against 'Commercial surrogacy' employed various arguments for rationalizing their stance. The most sound among them is Commodification argument.

³⁸⁹ Surrogacy is the "Practice in which a woman (the surrogate mother) bears a child for a couple unable to produce children in the usual way, usually because the wife is infertile or otherwise unable to undergo pregnancy. In so-called traditional surrogacy, the surrogate mother is impregnated through artificial insemination with the sperm of the husband. In gestational surrogacy, the wife's ova and the husband's sperm are subjected to in vitro fertilization, and the resulting embryo is implanted in the surrogate mother. Online Encyclopedia of Britannica. <http://vlib.interchange.at:2078/eb/article-9070470>,

Commodification

Kantian argument of respect for person is furnished. According to this notion, it is abhorrent to behave toward and treat people as object of commerce. According to Kantian philosophy, Sale of human being is not acceptable for the reason that it treats humans as objects instead of persons and thus as means rather than ends. Humans are sold and bought and treated as inferior to those who buy and sell them. An Extra wedge will be created between babies and adult if babies are allowed to be bought and sold and there will be inequality between man and woman if women are permitted to be sold and rented³⁹⁰

This Commodification is twofold in nature

Firstly, Surrogates are used as tool or machine to manufacture their desired product. Payments to bear a child amount to treat human body as an object of commerce. In the words of Anderson: "Pregnancy contracts objectionably reduce women's reproductive labor to a commodity."³⁹¹

Their bodies are reduced to a machine. It is like selling their bodies. As Sara Ketchum noted: "To make a person or a person's body an object of commerce is to treat the person as part of another person's domain, particularly if the sale of A to B gives B rights to A or to A's body."³⁹²

³⁹⁰Sara Ann Ketchum, "Selling Babies and Selling Bodies", *Hypatia*, vol. 4. no. 3 (Autumn 1989), p. 116-127.

³⁹¹Elizabeth S. Anderson, "Why Commercial Surrogate Motherhood Unethically Commodifies Women and Children: Reply to McLachlan and Swales," *Health Care Analysis*, no. 8, p. 19-26.

³⁹²Sara Ann Ketchum, "Selling Babies and Selling Bodies". P. 116-27.

Secondly, these contracts of commercial surrogate motherhood treat babies as object of commerce.³⁹³ Money that transfers hands in such contracts constitute the buying and selling of the baby. Advocates of ban on commercial surrogacy consider that baby-selling amounts to selling a human being. Elizabeth S. Anderson says: “Commercial surrogate contracts objectionably commodify children because they regard parental rights over children not as trusts, to be allocated in the best interests of the child, but as like property rights to be allocated at the will of the parents.”³⁹⁴

Sale of a human being devalues humanity. In the words of Ketchum: “The most straightforward argument for prohibiting baby-selling is that it is selling a human being and that any selling of a human being should be prohibited because it devalues human life and human individuals”.³⁹⁵

Exploitation

Exploitation argument states that if commercial surrogacy is permitted then poor women will feel herself forced to enter into such contracts when they desire not to do so. Thus child will be a burden to her instead of nurturing a ‘soul’ in her Belly. Baby will be deprived of the love, care and intimacy from the very beginning. She will produce babies even when she can’t afford it physically. She will produce more and more babies in order to meet both ends meet. Heidi writes in this regard: “A third argument against contracted child-bearing arrangements asserts that the

³⁹³ Heidi Malm, “Paid Surrogacy: Arguments and Responses”, *Public Affairs Quarterly*, vol. 3, no.2 (April, 1989), 57-66, www.jstor.org/stable/40435711 (accessed January 1, 2011).

³⁹⁴ Elizabeth S. Anderson, “Why Commercial Surrogate Motherhood Unethically Commodifies Women and Children: Reply to McLachlan and Swales,” p. 19-26.

³⁹⁵ Sara Ann Ketchum, “Selling Babies and Selling Bodies”, p.116-127.

opportunity to be paid for one's service in bearing a child will exploit poor women. They may feel compelled to enter into these arrangements when they would prefer not to do so."³⁹⁶

Neediness of Orphans

Orphans will find no home if commercial surrogacy is permitted.³⁹⁷ Money will induce females to enter into contract of surrogacy. Consequently it will become so easy for infertile couples to have a child if they can't get it naturally. And no one will turn to orphans. Consequently, it will turn the fate of orphans more evil as they will not have any chance of adoption by families. In the words of Ketchum: "There are children living in orphanages in third world countries about whom it is hard to believe they would not be better off being adopted by an American couple. It is just possible that they would be more likely to be adopted if contracted motherhood were less available."³⁹⁸

▪ Supporter's arguments

This group has posed counter-arguments to the stances of the former group.

Payment is not for Child:

Firstly, Payment is made not for child. It is given for surrogate's services, efforts and risks for bearing a child. She is paid for the loss of earning due to pregnancy, for the pain she bears, for the exertion she may make to restore her body to its original position that was prior to pregnancy. According to Heidi Malm, when a woman is paid against surrogacy, she is actually being paid for the risks she bears by nurturing the child in her womb and delivering, not drinking coffee or

³⁹⁶ Heidi Malm, "Paid Surrogacy: Arguments and Responses", p. 57-66,

³⁹⁷ Ibid.

³⁹⁸ Sara Ann Ketchum, "Selling Babies and Selling Bodies", p.116-127

alcohol during pregnancy, loss of earnings from other sources, and to make her body return to her original condition.³⁹⁹

Secondly, imbursements are not made to the mother for her transferring the right of custody of the child but for giving up that right. Hence it does not amount to a sale in legal sense. This argument is rejected by the first group on the ground that it does commodify children even if it does not constitute 'legal sale' in the strict sense. Anderson contends in following terms:

Anderson is of the view that commodification is not legal concept; instead it is an ethical and cultural concept. If this transaction does not amount to sale, even then it may still commodify children where it has replaced the parental norms with regard to custody and rights of child with market norms. She argues that payment for surrogacy turns the control of parents over child as trust to alienable property rights.⁴⁰⁰

Commercial Surrogacy does not Commodify Women:

According to this group commercial surrogacy does not disrespect or disgrace women as claimed by McLachlan and Swales in their article 'babies, Child Bearers and Commodification': "There is nothing inherent in treating woman as an incubator for a child that precludes also treating her with respect. Therefore, if a given mother is disrespectfully treated by the other parties to a

³⁹⁹ Heidi Malm, "Paid Surrogacy: Arguments and Responses", p. 57-66,

⁴⁰⁰ Elizabeth S. Anderson, "Why Commercial Surrogate Motherhood Unethically Commodifies Women and Children: Reply to McLachlan and Swales," p. 19-26.

pregnancy contract, this is a problem with the particular people who treat her that way, not a problem inherent in the surrogacy arrangements.”⁴⁰¹

Supporters of commercial surrogacy reply to the argument of women being commodified by commercial surrogacy in another way as well. ‘Contracts’ show autonomy and personal perspective of parties according to them. Thus when pregnancy contract are voluntarily made then it is not violating dignity, honor and respect of human beings.

First group is not convinced with this explanation and refutes the stance on the ground that there are some rights which are so vital for the dignity of ‘Humans’ that they can’t be given up or alienated even if a person consents to transfer it. They are not transferable. Rebuttal is articulated in following expression:

“The error in this argument is its failure to recognize that some rights in one’s person are so essential to dignity and autonomy that they must be held inalienable. This is not a paternalistic claim. The claim is not that individuals must be protected from their own bad judgment. The claim is rather that there are some ways of treating people that are morally objectionable, even if they consent to being treated those ways.”⁴⁰²

No Exploitation of Poor:

Surrogacy creates no exploitation of poor. If commercial surrogacy is utilized by poor ladies for escaping their poverty then there is no wrong in it. It will bring no good if we completely ban it on the ground that some poor ladies will employ it for the want of money and use it as a mean to evade their poverty.

⁴⁰¹ Hugh V McLachlan and others, “Babies, Child Bearers and Commodification,” *Health Care Analysis*, no. 1, p. 11-29.

⁴⁰² Elizabeth S. Anderson, “Why commercial surrogate motherhood unethically commodifies women and children: reply to McLachlan and Swales,” *Health Care Analysis*, no. 8, 19-26.

Orphans Rights can't Bar Others from having Children:

It is not a logical ground of banning surrogacy that the orphans in Orphanage will lose the chance of having a home. Too many Orphans don't mean that a couple should be refused to have an opportunity to have a child who will be genetically related to them. Heidi writes in this regard:

“If the need to find homes for hard to place children provides grounds for not allowing an infertile couple to have and raise a child genetically related to at least one of the, then it also provides grounds and just as strong grounds for not allowing a fertile couple to have and raise a child genetically related to at least one of them. Yet few of us would tolerate- much less advocate- a government which could legitimately say to a fertile couple “I am sorry, we cannot allow you to have and raise a child genetically related to at least one of you because there are too many other children who need homes.”⁴⁰³

ii. Gametes Sale

In United Kingdom, gamete donation is dealt by Human Fertilization and Embryology Authority.

⁴⁰⁴It was created by Human fertilization and embryology Act of 1990. It can license the clinics to use the technique and decide the rules for the compensation of gametes donors. According to Human fertilization and Embryology Act of 1990 (as amended), it is illegal to trade in sperms and eggs. Section 12(1) of the said Act states: “That no money or other benefit shall be given or received in respect of any supply of gametes, embryos or human amixed embryos unless authorized by directions.”⁴⁰⁵

It is an offence in U.K to give or receive money for the supply of gametes as noted by section 41(8-9) this Act:

⁴⁰³Heidi Malm, “Paid Surrogacy: Arguments and Responses”, *Public Affairs Quarterly*, vol. 3, no.2 (April. 1989), 57-66.

⁴⁰⁴ <http://www.hfea.gov.uk>

⁴⁰⁵ Section 12 (1), Human Fertilisation and Embryology Act 1990.

“(8) Where a person to whom a license applies or the holder of the license gives or receives any money or other benefit, not authorized by Directions, in respect of any supply of gametes, embryos or human admixed embryos, he is guilty of an offence.

(9) A person guilty of an offence under subsection (8) above is liable on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding level five on the standard scale or both.”⁴⁰⁶

However, donors can claim reasonable expenses for loss of earnings and travel according to the HFEA guidance:

“13.2 Donors may be reimbursed all reasonable expenses incurred in the UK in connection with donating gametes or embryos (for example a standard-class rail ticket by the most direct route), but not excessive expenses if these would be benefits in themselves.

13.3 Expenses claimed by donors should be directly linked to the process of donation (for example, the cost of travel to the centre, or the cost of childcare during donation when the donor would normally be caring for the child). They should not be expenses which the donor would have incurred irrespective of their donation.”⁴⁰⁷

Thus the law disallows the imbursement of donors but allows them to be compensated for expenses and for the inconvenience of donation. It is the HFEA's to decide as to how much compensation would be adequate for loss of earning, expenses and inconvenience of donation within these legal limits. HFEA had last reassessed their rules on donation in 2005. According to

⁴⁰⁶ Section 41, Payment to donors, Human Fertilisation and Embryology Act 1990.

⁴⁰⁷ 13.1 and 13.2 of hfea Guidance, <http://www.hfea.gov.uk>

the current policy of HFEA, donors are not allowed to sell their gametes, they can only claim the reasonable expenses for example travel costs, loss of earnings up to £61.28 for each full day (as for jury service), with a limit of £250 for each course of sperm or egg donation.⁴⁰⁸

Apart from this kind of compensation, another option of “egg sharing” is also available in U.K. egg sharing is an arrangement where a woman who wants to undergo ART can have it done on discounted fee or free for donating eggs to another woman.⁴⁰⁹

Gametes: property or not?

Researchers are divided on the issue whether the law should treat gametes⁴¹⁰ as property or not like they are on the question of sale of body parts. Some of the researchers claim that the best explanation of the status of the gametes is considering it as a ‘property’⁴¹¹ whereas other denies on the ground that it leads to commercialization and commodification of gametes and thereby of persons.

Supporters of the property regime claim that the concept of ‘property’ is misunderstood by people as absolute dominion over things whereas it should be realized as a series of relationships generating and generated by claims or rights in relation to objects. Kath O Donnell, a researcher

⁴⁰⁸ <http://www.hfea.gov.uk/6177.html>

⁴⁰⁹ Aaron D. Levine, *The Oversight and Practice of Oocyte Donation in the United States, United Kingdom and Canada*, www.springeronline.com (accessed January 2011).

⁴¹⁰ “Gamete is sex, or reproductive, cell containing only one set of dissimilar chromosomes, or half of the genetic material necessary to form a complete organism (i.e., haploid). During fertilization, male and female gametes fuse, producing a diploid (i.e., containing paired chromosomes) zygote.” Online Encyclopedia of Britannica. <http://vlib.interchange.at:2078/eb/article-9070470>,

⁴¹¹ There is a minority group in this matter as well who supports incomplete commodification. One of its supporters Suzanne Holland writes in her article: incomplete commodification affords us a more accurate reflection of the realities of our human transactions: we value both market efficiency and the fullness of our personhood. In other words, incomplete commodification provides a way of regulating the market and evaluating what reach the market ought to have for a particular entity, in this case non-organ body parts. Furthermore it allows us to arrive at a mean between the two extremes of complete commodification and complete non-commodification.” See Suzanne Holland, “Contested Commodities at Both Ends of Life: Buying and Selling Gametes, Embryos, and Body Tissues,” *Kennedy Institute of Ethics Journal* 11, no. 3 (Sep., 2001): 263-284.

at law school of university of Hull propounded in this regard that property is misunderstood most of the time that it has the commodification argument engraved in it and it has not be unlimited and absolute whereas liberal analysis of property represents autonomy, identity, personhood and rights to control reproductive material.⁴¹²

This group quotes the long tradition of relationship of property and self that urges that property enhances essential elements in the development and flourishing of identity or personhood and autonomy. Radin's notion of personal property is reiterated who defines it as claims which are so intimately bound up with the person that they are constitutive of human freedom, individuality and personality.⁴¹³ From these notions Donnell draws the conclusion: "Once body parts such as gametes, with their particular uniqueness and significance, become severable objects in reality and enter the external world, theories of property for personhood provide a justificatory basis for acknowledging and protecting the individual's continued interest in them".⁴¹⁴

Regarding commodification argument, this group replies that gamete donation and assisted reproductive technology is already commercialized and commodified. This is an inevitable truth. It has become a very profitable business for clinics. Only donors are not earning from it. Deprivation of donors from making money isn't preventing gametes from being commercialized and commodified. In the words of Kath O Donnell: "commodification is presented as an inveterate evil, but there is a failure to acknowledge that gamete donation and assisted reproductive

⁴¹²Kath O donnell, "Legal Conceptions: Regulating Gametes and Gamete Donation," *Health Care Analysis*, no. 2 (2000), p. 137-54.

⁴¹³ Margraet Jane Radin, "Property and Personhood", <http://cyber.law.harvard.edu/IPCcoop/82radi.html> (accessed January 2011).

⁴¹⁴Kath O donnell, op.cit., 137-54.

technology is the locus of enormous commercial interests and enterprise- but not for the originators of the genetic material. Donors are not making money,⁴¹⁵

One very important question which is ambiguous and unsettled in Law is regarding the autonomy and control of gametes. Neither U.K law nor U.S Law is clear in this matter. They have not provided any framework for the solution of the disputes that arises regarding gametes controls

2-Commercial Surrogacy and Gametes Donation In the light of Sharī'ah:

i. Commercial Surrogacy

As far as surrogacy is concerned there is no difference of opinion between scholars that it is not only prohibited to surrogate for money but voluntarily doing is also *Haram*. There is no room at all for its permissibility for many negative reasons.

Surrogacy is resorted if wife is not capable to carry the pregnancy because of absence of uterus or defective uterus or if she does not want to bear the pain of pregnancy and delivery or does not want for want of the beauty of her physique.⁴¹⁶

It is completely forbidden in Islam for various reasons. Allah says in Glorious Quran:

وَالَّذِينَ هُمْ لِأَفْوَاجِهِمْ حَافِظُونَ ﴿٥٠﴾

“

And

those who Guard their chastity (i.e. private parts from, from illegal sexual acts)⁴¹⁷

⁴¹⁵ Ibid.

⁴¹⁶ Hafiz Mubashir Hussain, *Jadeed Fihi Masail* (Lahore: Mubashir Acedemy, 2008), p. 59.

⁴¹⁷ Al-Qur'ān 23:5

إِلَّا عَلَىٰ أَزْوَاجِهِمْ أَوْ مَا مَلَكَتْ أَيْمَانُهُمْ فَإِنَّهُمْ
غَيْرُ مَلُومِينَ ①

except from their wives or (the slaves) that their right hands possess, for then, they are free from blame.”⁴¹⁸

Thus Allah The Exalted has forbidden the Muslims from involving in any kind of sexual activity other than with wives and female slaves thus any activity which involves sex or its after effect are not allowed except with wives and female slaves.

Dr. ‘Abd al- ‘Azeem al-Mat’ani of Al- Azhar University writes:

“The womb is a part of a woman ‘private parts and the private part (i.e. sexual relations) are not permissible except through the *Shari’ah* contract whose conditions are fully met. So the womb is exclusively for the husband who is married to that woman according to a valid marriage contract, and no one else has a right to use it for an alien pregnancy. If the woman who rents out her womb is not married to that husband, then she is permitting her private parts and her wombs to a man who is stranger to her: she is not permissible for him and he is not permissible for her. Even if this is not Full- scale *Zina* (Adultery) it is definitely *Haram* because it is enabling a man who is a stranger to her (that is not married to him) to put his semen in her womb”⁴¹⁹

Besides the illegitimacy of this pregnancy, there arise some other issues as well. Why surrogacy is to? A mother wants her baby but not out of her womb but the womb of any other lady. And that other lady does not want to be a “mother” of that child but merely wants to rent out her womb.

Who will be the “mother” of such child in the sight of *Shari’ah* if a baby is produced through this procedure?

⁴¹⁸ Al-Qur’ān 23:6

⁴¹⁹ Dr. ‘Abd Al-‘Azeem Al-Mat’ani, “Renting Womb is Haram,” <http://www.islam-qa.com/en/ref/22126/surrogate>. (accessed January 2011).

In 'Arabic' language the word 'parent' (*Wāledain*) is derived from 'natality' (*wilādah*) which is used for the whole process of begetting from conception to delivery. Father is '*wālid*' and mother is '*wālida*'. The feminine form both terms '*wālid*' and '*wālida*' would refer to the person who gave birth of child. Thus *wālida* or mother in Islamic *Shari'ah* is the one who has deliver the baby which is totally against the foremost purpose of 'surrogacy'. Quran has stated this notion in several places. For example following verse of Surah Al- Mujadallah (58:2) is the most compelling evidence which says:

الَّذِينَ يُظَاهِرُونَ مِنكُم مِّن نِّسَابِهِمْ مَّا هُنَّ أُمَّهَاتِهِمْ إِنْ أُمَّهَاتُهُمْ إِلَّا اللَّائِي
وَلَدْنَهُمْ وَإِنَّهُمْ لَيَقُولُونَ مُنْكَرًا مِّنَ الْقَوْلِ وَزُورًا وَإِنَّ اللَّهَ لَعَفُوءٌ غَفُورٌ



Such of you as put away your wives (by saying they are as their mothers) - They are not their mothers; none are their mothers except those who gave them birth - they indeed utter an ill word and a lie. And lo! Allah is Forgiving, Merciful.⁴²⁰

In another place Allah says:

وَوَصَّيْنَا الْإِنسَانَ بِوَالِدَيْهِ حَمَلَتْهُ أُمُّهُ وَهَذَا عَلَىٰ وَهْنٍ وَفِصْلُهُ فِي
عَامِينَ أَنْ أَشْكُرَ لِي وَلِوَالِدَيْكَ إِلَيَّ الْمَصِيرُ

And

we have enjoined on man (to be good) to his parents (his *walidayn*) in travail upon travail

⁴²⁰ Al-Qur'ān, 58:2.

did his mother bear him and in years twain was his weaning..... (Hear the command): show gratitude to me and to your parents (your *walidayn*).⁴²¹

One of the Verses said:

وَوَصَّيْنَا الْإِنْسَانَ بِوَالِدَيْهِ إِحْسَانًا حَمَلَتْهُ أُمُّهُ كُرْهًا وَوَضَعَتْهُ كُرْهًا
وَحَمْلُهُ وَفِصَالُهُ ثَلَاثُونَ شَهْرًا حَتَّىٰ إِذَا بَلَغَ أَشُدَّهُ وَبَلَغَ أَرْبَعِينَ سَنَةً
قَالَ رَبِّ أَوْزِعْنِي أَنْ أَشْكُرَ نِعْمَتَكَ الَّتِي أَنْعَمْتَ عَلَيَّ وَعَلَىٰ وَالِدَيَّ وَأَنْ
أَعْمَلَ صَالِحًا تَرْضَاهُ وَأَصْلِحْ لِي فِي ذُرِّيَّتِي إِنِّي تُبْتُ إِلَيْكَ وَإِنِّي مِنَ
الْمُسْلِمِينَ ﴿١٥﴾

And We have commended unto man kindness toward parents. His mother beareth him with reluctance, and bringeth him forth with reluctance, and the bearing of him and the weaning of him is thirty months, till, when he attaineth full strength and reacheth forty years, he saith: My Lord! Arouse me that I may give thanks for the favour wherewith Thou hast favoured me and my parents, and that I may do right acceptable unto Thee. And be gracious unto me in the matter of my seed. Lo! I have turned unto Thee repentant, and lo! I am of those who surrender (unto Thee).⁴²²

Thus the child will belong to the woman who carried the baby and gave it birth, thus defeating the very purpose of surrogacy. Moreover, surrogacy will lead to the confusion of lineage as the

⁴²¹ Al-Qur'ān, 31:14.

⁴²² Al-Qur'ān, 46:15.

mother is the 'surrogate mother' and the father is the one who gave his semen although he never married to the woman nor is he her husband⁴²³

ii. Gametes Sale

Regarding 'sperm donation', scholars bear unanimous opinion that it is completely prohibited. It is not allowed to use the donated sperm in any kind of IVF treatment, as donation of sperm will be from any person other than the husband. Many scholars consider that it amounts to adultery as both bears the same effect. In both cases tillage is inseminated by a stranger. This process also violates those verses which enshrine to guard the private parts as mother will be keeping and nurturing the sperm of a stranger.

وَالَّذِينَ هُمْ لِأُزْوَاجِهِمْ حَافِظُونَ ﴿٥﴾

And

those who guard their private parts,⁴²⁴

إِلَّا عَلَىٰ أَزْوَاجِهِمْ أَوْ مَا مَلَكَتْ أَيْمَانُهُمْ فَإِنَّهُمْ
غَيْرُ مَلُومِينَ ﴿٦﴾

Except with those joined to them in the marriage bond, or (the Captives) whom their right hand possesses, for (in their case) they are free from blame

⁴²³ Sheikh Muhammad Ibn Adam Al- kawthari, "What is the Islamic position on Surrogate motherhood?" www.qa.sunnipath.com (accessed July 2010) ; Sheikh Muhammad Amin Khilwadia, The Islamic Ruling on Surrogate Motherhood," <http://www.ilmgate.org/the-islamic-ruling-on-surrogate-motherhood/> (accessed July 2010).

⁴²⁴ Al-Qur'ān, 23:5.

فَمَنْ ابْتَغَىٰ وَرَاءَ ذَٰلِكَ فَأُولَٰئِكَ هُمُ الْعَادُونَ ﴿٧﴾

but

those whose desires exceed those limits are transgressors.⁴²⁵

Therefore those who want a child by artificial insemination of either using alien sperm, they come within the purview of transgression as asserted in this Hadith of Prophet (Peace be upon him): “Ruwaīyh ibn Thābit al-Ansāri (Allah be pleased with him) narrated that the messenger of Allah (peace be upon him) said on the day of Hunaīyn: “It is unlawful for a man who believes in Allah and the last day that he waters the plant of another”⁴²⁶.

The meaning of watering the plant of another is to introduce one’s sperm into the wombs of another person’s wife.

Hence AID, AIM and Surrogate motherhood is completely prohibited when a third party is involved.

Moreover, this third party will create confusion in child’s identity and will defeat the one of the five universal objectives of *Sharī’ah* that is preservation of lineage.

⁴²⁵ Al-Qur’ān 23:6

⁴²⁶ Abū Dāwūd, *Sunan*, vol.2, p. 992. Hadith no. 2158.

Abū Huraira (Allah be pleased with him) reported that Allah's Messenger (Peace Be Upon Him) stated: "The child is to be attributed to the bed he is born, and a fornicator should be thrown with a stone."⁴²⁷

The meaning of this Hadith is that the right of paternity will always be for the person who is married to the child's mother.

Egg donation by a female is exactly the same. Regarding this issue, **Sheikh Ahmad Kutty**, a senior lecturer and Islamic scholar at the Islamic Institute of Toronto Canada, states: "Egg donation is not allowed in Islam; this is because of the fact that it dilutes and mixes up blood lineages. In other words, it mixes the egg and sperm of two parties who are not married. In this way, it is no different from adultery. There is a consensus among scholars on this issue. Hence, no Muslim should ever even entertain such an idea".⁴²⁸

3- Comparison

As far as the sub issue of commercial Surrogacy is concerned, here both the Laws go hand in hand. It is Impermissible in U.K Law as well as in *Sharī'ah* but the voluntary surrogacy is point of divorce between the both. In U.K Law voluntary surrogacy is permissible though unenforceable. She may be entitled to reasonable expenses but commercial surrogacy is impermissible. Some researchers strongly condemn the commercialization of surrogacy and amount it to Commodification of women and child. Whereas other defends that payment to surrogates does not commodify her or the child. Some contend that she demean humanity by

⁴²⁷ Muslim ibn Al- Hajjāj al- Qashīrī al- Nisaborī, *Sahīh*, trans. 'Abd al-Hameed Sidique, vol. 2, (Lahore: Sh. Muhammad Ashraf, 1990), p. 773, Hadith No.1458.

⁴²⁸http://www.islamonline.net/servlet/Satellite?pagename=IslamOnline-English-Ask_Scholar%2FFatwaE%2FFatwaEAskTheScholar&cid=1235628692727

renting her womb, on the contrary, some defends that she does not disgrace humanity when she gives the pleasure of a baby to an infertile couple. In *Shari'ah*, it is completely Intolerable for unavoidable reasons that have been mentioned earlier.

Second Sub issue 'gametes sale 'gave rise to the same conclusion i.e. that it is neither allowed in Law nor in *Shari'ah*. U.K Law is very unequivocal in this regard that only reasonable expense may be reimbursed to the donors for their expenses, inconvenience and loss of earning but no amount above that can be paid. Besides that egg sharing is also an offer in recognition of altruistic action.

Researchers view point is divided in this regard as well. Some view gametes as property and some do not. However U.K government is facing strong pressure to review this policy. Many newspaper's articles can be seen that call for increased payment for gametes donation.⁴²⁹ There are two reasons for this situation. Firstly, there is a shortage of gametes and couples face difficulty in seeking gametes from the donors. Secondly, People of U.K are spurred by the situation in U.S.A where people are paid a good amount for donation which results in lack of scarcity. On the contrary, Islamic law put complete ban on the gamete donation. Islam permits the employment of IVF for procreation but with the condition of using sperms and eggs of spouses. Thus Using some one's else gametes are strictly prohibited. Islamic principles and texts are very crystalline in this regard.

⁴²⁹ See the article 'why sperms donors should be paid more by Laura Witjens, 20th October 2010, www.bbc.com

CONCLUSIONS AND RECOMMENDATIONS

Shari'ah and Law have almost same concept of ownership and property. As far as the rights are concerned granted by ownership and property are concerned, English Law and *Shari'ah* are neck and neck. For example right to use, right to benefit from and dispose off and the duties such as the duty to avoid any such use that is harmful for others. An Almost complete similarity can be found in the modes of acquisition of property as well. However, the point of dissimilarity is found with regard to the some restriction imposed by *Shari'ah*. These restrictions are regarding the creation, use and alienation of the property. In *Shari'ah*, those objects can't be owned and used that are prohibited by explicit text of al-Qur'an and Traditions of Messenger of Allah (P.B.U.H). Pork and wine are some of its example. Whereas it is perfectly alright to own and use these things in western legal system. *Shari'ah* does not allow Muslims to invest their properties in the prohibited areas like in vulgar movies and modelling. Likewise, *Shari'ah* has not given free hand of alienation of property. An owner can't bequest his property the way he wants. He cannot bequest in the favor of legal heirs. Moreover, he will be restricted to 1/3rd in this regard.

It is construed from the analysis and scrutiny of the issues related to the 'ownership of human body in the light of *Shari'ah* and Law' that U.K Law and Islamic Law are more or less identical to each other in this matter.

Regarding the main issue of recognition of 'property' in the human body and organs, U.K Law has declared the same verdict what majority of Islamic Scholars or councils of Islamic *Fiqh*

have asserted. Section 32 of the Human Tissue Act 2004⁴³⁰ completely bans any kind of commercial dealings in Human body for the purpose of transplantation. Same is the declaration of Councils of Islamic *Fiqh* and Scholars.⁴³¹

However when the researches are explored, it is observed that there is a disparity of the supporters and opponents of both between the two. A substantial majority of the Islamic Scholars negate the concept of 'ownership and property' in human body and very inconsiderable number of researches support the said notion. However the conclusion of this research calls for ownership but that doesn't lead to the permission of sale. Human body is owned by human beings in the way all other things are owned in this world on the behalf of Allah The Exalted. Human beings are vicegerents of Him and thus transacts in all objects as authorized and directed. Owner of the land is Allah but humans buy it, sell it and own it. Likewise, Human body is owned and benefitted from. He will question human beings regarding human body as he will inquire about all other worldly articles possessed and owned by human beings.

But as far as the Trade of organ is concerned, it can't be permitted on some other ground. When the organ is dislocated from the human body, it becomes soul less and amounts to carrion (*maytah*) and it is prohibited in *Shari'ah* to eat⁴³² or sell⁴³³ carrion. Thus when body organ is removed from human being who is alive, it is carrion and thus not allowed to trade in. It is not allowed to use such organs except when there is a dire necessity of saving human life on the ground of necessity makes impermissible permissible. On the other hand, insignificant number of

⁴³⁰ Human Tissue Authority. <http://www.hta.gov.uk/>.

⁴³¹ Muhammad Naeem Yaseen, "The rulings for the donation of human organs in the light of Sharia rules and medical facts"; 'Ismatullah 'Inayatullah, *al 'Intifa'a bi Ajza al-Ajza al-Adami*;; Kamāl al-dīn Bikro, "Mada mā Yamlik al-Insān min Jismihi."; Fatwa issued to Islamic medical association of South Africa by Dār al-Ifṭā, Riyadh Saudi Arabia, www.alfurqanonline.net/files/organ

⁴³² Shirbīnī, *Mughnī al-Muhtāj*, vol. 1, p. 338.

⁴³³ Sarakhasī, *Al-Mabsūt*, vol. 24, p. 46; Kasānī, *Badā'i' al- Sanā'i'*, vol. 11, p. 88.

material is being written against this concept nowadays in Law whereas substantial number of pieces of writings can be found in support of this concept. They have supported the notion of property regime in human body on different grounds and from different perspectives.

For Example Muireann Quigley in her article 'Property and the body: Applying Honoré' has placed the human body within a coherent property framework⁴³⁴. She applied 'Honoré's conception of property' to the realm of the human body and its parts and tried to prove that Human body qualifies to be considered as property.

Another researcher Stephen Wilkinson chose Commodification Argument⁴³⁵ to debate and tried to prove that the Commodification argument cannot be used to justify the legal prohibition of organ sale.

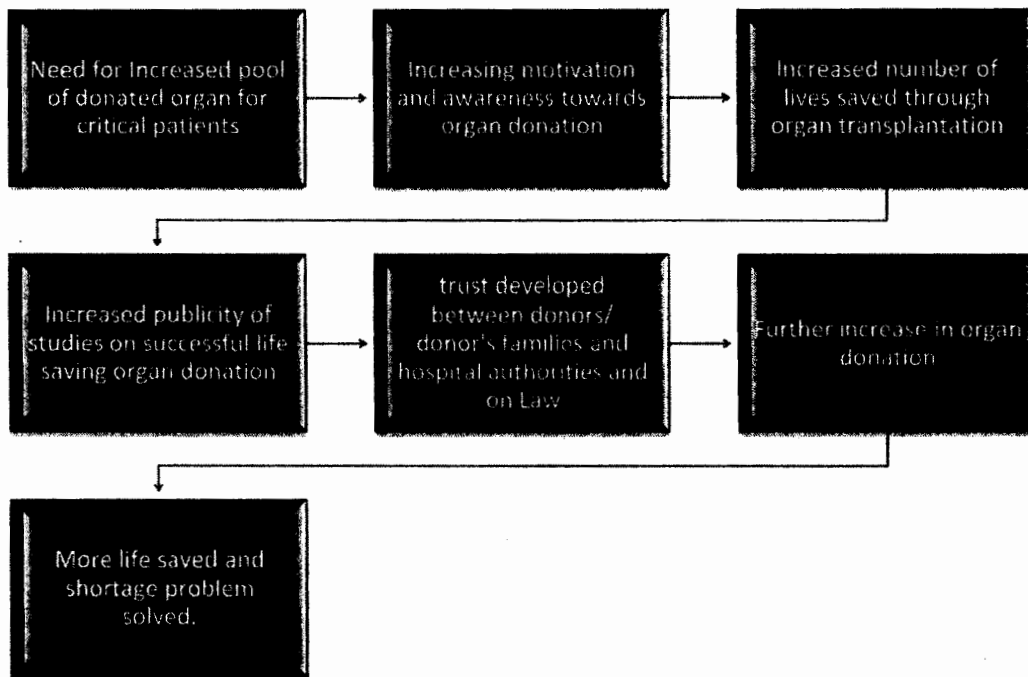
Likewise, some researchers have chosen 'consent regime' to prove that it bears the implied recognition of 'property' in body. While some other has urged its recognition on economic rule of supply and demand and the distribution of benefits. And the list goes on.

Work that is being done nowadays to negate the idea of ownership and property is mostly based on counter argument to the supporter's arguments as done by Loane Skene. Perhaps the reason is that they don't have to work really as their aspiration has already been realized by the ban on the trade in body organ. The other side's work is to prove it incorrect and made legislators amend according to their belief.

⁴³⁴ Muireann Quigley, "Property and the body: Applying Honoré", 631–634.

⁴³⁵ Stephen Wilkinson, "Commodification arguments for the legal prohibition of Organ Sale," *Health Care Analysis* (2000), 189-201.

In Short, Trade in Human organs for the purpose of transplantation is not permitted both in *Shari'ah* and Law. Whereas donation has been allowed for the transplantation, thus altruistic way of has been opted for the purpose of saving human lives.⁴³⁶ As far as the shortage of organ is concerned, this problem can be solved without recognition of property regime in the Human body. The rate of donation can be increased by taking various steps that are represented in following chart and explained afterwards:



- **Government should take steps for creation of awareness in general public. Sentiments of people can be satisfied by realizing them that organs of their relatives are giving lives to many people and some day they may require such organs for their**

⁴³⁶ Supreme Council of Ulema in Riyadh in their Resolution no. 99 dated 6 dhilqadah 1402 see <http://en.allexperts.com/q/Islam-947/islamic-rule.htm>.

relatives too. They should be made realize that a very large number of people who need organs for transplantation die every day due to its scarcity.⁴³⁷

- People can be motivated by a large- scale campaign using all kinds of medias. Stars and celebrities can be used for creation of motivation as they have always proved themselves very beneficial for such purposes.
- Successful stories of transplantation of organs acquired through this mechanism should be widely publicized.
- If above mentioned steps are followed, shortage problem will be solved.

As far as the sub issue of commercial Surrogacy is concerned, here both the Laws go hand in hand. It is Impermissible in U.K Law as well as in *Shari'ah* but the voluntary surrogacy is point of divorce between the both. In U.K Law voluntary surrogacy is permissible though unenforceable. She may be entitled to reasonable expenses but commercial surrogacy is impermissible. Some researchers strongly condemn the commercialization of surrogacy and amount it to Commodification of women and child. Whereas other defends that payment to surrogates does not commodify her or the child. Some contend that she demean humanity by renting her womb, on the contrary, some defends that she does not disgrace humanity when she gives the pleasure of a baby to an infertile couple. In *Shari'ah*, it is completely Intolerable for unavoidable reasons that have been mentioned earlier.

Second Sub issue 'gametes sale 'gave rise to the same conclusion i.e. that it is neither allowed in Law nor in *Shari'ah*. U.K Law is very unequivocal in this regard that only reasonable

⁴³⁷ In U.K alone eight thousand people are on the waiting list for the transplant surgery, out of these eight thousand patients five hundred die each year waiting for organ. This number rises by 8 percent a year. <http://www.independent.co.uk/life-style/health-and-families/health-news/sale-of-human-organs-should-be-legalised-say-surgeons-2176110.html>

expense may be reimbursed to the donors for their expenses, inconvenience and loss of earning but no amount above that can be paid. Besides that egg sharing is also an offer in recognition of altruistic action.

Researchers view point is divided in this regard as well. Some view gametes as property and some do not. However U.K government is facing strong pressure to review this policy. Many newspaper's articles can be seen that call for increased payment for gametes donation.⁴³⁸ There are two reasons for this situation. Firstly, there is a shortage of gametes and couples face difficulty in seeking gametes from the donors. Secondly, People of U.K are spurred by the situation in U.S.A where people are paid a good amount for donation which results in lack of scarcity. On the contrary, Islamic law put complete ban on the gamete donation. Islam permits the employment of IVF for procreation but with the condition of using sperms and eggs of spouses. Thus Using some one's else gametes are strictly prohibited. Islamic principles and texts are very crystalline in this regard.

⁴³⁸ See the article Laura Witjens, "Why Sperms Donors should be Paid More"October 20th, 2010, www.bbc.com

Appendix

List of Qur'ānic Verses

S. No	Qur'ānic Verses	Vers e No.	P. No.
1.	<p>الَّذِينَ يَأْكُلُونَ الرِّبَا لَا يَقُومُونَ إِلَّا كَمَا يَقُومُ الَّذِي يَتَخَبَّطُهُ الشَّيْطَانُ مِنَ الْمَسِّ ذَلِكَ بِأَنَّهُمْ قَالُوا إِنَّمَا الْبَيْعُ مِثْلُ الرِّبَا وَأَحَلَّ اللَّهُ الْبَيْعَ وَحَرَّمَ الرِّبَا فَمَن جَاءَهُ مَوْعِظَةٌ مِّن رَّبِّهِ فَانتَهَى فَلَهُ مَا سَلَفَ وَأَمْرُهُ إِلَى اللَّهِ وَمَنْ عَادَ فَأُولَئِكَ أَصْحَابُ النَّارِ هُمْ فِيهَا خَالِدُونَ ﴿٢٧٥﴾</p>	2:272	52
2.	<p>إِنَّمَا حَرَّمَ عَلَيْكُمُ الْمَيْتَةَ وَالدَّمَ وَلَحْمَ الْخِنزِيرِ وَمَا أُهْلَ بِهِ لغيرِ اللَّهِ فَمَن اضْطُرَّ غَيْرَ بَاغٍ وَلَا عَادٍ فَلَا إِثْمَ عَلَيْهِ إِنَّ اللَّهَ غَفُورٌ رَّحِيمٌ ﴿١٧٢﴾</p>	2:173	82
3.	<p>يَتَأْتِيهَا الَّذِينَ ءَامَنُوا لَا تَأْكُلُوا أَمْوَالَكُم بَيْنَكُم بِالْبَاطِلِ إِلَّا أَن تَكُونَ تِجَارَةً عَن تَرَاضٍ مِّنكُمْ وَلَا تَقْتُلُوا أَنفُسَكُمْ إِنَّ اللَّهَ كَانَ بِكُمْ رَحِيمًا ﴿٢٤﴾</p>	4:29	92
3.	<p>يَتَأْتِيهَا الَّذِينَ ءَامَنُوا إِنَّمَا الْخَمْرُ وَالْمَيْسِرُ وَالْأَنْصَابُ وَالْأَزْلَامُ رِجْسٌ مِّن عَمَلِ الشَّيْطَانِ فَاجْتَنِبُوهُ لَعَلَّكُمْ تُفْلِحُونَ ﴿٩٠﴾</p>	5:90	53

4.	<p>حُرِّمَتْ عَلَيْكُمْ أَلْمَيْتَةُ وَالِدَمُّ وَلَحْمُ الْخِنْزِيرِ وَمَا أُهْلِيَ لِغَيْرِ اللَّهِ بِهِ وَالْمُنْخَبِقَةُ وَالْمَوْقُودَةُ وَالْمُتَرَدِّيَةُ وَالنَّطِيحَةُ وَمَا أَكَلَ السَّبُعُ إِلَّا مَا ذَكَيْتُمْ وَمَا ذُبِحَ عَلَى النُّصُبِ وَأَنْ تَسْتَقْسِمُوا بِالْأَزْلَمِ ذَٰلِكُمْ فِسْقٌ الْيَوْمَ يَبْسُ الَّذِينَ كَفَرُوا مِنْ دِينِكُمْ فَلَا تَخْشَوْهُمْ وَاخْشَوْنَ الْيَوْمَ أَكْمَلْتُ لَكُمْ دِينَكُمْ وَأَتَمَمْتُ عَلَيْكُمْ نِعْمَتِي وَرَضِيْتُ لَكُمْ الْإِسْلَامَ دِينًا فَمَنْ اضْطُرَّ فِي مَخْمَصَةٍ غَيْرَ مُتَجَانِفٍ لِإِثْمٍ فَإِنَّ اللَّهَ غَفُورٌ رَحِيمٌ ﴿٣﴾</p>	5:3	84
5.	<p>قُلْ لَا أَجِدُ فِي مَا أُوحِيَ إِلَيَّ مُحَرَّمًا عَلَى طَاعِمٍ يَطْعَمُهُ إِلَّا أَنْ يَكُونَ مَيْتَةً أَوْ دَمًا مَسْفُوحًا أَوْ لَحْمَ خِنْزِيرٍ فَإِنَّهُ رِجْسٌ أَوْ فِسْقًا أُهْلِيَ لِلَّهِ بِهِ فَمَنْ اضْطُرَّ غَيْرَ بَاغٍ وَلَا عَادٍ فَإِنَّ رَبَّكَ غَفُورٌ رَحِيمٌ ﴿١٤٥﴾</p>	6:145	83
6.	<p>قُلْ مَنْ يَرْزُقُكُمْ مِنَ السَّمَاءِ وَالْأَرْضِ أَمَّنْ يَمْلِكُ السَّمْعَ وَالْأَبْصَرَ وَمَنْ يُخْرِجُ الْحَيَّ مِنَ الْمَيِّتِ وَيُخْرِجُ الْمَيِّتَ مِنَ الْحَيِّ وَمَنْ يُدَبِّرُ الْأَمْرَ فَسَيَقُولُونَ اللَّهُ فَقُلْ أَفَلَا تَتَّقُونَ ﴿٦١﴾</p>	10:31	74
7.	<p>إِنَّا نَحْنُ نَرِثُ الْأَرْضَ وَمَنْ عَلَيْهَا وَإِنَّا يُرْجَعُونَ ﴿٤٠﴾</p>	19:40	73
8.	<p>وَعَاتِ ذَا الْقُرْبَىٰ حَقَّهُ وَالْمِسْكِينَ وَابْنَ السَّبِيلِ وَلَا تَبْدُرُوا تُبْدِيرًا ﴿٦١﴾</p>	17:26	55

9.	<p>﴿وَلَقَدْ كَرَّمْنَا بَنِي آدَمَ وَحَمَلْنَاهُمْ فِي الْبَرِّ وَالْبَحْرِ وَرَزَقْنَاهُمْ مِّنَ الطَّيِّبَاتِ وَفَضَّلْنَاهُمْ عَلَىٰ كَثِيرٍ مِّمَّنْ خَلَقْنَا تَفْضِيلًا﴾^(٧٠)</p>	17:70	86
6.	<p>﴿وَقُلِ الْحَمْدُ لِلَّهِ الَّذِي لَمْ يَتَّخِذْ وَلَدًا وَلَمْ يَكُن لَّهُ شَرِيكٌ فِي الْمُلْكِ وَلَمْ يَكُن لَّهُ وِليٌّ مِّنَ الدُّنْيَا وَكَبِيرُهُ تَكْبِيرًا﴾^(٣١)</p>	17:11 1	75
7.	<p>يَتَأَيَّهَا النَّاسُ إِن كُنْتُمْ فِي رَيْبٍ مِّنَ الْبَعْثِ فَإِنَّا خَلَقْنَاكُمْ مِّن ثُرَابٍ ثُمَّ مِّن نُّطْفَةٍ ثُمَّ مِّن عِلْقَةٍ ثُمَّ مِّن مُّضْغَةٍ مُّخَلَّقَةٍ وَغَيْرِ مُخَلَّقَةٍ لِّنُبَيِّنَ لَكُمْ وَنُقِرُّ فِي الْأَرْحَامِ مَا نَشَاءُ إِلَىٰ آجَلٍ مُّسَمًّى ثُمَّ نُخْرِجُكُمْ طِفْلًا ثُمَّ لِتَبْلُغُوا أَشَدَّكُمْ وَمِنْكُمْ مَّن يَتُوقَىٰ وَمِنْكُمْ مَّن يُرَدُّ إِلَىٰ أَرْضِ الْاَعْمُرِ لِكَيْلَا يَعْلَمَ مِّن بَعْدِ عِلْمٍ شَيْئًا وَتَرَى الْأَرْضَ هَامِدَةً فَإِذَا أَنْزَلْنَا عَلَيْهَا الْمَاءَ اهْتَزَّتْ وَرَبَتْ وَأَنْبَتَتْ مِن كُلِّ زَوْجٍ بَهِيجٍ﴾^(٥)</p>	22:5	78
8.	<p>﴿وَالَّذِينَ هُمْ لِغُرُوجِهِمْ حَافِظُونَ﴾^(٥)</p>	23:5	11 9
9.	<p>﴿فَمَنْ ابْتَغَىٰ وَرَاءَ ذَلِكَ فَأُولَٰئِكَ هُمُ الْعَادُونَ﴾^(٧)</p>	23:6	12 4
10.	<p>﴿إِنَّ الَّذِينَ يُحِبُّونَ أَن تَشِيعَ الْفَاحِشَةُ فِي الَّذِينَ ءَامَنُوا لَهُمْ عَذَابٌ أَلِيمٌ فِي الدُّنْيَا وَالْآخِرَةِ وَاللَّهُ يَعْلَمُ وَأَنْتُمْ لَا تَعْلَمُونَ﴾^(١٢)</p>	24:19	54

11.	<p>الَّذِي لَهُ مُلْكُ السَّمَوَاتِ وَالْأَرْضِ وَلَمْ يَتَّخِذْ وَلَدًا وَلَمْ يَكُن لَّهُ شَرِيكٌ فِي الْمُلْكِ وَخَلَقَ كُلَّ شَيْءٍ فَقَدَرَهُ تَقْدِيرًا ﴿٢١﴾</p>	10: 31.	74
12.	<p>وَوَصَّيْنَا الْإِنْسَانَ بِوَالِدَيْهِ حَمَلَتْهُ أُمُّهُ وَهْتًا عَلَى وَهْنٍ وَفِصْلَهُ فِي عَامَيْنِ أَنْ اشْكُرْ لِي وَلِوَالِدَيْكَ إِلَيَّ الْمَصِيرُ ﴿١٤﴾</p>	31:14	12 1
13.	<p>قُلِ ادْعُوا الَّذِينَ رَعَيْتُمْ مِنْ دُونِ اللَّهِ لَا يَمْلِكُونَ مِثْقَالَ ذَرَّةٍ فِي السَّمَوَاتِ وَلَا فِي الْأَرْضِ وَمَا لَهُمْ فِيهِمَا مِنْ شَرِكٍ وَمَا لَهُ مِنْهُمْ مِنْ ظَهِيرٍ ﴿٢٢﴾</p>	34: 22.	73
14.	<p>وَوَصَّيْنَا الْإِنْسَانَ بِوَالِدَيْهِ إِحْسَانًا حَمَلَتْهُ أُمُّهُ كُرْهًا وَوَضَعَتْهُ كُرْهًا وَحَمَلُهُ وَفِصْلُهُ ثَلَاثُونَ شَهْرًا حَتَّىٰ إِذَا بَلَغَ أَشُدَّهُ وَبَلَغَ أَرْبَعِينَ سَنَةً قَالَ رَبِّ أَوْزِعْنِي أَنْ أَشْكُرَ نِعْمَتَكَ الَّتِي أَنْعَمْتَ عَلَيَّ وَعَلَىٰ وَالِدَيَّ وَأَنْ أَعْمَلَ صَالِحًا تَرْضَاهُ وَأَصْلِحْ لِي فِي ذُرِّيَّتِي إِنِّي تُبْتُ إِلَيْكَ وَإِنِّي مِنَ الْمُسْلِمِينَ ﴿١٥﴾</p>	46:15	12 2
15.	<p>الَّذِينَ يُظَاهِرُونَ مِنْكُمْ مَنْ يَسَابِهِمْ مَا هُنَّ أُمَّهَاتِهِمْ إِنْ أُمَّهَاتُهُمْ إِلَّا اللَّائِي وَلَدْنَهُمْ وَإِنَّهُمْ لَيَقُولُونَ مُنْكَرًا مِنَ الْقَوْلِ وَزُورًا وَإِنَّ اللَّهَ لَعَفُؤٌ غَفُورٌ ﴿٢٧﴾</p>	58:2	12 1

16.	أَلَمْ يَكُ نُطْقَةً مِّن مِّنِّي يَمَّنِي ﴿٢٧﴾	75:37	78
17.	ثُمَّ كَانَ عَلَقَةً فَخَلَقَ فَسَوَّىٰ ﴿٢٨﴾	75:38	78
18.	فَجَعَلَ مِنْهُ الزَّوْجَيْنِ الذَّكَرَ وَالْأُنثَىٰ ﴿٢٩﴾	75:39	79

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