

MINES OWNERSHIP FROM THE VIEWPOINT OF JURISPRUDENCE AND LAW (EMPHASIZING ON IMAMIYAH AND HANAFI JURISPRUDENCE, IRAN AND AFGHANISTAN LAW)

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ABSTRACT

The mines ownership is one of the important issues, which is referred to as 'public ownership'. Initially, regarding the 'Oula' (fortiori) principle, it seems that the existence of the mines in people's properties makes the mines private property. However, with recognition of the ownership reasons, verdicts, and principles, it can be concluded that the ownership of mines is a type of public ownership. The requirement of the public ownership is the manipulations in the mines that should be done both with the permission of the Islamic state and in line with communal interests and social benefits. The current study, through extensive comparative analyses in the area of Islamic jurisprudence and law (with the emphasis on the Hanafi and Jafari jurisprudence and the laws of Islamic Republic of Iran and Afghanistan) has concluded that the ownership of the mines, even if they are placed in private properties, is of public ownership type. Our reason is the narratives on Anfal (spoils) of the mines. From the narratives, It is inferred that the mines are among the public properties and their ownership is also public, and the jurisprudence and legal principles such as the 'Aham va Mohim' (importance) principle and priority of what is more important over what is important also confirms such idea. In order to prevent distortion in the social order and society discipline, The Islamic State, through acquisition of the private property in a good expense, prioritizes the public ownership and protects the society's rights (through exploitation of the mines and using the products for the social interest).

Keywords: ownership, mines, mines ownership, treasure, Anfal.

INTRODUCTION

The mines as one the biggest natural wealth, play an important role in the human societies. Therefore, in addition to the importance of comparative studies, two objectives as “collection of the views” and “untying of the views” must be revealed in the process of creating a balance and consistency between the religious culture and the time requirement:

- 1- Collection of the jurisprudential religions' views on the mines ownership; it is true that the collection and perception of the Islamic sects' jurisprudential views is possible, but putting these different sects' views and verdicts beside each other based on a research and in one collection, both makes the views studying easier and provide a clearer recognition of the views of the person's sect, since the awareness in the light of others' views (and the views of other sects) is more realistic, desirable, and clearer.

- 2- Indication of the jurisprudential sects' solutions in terms of mines' ownership; collecting the views on mines' ownership is done with the aim of "finding a remedy" and "untying" from the theoretical (and probably scientific) problems and issues. Besides, the width of selection of "the most correct Islamic teaching" and "the best choice to solve the problems of the time" would be extended and at the same time, the Muslim legislators must use the ideas of all Islamic sects to "adopt new rules" and "amend the existing laws". In this regard, the current study tries to structuralize the desired information in three chapters:

1- The Concepts and Generalities:

In order to enter the realm of research and the depth of investigation about any subjects, it is required to evaluate a series of concepts and general discussions about it. Due to this reason, in the first chapter of the current study, we deal with defining and elaborating the main discussions, and explain the keywords and general subjects related to the subject of the study, to clarify, and determine the main openings of the discussion on the subject of "ownership" which is among the most important and complete subjects of the law, as well as the discussion of "mines ownership" which is among the most controversial issues, since one of the most important legal cases which has an inseparable tie with the human economy is the subject of ownership, and the mines ownership is undoubtedly one of the very effective and gainful examples of it.

1-1- The Concepts:

It is quite clear that discussing, investigating, and contemplating about the concept of the keywords of the important discussions is essential and fundamental, since they have various lexical meanings and also have different references in the "Jafari jurisprudence", "Hanafi jurisprudence", "Iran Law" and "Afghanistan Law". Therefore, it is required to briefly address the different views of the scholars of the sects and the legal cases of the above mentioned countries, and determine the desired view which is the main axis of the discussions about this subject, clearly and reasonably.

1-1-1-Lexical Meaning of Ownership:

The word "property" lexically means owning something, capturing, seizing or overcoming a thing and it can be a relationship between the owner and the property that he captures. In the Persian dictionary, ownership means taking the ownership of something or owning it, and a right someone has over something and he can do whatever he desires to it, except for the case it is banned by the law. In our point of view, the relationship between the owner and what is owned in the ownership is so important that it allows the owner to do whatever changes he desires. One of the scholars states: "ownership means inclusion of something, capturing it, or possession of something. Landed property is realized when the person captures a property and possess it. The property, in general convention means the objects, things, and sometimes the possession itself. Also, the 'Malek' (the Arabic term) is someone who owns a 'Mamluk' (a property). Some other scholars (Ibn Mandhur, 1993, 492) has inferred from the dictionaries in terms of ownership that: "ownership is capturing or inclusion of something or the ability to despise and seize it".



1-1-2- The Concept of Ownership in Hanafi Jurisprudence and Afghanistan Law:

In the Sunni jurisprudence terms, some have arisen this subject under the title of “right of ownership” in a genitive form (Qodri Pasha, Mohammad, Murshid al-Hayvan li-Marefah Ahwal al-Insan, in 1405 Articles) and Sanhuri, defining ‘absolute ownership’ states that: “Al-Milk al-Tam an Sha’anohu an Iatasarrof behi al-Malik Tasarrofan Motlaqan Fima Yamlakoh Ainan va Manfa’ah va Esteghlalan Fa Iantafea bel-Ain al-Mamlukah va bi Ghellateha va Thamariha va Natajiha, va Iatasarref fi Ainiha bi jamiea al-Tasarrof al-Jaezah”¹ (Al-Sanhuri, 1954, 31). The absolute ownership means the owner can capture the subject of the property, as well as its benefits, products, and exploit the property itself, its benefits, products, fruits, and its outcome, and he can do the allowable occupations on it. Based on the definition Sanhuri has provided, the elements that make up the ‘ownership right’ are:

- 1- Benefiting from the original property.
- 2- Exploitation of the property’s grain (outcome and harvest), fruit and product which is the same as profiteering.
- 3- Allowable capture of the original property.

Zohaili also defines ownership as follows: “the ownership and the property is a relationship between the man and the property which is validated by the religion, and has allocated the property to man, as whenever there are no obstacles on the capturing of the property, he can do any occupations he desires to. Both the relationship and what is owned are called the property”. Therefore, by definition of the property in Article 125 of Al-Jumla, which states: “Al-Milk ma Malakahu al-Insan Sava’a Kana A’aianan ow Manafeah” (Al-Majl, 1876, 11), is the same definition provided by Zohaili (Al-Zohaili, 1984, 56). Al-Zarqa (deceased in 1999), one of the contemporary Hanafi scholars, has named the ‘ownership right’ on top of the objective rights and defines it as follows: “the ownership right from the viewpoint of the jurists is a right that grants the owner of the right domination of something and gives him the absolute possession and power over it, and allows him to benefit and exploit it as long as it’s not harmful to others. Thus, the freedom of the owner is limited to what is appropriate for the care and protection of the rights of others. Therefore, the owner’s right is limited to what is required for protection and maintenance of others’ rights” (Al-Zarqa, Bita, 33). In this definition, the ownership of the genitive is taken as a right and interpreted as ‘right of ownership’ under the influence of other Sunni jurists. Abu Mozaffar As’ad ibn Mohammad Neishaburi Karabisi (deceased in 1113) wrote in the book Al-Forugh: “the ownership is the possession over all types of occupation” (Al-Neisaburi al-Karabisi, Bita, 698). Qazi Mohammad bin Mohammad bin Nuh Qabesi Ghaznavi (deceased in 1203) states in his book Al-Havi al-Qudsi: “Val-Mulk Ibarah an il-Ikhtisas al-Hajez” (Al-Qudis, Bita, 515). The ownership is the allocation of an obstacle, i.e. the permission of capture and allocation of ownership to the owner and preventing the capturing by others. He adds: “Helliati (the permission to capture objects) is the freedom of exploitation and it is realized in two ways. One is the Ihlal (making a thing Halal) and the other is Malikiyah (ownership) and what is obtained through ownership is more rational and illustrative, since the ownership cuts the partnership, but Ihlal does not. In the book Hidayah, it is said: “Milkahu fa Milk al-Tasarrof



¹ « الملك التام عن شأنه أن يتصرف به المالك تصرفاً مطلقاً فيما يملكه عيناً ومنفعةً واستغلالاً، فينتفع بالعين المملوكة و بغيرها و ثمارها و نتائجها، و يتصرف في عينها بجميع التصرفات الجائزة».

Fih” (Al-Marghinani, Bitā, 52). Since he owns it, he also owns capturing it. Sadr al-Shariah Obayd-ollah bin Masoud (deceased in 1344) in the book “Sharh al-Vaqayeh fi Masael al-Hidayah” defines ownership as follows: “the ownership is the religious relationship and connection between the man and the object that has allowed the capturing of the property by the owner, and prevent from capturing of someone else” (Sadr al-Shariah, Bitā, 196). Sharif Ali bin Mohammad Jorjani (deceased in 1413) has accepted Sadr al-Shariah’s definition with a bit of discrepancy (Al-Jorjani, Bitā, 204). Kamaledin Mohammad bin Abdol-Vahid known as “Ibn Hammam” states that: “the ownership is an ability that the religion realizes and proves as the first step in capturing a property.

1-1-3- Concept of Ownership in Jafari Jurisprudence and Iran Law:

“Melk”, “Malikiyah”, and “Milkiyah” in the jurisprudential terms is a reputed case that can be composed verbally or non-verbally. Contemplating the words of the jurists, several cases can be inferred: first case: the credibility of the capture of something as a formative power over it and possessing it, such as the case someone says: “I owned the car” and “I put the car under your possession”, in which the permission to possess is among the requirements of this credit. Second aspect: credit to relationship between the owner and the owned object, so that the property has two parties such as the case for fatherhood and parity. Third aspect: credit of inclusion, comprehensibility and enclosing something. In this case, the ownership would be different from Jedah discussion, and its meaning is that an object encloses another object in a way that by change in what encloses, the enclosed is also changed, with the claim as if the owner encloses his property in a way that with his change, the property is also changed. In Imamiyah jurists’ terms, different definitions have been provided. Sahib Jawahir states: the definitions that can be extracted from the collection of Imamiyah jurists’ words can be summarized in three definitions. We would provide these three definitions based on the documents and evidence, and then we will investigate them, so that a non-comprehensive and incomplete definition (a definition that does not include all people and does not exclude non-applicable definitions) would be criticized.

1-1-3-1- Defining “Ownership” as Reign:

Mohaqeq Khei (deceased in 1992) mentioned the difference between the right and the sentence with ownership. He believed in credibility of the relationship between the owner and the owned under the titles “Malikiyah” and “Milkiyah”, and considered it as signatory sentences. Great jurists such as Sheikh Mortaza Ansari, Seyyed Mohammad Kazim Yazdi, and Ruhollah Musavi Khomeini have accepted such an idea. Therefore, one of the credit cases is the ownership defined by the late Khoei as follows: “Va Maani al-Milkiyah Itibar Ihatah al-Malik bil Mamluk ... va Ilayh fa Haghighah al-Milkiyah Innama Hia Al-Saltanah va al-Ihatah” (Khoei, Bitā, 44). Ownership is capturing and enclosing the property by the owner ... thus, the truth of the “Malikiyah” is the same as reign, enclosure, and capture.

Some scholars says that ownership in Islamic veiw is the nature of reign, not the relationship that is its requirement. In our point of view, the ownership is the same as reign in both of the mentioned definitions, and the reign is created due to the relationship between the person and the object, which is based on the credibility of the wise both in existence and subsistence. Therefore, the requirements of the ownership such as the ‘Ihya’a’ (revitalizing) and ‘Hiazah’ (possession and other cases are not among the true requirements, but they are the reason and cause of something that is credited by the wise.

1-1-3-2- Definition of “Ownership” as Property:



Great jurists such as Mohammad Hussain Nayini known as “Mohaqqiqi Nayini”, Molla Mohammad Kazim Khorasani known as Akhund of Korasan (Khorasani, 1988, 403), Sheikh Mohammad Hussain Ibn Mohammad Hasan Isfahani known as Mohaqqiq and Mirza Habibollah Rashti have considered the ownership to be eligible, owning, and having a property. The eligibility is outside the scope of Jedah, and does not contradict the reputed ownership. Akhund believes in commonality and it is inferred from his words that the ‘malikiyah’ and ‘Milkiyah’ in our discussion has the second meaning and the truth of ‘Milkiyah’ is that the owner is optional about the property.

1-1-3-3- Definition of Ownership as the Relationship between the Owner and the Owned:

Some scholars and jurists defining the ownership has considered a specific relationship between the owner and the owned, i.e. a specific relationship between the property owner and the property and the owner and the owned leads to independent capturing of the owned by the owner based on the convention and initiation sentence. Sheikh Ansari writes in this regard: “fa Innaha Nisbah Bayn al-Malik va al-Mamluk, va la Yahtaj ila Man Yamlak Ilaih Hatta Yastahil Ittihad al-Malik va al-Mamluk Ilaih” (Ansari, 1994, 9). The ‘Milkiyah’ is a relationship between the owner and the owned, and it does not need a third party named ‘Mamluk Ilaih’ to require the unison the ‘Malik’ and ‘Mamluk Ilaih’ and lead to impossibility. The two terms of “the right” and “the Melk” (property) have been used in the words of Sheikh Ansari. As for the first case, he states: the right is the action power and has two parties (the right-holder to whom belongs the right and the right-giver upon whom the right is) and obviously, it is realized when two persons are available from the outside, and it is impossible a unique person be both the right-holder and the right-giver. For the second case, he states that “Milkiyah” is a relationship between the ‘Malik’ and the ‘Mamluk’ which needs the two elements of the owner and the owned, i.e. “Man Yamlak Ilaih” (the one upon him is the owned) is not needed so that its realization with a unique person is not impossible. The relationship between what is owned and the owner is so close and it can be considered as equality; however it is a relationship of correlation and not equality. Therefore, the properties are divided into two types:

- First: the private property: by private property, any properties that belongs to people due to requirements of the religious ownership or obtaining of a specific right.
- Second: public property: the public property such as Khums, Zakat, Tax, Anfal, and the like, which are used for the public interest.

1-1-4- Comparison between the Concepts of Ownership in Iran and Afghanistan Law:

Civil Law is mentioned in the Chapter 1, in terms of ownership in Iran, and in Articles 30 to 39, the subject of ownership has been addressed. Although the attributes and constituents of the ownership have been sporadically mentioned in different articles, no specified definition of it has been provided, which in our view is one of the negative points of this law and has not been referred in other articles by a reference. Some lawyers by citing Article 30 of this Law, have regarded this article as the definition of ownership with a little manipulation, which is not justifiable in our view. In Article 30 of the Civil Law of Islamic Republic of Iran, it is said that: “any owner is optional to capture his property and benefit from it in any ways possible except for the cases which are banned by the law”. This law is by no means a definition of ownership. However, the condition of application of the right due to the ownership is that it does not result



in any further loss or damage. This condition has been mentioned in Article 132 of Iran Civil Law: “one cannot capture his property if it requires to inflict a damage to the neighbor, except for the case of extent of convention and to obviate a need or avoid a loss”. However, this article and the former one (absolute and bond) are mentioned in Afghanistan Law in the same place and in one article, which will be elaborated later on. The concept of ownership can be investigated in two basic sources of legislation in Islamic Republic of Afghanistan. Unfortunately, the defect on lack of a definition for ownership in the Law of Islamic Republic of Iran also applies for our law, i.e. in the Afghanistan Law also we could not find a codified definition of ownership. The Constitution of the Islamic Republic of Afghanistan as the highest legal document in the country under the rule of President Hamid Karzai, the transitional President of the Government of the Islamic Republic of Afghanistan which was enacted by the Loya Jirga on December 22nd, 2003 to January 4th 2004 in 12 Chapters and 162 Articles. In Article 9 of this Law, the mines ownership belongs to the State. “The mines and other underground resources and antiquities are under the ownership of the government. The protection and administration of the state’s properties and the appropriate use of natural resources and other public property are regulated by the law”. It is based on the same Article that the Ministry of Mining of the Islamic Republic of Afghanistan acts as a key ministry in exploration, discovery, development, extraction and processing of the minerals and hydrocarbons. This ministry is also responsible for protection of the ownership, transportation, and marketing of the natural resources based on the law of the Minerals and Hydrocarbons. In the third book of Afghans’ Civil Law (Objective Law) which has been published in the official paper No. 353 in January 5th, 1977 which has been collected and printed by the Justice Ministry of Islamic Republic of Afghanistan under the title of “the Collection of Afghanistan’s Laws” in 2009, both the principle of ownership and its boundaries have been clearly defined: “ownership is a right according to which the object comes into possession and capture of the person. And only the owner can use and exploit it or do any other kinds of capture in the scope of the sentences of law”. Although the above definitions has ignored some requirements of defining, which has faced it with serious challenge, the main definition of a legal teaching in the law is rational and acceptable. The defect of this definition is that no attention has been paid to its comprehensibility.

1-1-5- The Analyses and Criticism of the Concept of Ownership in Irans’ and Afghanistans’ Law:

In our view firstly, the ownership cannot be genitive, since the right is a kind of ownership and inferior to it. There would be no problems in the cases the owned and the right are used in their specific domains, which is outside the scope of our study. But whenever these two terms are used correlated and in a common realm (the affairs related to ownership), the right would be a type of ownership and by addition an object to the original object becomes necessary. Since the meaning of ownership is a type of specific addition between the owner and the owned, the specific addition is the genitive for example “the car of Hasan”, it has been “the car” which is added to “Hasan” and now is in possession of him. In addition of the ownership to the owned, the genitive (the owned) is of two types. The owned is either an object or a subject. Any of these two types itself has other types and a maximum of six types can be considered. The elaboration is that: firstly, the owned is the same as the property which is three types itself: a) external object such as a “car” which is self-sufficient, b) the Zamme (obligation) object such as the object of

sale in the forward sale and the purchase money in the sale of credit, c) it is neither an object nor a debt (which is upon him) such as the right of crime and the right of Zakat. The latter two types can be entrusted to others. Secondly, the owned is subjective which is itself of three types: it is either Zemme such as a worker who has been hired whose Zemme is owned by the person who has hired him, or it is job that can be entrusted to others, which is of two types: a) affairs such as the interests of the lords whose credit does not depend on the addition to the owner, b) affairs such as the right of option dependent on the contract, right of mortgage dependent on the deposit, right of Qisas dependent on the murderer, and the right of pre-emption dependent on the object of sale.

Since the right, objective or subjective, belongs to something other than itself, and it is in a way that except with the assumption of credibility of the ownership for its owner, it cannot be validated, the two latter types are both rights. However, the other four types (the object, its benefits, the Zemme object, and subject in Zemme) are outside the scope of definition of right, although the ownership definition includes all six above-mentioned cases. In addition to the mentioned defect, this approach has only mentioned three examples (the object, the benefit, and the exploitation) in elaboration of the examples of ownership, and it has ignored the other cases (Zemme property, subject, and the right). Therefore, this definition would not be comprehensive. The third defect is that in analysis and investigation of the term 'right' we consider two applied meanings of right: one is the right as ability or justifiability both religiously and legally, and the other is the right as a privilege. Analyzing the second meaning, our view is that: "in this case the word 'right' is added to the word which comes after it, such as the right of ownership or the right of Tahjir, by which a privilege is meant, contrary to the first meaning. The word 'right' in this application firstly does not mean 'ability'. Secondly, its allocation pre-exists in the outside, thirdly, addition of 'right' to the word after it is expressive and the genitive of something. For example, "the right of ownership" does not mean the right to own something, but it means a privilege set and recognized by the law or religion for people. Fourthly, 'right' in the second meaning is stemmed from one or several rights in the first meaning. For example, from the right of ownership, the material possession right and transfer of the object and the benefit or right of absence and the like are created. In jurisprudence and legal terms, this ability or privilege is referred to as a 'relation', 'addition', or 'relationship'. Therefore, if right means privilege and its addition to ownership form expressive genitive form, we cannot find a defect with it and we would also accept it, since one of the two words is used to determine the concept of the other and final, it is indicative of objectivity and unity. However we were persuaded that the right is inferior to the owned. The defect we found with definition of ownership as reign is that ownership is not reign except for the Holy Creator of the universe who is the true owner and has formative ownership, but it is merely a credit relationship.

Regarding the elements of ownership, in our view, the acceptable definition is the same definition extracted from Seyyed Yazdi's words; ownership is a credit relationship between the person (be it real or legal) and the owned property. The owner can do any kinds of reasonable capture he desires to the property.

1-1-6- The Concepts Related to the Subject:

The title of the current study is "the mines ownership from the viewpoint of jurisprudence and law (with emphasis on the Imamiyah and Hanafi jurisprudence, Iran and Afghanistan Law)". The words which are most applied in this subject would be investigated.



1-1-6-1- Concept of Mines:

The lands including the mines are the most important resources and infrastructures of the society's economy which meet the needs of the men. معدن (Mine) is equal to passive form of عدن (to make holes under the ground to take out coal, gold, etc), a time and place name, whose plural form is معادن (mines). in Holy Quran, the word جنات means gardens and the word عدن means a long stay (Al-Ra'ad, 23). In law, it has been referred to as "Mining" and "Minerals" (= as provided in Iran Mines Law) and "Mineral" (=as provided in Afghanistan's Proposed Mines Act). In Persian, the mines are the same as a place to extract and exploit and obtain the jewel and expensive materials such as oil, gas, gold, silver, copper, iron, uranium, coal, lead, zinc, ruby, peridot, turquoise, agate, mercury, sulfur, bitumen, salt, and etc. There are controversies among the Sunni jurists about the meaning of mine.

The legislator of Islamic Republic of Iran and Islamic Republic of Afghanistan in Article 49 and 9 (as regularly publicized) and Mines Act of Afghanistan enacted in 2013, in Clause 1 of Article 3, has legislated on the mines: “the mine is a place in which the minerals are stabilized and mineral activities or other activities related to it are done. The buildings, facilities, equipment, and devices used for extracting, processing, and preparation of the minerals on the ground and underground are also included in this definition”. In the mentioned definition, the mine is considered a place name, denoting the location of the mine, while the location of mine is not a mine, but it is a land in which the mines are located. Therefore, the definition of the second phenomenon is needed (what exists in this place) and seemingly, those codifying this law have not been aware of the Islamic Law teachings and due to unawareness, they had to use similar western words (other than Islamic Law teachings). Therefore, they have referred what is buried as a reservoir on the ground or beneath it to ‘Mineral’ which is an English word, meaning the mineral material, inorganic, mineral water, and mine. In our point of view, the definition provided in the Afghanistan Law lacks the scientific precision. But the Iran Legislator in Clause E of Article 1 of Mines Act of Iran has defined the mine as follows: “mine is a mineral reservoir exploitation of which is economic”. In the Imamiyah jurisprudence, the words of the jurists are different and controversy in their idea is manifest.

In our point of view, the word extraction is one of the chapters of definition of mine which plays an important role in determination of what is meant by the mine, and it is correct that by the mine, the valuable reservoirs and properties which are not from the same material as ground, are meant. In the narratives by Imamiyah and Hanafi also there are reasons to refer the mine to mineral reservoirs and properties (Al-Samaraghandi, 1994, 330).

1-1-6-2- Concept of Treasure:

Whether the words “Rakaz” and “buried treasure” and the word “treasure” are three different terms from the word “mine”, or there are no differences between them, and they are equal? Or common or proper? From the viewpoint of the republic, these two words are different and imply different truths. In our view, the word ‘treasure’ is an independent word, which is opposite the mine. In ‘Sahihah’ of Ibn Abi Amir (Horr Ameli, 1988, 494), it is stated that: Khums is applied for five things: Treasures, mines, pearl, and spoil. The property extracted from the earth is of three types: treasure (Kanz and Rakaz; what is buried in the ground). Kanz is the name for the things the human beings have buried, and mine is the thing created by Almighty God at the same time he created the universe, and Rakaz can be used for both. Referring Mohaqiq Damad, in our view also the mine is an independent title and narratives such as Sahihah (Horr Ameli, ibid, 494)



also prove it. Mohaqiq Khoei has referred to this narrative as Sahihah (Musavi Khoei, 71). Others have considered it to be Mursal (the hadith which is not narrated by Ma'asum), which is also criticized by him (Mohaqiq Damad, 1997, 149), since the interpretation to 'non-united' reveals based on the convention that the narrators are several famous and well-known people whose names are not needed due to clarity (Musavi Khoei, *ibid*, 1088). Therefore, a correct narrative that proves application of Khums exerts that the mine, treasure, pearl, spoil, and the thing Ibn Abi Amir has forgotten (in some narratives, it has been specified as a property which is mixed with Haram), each are independently subject to Khums.

1-1-6-3- Concept of Anfal:

A large part of the lands are considered as Anfal and are under the ownership of the Islamic State. In Article 45 of the Constitution of Islamic Republic of Iran, in which it has been clarified that the Anfal and public wealth belongs to the Islamic State, 16 examples have been noted. This Article has not talked about the ownership of the Islamic State, but it has used the term "at disposal of" which also includes the ownership. This is one of the defects that initially grabs the attentions, since undoubtedly, the Anfal belong to the government and the law should not use these concise words. However, it is possible to revise this problem due to two reasons. One is that the legislator has not intended to express a legal jurisprudential problem, but it has enacted the mentioned law to decide about the utilization of the mentioned property. And the other is: the two titles of 'Mubahat Ammah' (the property that belongs to no one) and Anfal have been mentioned about which there are different jurisprudential attitudes. Due to these two reasons, it is said in the text of the law: "at disposal of the Islamic State" so that they would be used for the public interest (either directly exploited by the government or assigned to the private sector). In the Constitution of Islamic Republic of Afghanistan, Article 9 has emphasized on ownership of the properties such as the mines, with more clarity. The late Sheikh Mofid in the book 'Maqna'a' writes: "Anfal are the lands conquered without invasion, the lands which belong to the deceased people, who has no heir, the jungles and canebrakes, the seas, the deserts, the mines, and the valuable properties of the kings" (Mofid, 278). We do not imitate the Sheikh, who is not acceptable in sciences, but the interpretations of people like Sheikh Mofid (1022) who have lived in a time close to the Imams' living time, when correcting and interpreting such people's narratives, deep contemplation and precision must be applied. From narratives such as Movassagheh of Ishaq bin Ammar, Narrative of Abi Basir, Narrative of Davood ibn Farqad, and the rational reasoning, it can be inferred that Anfal are the properties that after the Holy Prophet, belonged to Imams and the Islamic ruler, and they are exclusive to the position of Imam and governance (holy authority).



1-2- The Generalities:

In this chapter, the discussions that play an important and fundamental role in determination and clarification of the subject, would be addressed.

1-2-1- The Historical Background of the Mines Ownership:

The history of the research on mines ownership among the jurisprudential-legal discussions such as the parity, has not only been associated with human being from the advent of Islam, but also from the creation of him from the very first days. However, in terms of the ownership of the mines, there is no such a long history. Therefore, there have been fewer studies about the mines

ownership and the research on this subject is limited to several thesis and articles. One of the privileges of the economic school of Islam is that it requires the dual or multiple ownership, unlike that of Western capitalism which confines itself in the boundaries of private and individual ownership and on the contrary to the Communist economic system and Eastern communal system which have been confined to shared ownership. In the economic system of Islam, there are three types of ownership none of which being the principal and the other two being exceptions affected by the conditions of the time. These three types of ownerships are: 1- Private ownership, 2- Public ownership, and 3- State ownership. Each of them has boundaries and limitations specific to it, whose elaboration must be followed in the discussions related to Islamic economy.

1-2-2- Types of Ownership:

There is a deep relationship between the property and the owner, which is referred to as “Milkiyat”. This relationship is the origin of titles such as “Malikiyat” and “Mamlukiyat”. The Civil Law of Islamic Republic of Afghanistan in Article 481 has asserted that: “The properties belonging to people are the private properties and the properties that belong to no one and are allocated for the public interests are the public properties”. The Civil Law of Islamic Republic of Iran enacted in May 14th, 1928, also has addressed the types of properties in Article 11 and has allocated Chapter 3 to the properties with no specific owners. One of the divisions that most of the law makers have accepted is the division of economic laws to the public and private laws. The private property or the private ownership, which are related to the private state, are realized when the property belongs to specified person or persons. The public ownership which is related to the public property, is realized when the property and the wealth belongs to all Muslims (not certain person or persons). The title of the state, which is related to the government property is realized when the property belongs to the Islamic State. In each society, there are things that do not belong to person or persons but they belong to all. Some of the differences of these things, called public property and public ownership are: the ownership of this type of properties is the public state and wealth that belongs to all Muslims. These properties are used for the public interest. Public properties must be used for ‘general interest’ affairs and to the benefit of the public. These properties are the rights of no one. If the public properties belong to all people and the whole society in a way that the government can capture them by selling or buying them for the public interests and with observance of those interests, based on its duties and limitations, the ownership of these property is called the state ownership. The ownership of these properties belongs to the government and it can consume these properties wherever appropriate.

2- Approaches on Mines Ownership:

One of the most basic and fundamental questions is that whether the ownership right and property of the mines is of private ownership type belonging to persons or of public ownership type? In other words, is the mine absolutely and totally included as Anfal? Or it is not absolutely included as Anfal, but only in case the lands belong to Imam (PBUH) or the Islamic ruler such as the lands of the deceased, is it Anfal? To answer this question, the jurisprudential and legal ideas and verdicts on “mines ownership” must be addressed and in this regard, the ideas and verdicts of Imamiyah and Hanafi jurisprudence and the Iran and Afghanistan Law would suffice. The Imamiyah and Hanafi jurists as well as the lawyers, have ideas and attitudes about the mines



ownership, which will be investigated in this chapter. Anyways, the mines either belong to private ownership of a person or the public ownership, which itself consists of two types: it is either owned by the Ummah or the government.

2-1- Theory of Private Ownership of Mines:

This type of ownership is common in most of the cases and that is the property either in specific ownership of the person or several persons in a common and shared manner. In any cases, the ‘possession’ or ‘reign’ is the main criterion for this type of ownership. The private ownership is among the innate affairs and Islam has founded the private ownership based on the same foundation, and has founded different types of possession. One of the contemporary jurists writes: “The Holy religion of Islam is the religion of nature and based on the nature, considers the achievement of any person to belong to himself and encourages the enthusiasm to work through this means, and as a result, makes his latent talents flourish” (Ahmadi Mianji, 2003, 23). Although this approach has economically addressed the ownership, legally, the private ownership can be focused as an ownership originated from the human nature, since the main origin of reputed and contractual ownership is the human nature. Therefore, a child who is still not eligible to possess something and has just learned to talk, keeps saying “It’s mine”. By the private ownership the ownership means that it leads to the allocation of properties, benefits, and objects to specified person or persons. In the Holy Quran and the narratives (the main sources of Islamic Law), this type of ownership has been comprehensively focused and has an important and clear position.

2-2- The Theory of State Ownership of the Mines:

The state ownership, is a religious possession, which entrusts the government with the right of ruling the society and establishing a fair system. Properties such as the spoils, Khums, and Anfal are possessed by the state and are examples of the state ownership. The mines, whether solid or liquid, belong to the government based on the Malikiyah sect. The reason behind this claim is that sometimes the mines are discovered by evil people and if these mines are not owned by the Imam, it may cause sedition or disorder (chaos) (Al-Zohaily, 1984). Although addressing the Malikiyah approach is not in the scope of the current discussion, based on the inference made, it should be taken into consideration. The reason the Malikiyah has provided for state ownership of the mines indicates that this ownership is based on the secondary sentence and since the discovery of mines, with the assumption that they are not owned by Imam, by the evil people may lead to disorder and chaos, it should be admitted that mines ownership is of state type.

2-3- Mines Public Ownership Approach:

What is intended by the current study is that the mines are Anfal. Therefore, their ownership is public and belonging to the Islamic ruler.

3- The Principles and Reasoning of Mines Public Ownership:

The basis of the Hanafi verdict is the adherence to ownership, i.e. anybody who own the original also owns the subsidiary. Therefore, with possession of the land in which the mine is located, the mines can also be possessed, since when the land becomes a property, all its components are also



owned. Thus, whenever it is inside a person's property, that person would own it, and whenever it is located in a land owned by the government, it would be possessed by the government. And if the land belongs to no one, the mine would belong to one who has discovered it, since this way, the mines subordinate to the land are lawful (Al-Zohaily, 1984, 4567). Mohammad bin Hasan Sheibani (805) in the book "Al-Asl" (Al-Sheibani, 2012, 44) has approved this idea and has narrated a narrative, which is close to the content of this narrative: "Aghabah Ibn Khalid says: Imam Sadiq (PBUH) said: among the sentences the Holy Prophet (PBUH) has expressed is that the mine and old well whose digger is not known, and the Ojama (the animals, which are abandoned and have no owners) are Jabar (if they cause a death, nobody is responsible for it, and the Ojama are the domestic animals and the Jabar means wasting, for which nobody is responsible) (Al-Sivari, 2010, 379). In our view, if there is a reason for public ownership of the mines, even in the title, principles like what was mentioned cannot challenge this reason. It would be investigated in the future discussions. One of the Sunni intellectuals who has taught the Islamic Shariah in 1944, writes that: Comparing the Islamic Shariah with the enacted laws is an argument of analogy, since it is the comparison between the earth and the sky, and the human and his creator. How can such comparison be rational?" (Oudah, Biti, 29). This approach is indicative of the basic difference between the statute laws and the Islamic Law, i.e. the basis of the Islamic Law is the creator's will.

3-1- The Principles of Mines Public Ownership:

Some jurists, although considering the mines to be among the common properties have established the basis of mines ownership on the subordinate ownership. Sheikh Ansari writes that: "The benefits are subordinate to the original. And whenever the original is owned by someone, according to the principle, he also owns the benefits" (Tabatabai, 1994, 319). Some other jurists write that: "The basis of religious ownership of human over the work and its products, and the industries, is his formative ownership over the wisdom, thought, will, organs, and actions" (Montazeri, 2010, 423), i.e. based on the same foundation that due to evolution the person has control over his wisdom, intellect, and thought, he also owns his work, products, and industries.

Based on the subordination principle; (i.e. what exists in the land belongs to land itself), if the mine is located in a land, which is owned by the state, clearly, subordinate to the land in which the mine is located, it would also belong to the state. In this case, it is only the state that has the right of any kinds of capture in the mines and except the state, nobody is allowed to possess the mines without its permission. In case the mines discovered are located in the lands that belong neither to the state nor to a person, anybody who extracts it, is the owner, since the mine has been in a Mobah land over which the state or a person has no ownership and the mine, based on the land subordination principle, would be Mobah. Accordingly, anybody who exploits it would be its owner. In the second assumption, as a secondary sentence, and to prevent chaos, the governed should be the regulator of the public property and manage their exploitation. Therefore, many of the examples of mines are either under the ownership of the Islamic state based on Article 9 of Constitution of Islamic Republic of Iran or at disposal of the Islamic State based on Article 45 of Constitution of Islamic Republic of Iran. Anyways, the government's rights about the mentioned lands is only a political and management right, which is based on the religious Fatwa of protection of the properties. The Islamic ruler issues a Fatwa: "in obligation of



protection of others' properties and prohibition of capturing it without his permission, there is no difference between the private properties and state properties" (Hosseini Khamenei, 1906, 480). But in our view, the basis of the laws is the universe creator's will and this will is either a thing that leads to legal principles (Ta'asisi principles) or the principles, which are conventional among human beings (Emzaei principles). Therefore, the viewpoint of Quran should be considered about the mines ownership.

3-2- The Reasons for the Public the Ownership of Mines:

Investigation of the mines ownership is realized in the two affirmative and privative axes, since for proving this claim, the opposite reasons should be answered and then provide reasons to prove this hypothesis. But before determination of the agreements and disagreements, the 'Oula' principle would be elaborated.

3-2-1- Oula (fortiori) Principle in the Ownership of Mines:

What is the Oula principle in mines ownership? Is it among the Shubha Vujubiah (a doubt stemmed from the probability of the obligation of a sentence) in the Islamic ruler sentence? Or is it a Shubha Tahrimiyah (being dubious if something is Haram or Vajib) in capturing others' property without their permission? Or is it among the subject doubts of ownership? Regarding the diversity of the probable Shubha, different approaches may arise. Therefore, if achievement of the right about the mines' ownership is not possible through the reasoning, or it faces serious challenge and controversy, and we could not prove the state ownership, which if proven the extraction of mines would depend on the permission of the Imam and Islamic ruler, or we fail to prove the public ownership, which if proven anybody who revitalize it before others would be prioritized for ownership, is there the Oula principle in this issue? i.e. if the privative and affirmative reasons cannot be provided, what is the requirement of the principle? The past jurists have not had discussed about it comprehensively and usually, they have discussed about the mines in the book of Khums, stating: "va Hova min al-Faraez va Ghad Ja'alaha Allah Ta'ala le-Mohammad va Zorriataha Avazan an al-Zakat Ikraman Lahom ..." (Tabatabai Yazdi, 1988, 366). Khums is among the obligations the Almighty God has constituted as an honor for the Holy Prophet and his offspring, instead of Zakat.

3-2-1-1- The Non-ownership Principle:

The Milkiyat and Malikiyat and the words like these are among the genitive meanings whose existence and realization depends on the owner and the rich (the one who has property and wealth) based on the convention and logic of human, and that is the allocation and a specific relationship between the owner and the owned, which has reign to the reign of the owner, and he can capture it without intervention of others (Naraghi, 1996, 113). Therefore, perception and recognition of the meaning of the ownership and property is not dependent on the religion and religious reason, but on the convention. Our view in this cases is that the ownership is among the enacted sentences, which is dependent on a social contract for realization, i.e. to prove it require an acceptable reason, authentic argument, and fulfilment of condition. It should be proven with acceptable reasons that the convention validates the property belongs to 'Ahmad' and proving this truth requires an acceptable reason and authentic argument. In terms of our discussion, whether the mines belong to the Imam and Islamic ruler, or they are public or private



property, requires a reason (though the rule of possession, which is the presumption of ownership) to prove his ownership. So, if the mines' ownership is doubted (which is equal to doubt in the ownership of someone over the mines) the principle is non-ownership. lately Naraghi states for cases of doubt in ownership: "Inna Al-Asl fi al-Ashya Adam al-Milkiyah" (ibid, 114). The principle in everything is that this property does not belong to anybody. The reason behind this claim is the jurists ideas and that is in all general Mobah, as long as the reason of ownership is not realized, the principle of non-ownership is true. As a result, the mines extraction and capturing it would not require ruler's permission and people could go for it.

3-2-1-2: Presumption of Innocence of Obligation:

By innocence, the acquittal of the person from the obligation means whenever the innocence is implemented for a case of doubted obligation (whether formative or privative) the person is acquitted from that obligation. The method of scholars in jurisprudence is that they prioritize the acquittal principle over other practical principles. It is probable that in this regard, the Oula principle is implemented that the mine ownership is doubted, whether the ownership is public and the private person can capture it and extract from it by revitalization without the Islamic ruler's permission? Because it is among the public properties and capturing the public property without permission of the Islamic ruler is allowable and we are dubious whether the Islamic ruler's permission is obligatory or not? Or it is among the state properties belonging to the Islamic ruler, is it obligatory to get the permission of the Islamic ruler for extraction, revitalizing, and capturing of the mines? Since the case is one of the cases of obligatory doubt, the principle of acquittal is implemented. And the result of the acquittal principle is that the permission of the religious ruler is not needed and based on the Oula principle, people can extract from the mines without any permissions, or capture it through revitalizing.

3-2-1-3- The Principle of Acquittal from the Haram (forbidden) Obligation:

It is possible to arise the doubt from another aspect, and that is since mines' ownership might be of the state ownership type and belong to the Islamic Ruler, doubt in Haram being or not Haram being of the mines extraction and capturing is arisen. In the privative sentential doubt also, the acquittal can be implemented, and it asserts that extracting without the permission of the Islamic ruler is not Haram and it is permissible. Anyways, whether we accept the first and second approaches, or accept this approach, in all three cases, the mine can be extracted without the permission of the Islamic Ruler. We ignore clarifying the ideas and verdicts on the Oula principle and avoid criticizing them, which have nothing but scientific outcome, but lack practical outcome, in order to avoid redundancy and extension of the discussion. It should be noted that the acquittal principle has been also seriously taken in the laws and the Constitution of Islamic Republic of Afghanistan, in Article 25, and the Constitution of the Islamic Republic of Iran in Article 37, have recognized it.

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