

CHAPTER 5

THE ISLAMIC PERSPECTIVE ON EXPROPRIATION AND COMPENSATION

5.1. Introduction

Investment is not a new concept in Islamic law. The classical jurists described investments by the term *al tathmīr* (investment, raising profit or fruiting), *al tanmiyyah* (development), *al istinmā'* (developing or increasing), and *al numuw* (growth). The jurists also used other terms such as *al intifā'* (utilisation) and *al istighlāl* (exploitation).⁶⁸³

Contemporary jurists define investment by several definitions. Afīfī. A, defines investment as “operating wealth to increase production and increase the blessings of Allah, in order to achieve financial, economic and social goals”.⁶⁸⁴ Abu Al- Sa'ūd defines investment as the use of wealth for the purpose of growth and profit for the owner, without contradicting what is prohibited by an explicit text or the like according to the overall rules of Shari'ah.⁶⁸⁵ It seems that the previous definitions of investment are close, and if they differ in terms, they do not depart from the operation of wealth, its exploitation, the realization of benefits, and the collection of growth.

⁶⁸³ Sumiran. M. (2019). “*Tashjī' Al-Istithmār fi Al-Fiqh Al-Islāmī Dirāsāt Muqāranah ma'a Al-Qānūn Al-Urdunī*”. *Dirāsāt Al-Sharī'ah wa Al-Qānūn*. Volume 46. Issue 1. p. 601; Isma'il, A'. (2010). “*Ḍamānāt Al-Istithmār fi Al-Fiqh Al-Islāmī wa Taṭbīqātih- Al-Mu'āshirah*”. Dar Al Nafā'is. Amman. p. 21. Al-Zuqailiy, A'. (2005). “*Ḥukm Istithmār Ghayr Al-Muslimīn fi Al-duwal Al-Islāmiyyah*”. *Al-Majallāt Al-Urduniyah li al-Dirāsāt Al-Islāmiyyah*. Volume 2. Issue 3. p. 10.

⁶⁸⁴ Afīfī, A. (1995). “*Ma'āyir Istithmār Al-Amwāl fi Al-Islām*”, *Majalat Al-Iqtisād Al-Islāmi*, Dubai, Al-Bank Al-Islāmī. p. 44.

⁶⁸⁵ Abu Al- Sa'ūd, M. (1981). “*Al-Istithmār Al-Islāmī fi Al-'Aṣr Al-Hāḍir*,” *Majalat Al Muslim Al Mu'āshir*, Kuwait, Volume. 28, p. 96. For more see Al-Hawāri, S. (1980). “*Barāmij Tamwīl Al-Istithmār wa Al-Mushārakah Al-Islāmiyyah*,” [n.p], Jeddah, p.3.

In terms of foreign investment, Al-Marzūki defined it as, “the formation of a new business establishment, or the expansion of an existing one, through residents of a particular country within the borders of another country,”⁶⁸⁶ or “the wealth coming to a country other than his, with the intention of earning profit.”⁶⁸⁷ Foreign investment in Muslim countries has existed since the beginning of the emergence of the Islamic state during the era of the Prophet PBUH. Among the clear examples of this is the fact that the Prophet PBUH, after the conquest of Khaibar and expelling the Jews from it, accepted the offer they made for him to stay in Khaibar and work on its land and cultivate it in return for receiving half of the production, where the Prophet PBUH told them, “We shall allow you to stay on the land, on that condition, as long as we wish”.⁶⁸⁸

It is imperative that states need to attend to public interest, and it is common in any country that such will take precedence over individual ownership whether it is foreign investment or not. Disputes may occur as a result of this which requires delicate attention as it also involves relation between states. International arbitration is the mechanism provided for under international investment treaties, and it is possible that Islamic law can directly be the governing law especially if it is between the nationals of a Muslim country against another Muslim country.⁶⁸⁹ In such cases, Islamic law may be referred to, and it is

⁶⁸⁶ Al-Marzūqi, A. (n.d). “*Al-Istithmar Al-'Ajnabi Al-Mubāshir mīn Manẓur Islāmī*”, (n. p). p. 4.

⁶⁸⁷ *Ibid.* p. 4.

⁶⁸⁸ Sahih Muslim #1551f. Chapter: Musāqah and Mu‘āmalah in Return for a Share of the Fruit and Crops. Book 22, Hadith #6. <https://sunnah.com/muslim:1551f> (accessed on 14 February 2022)

⁶⁸⁹ An extensive discussion was held by international law scholars about references of Islamic law before the world court and international tribunals. Arguments have been made on the potentials of principles of Islamic law to be referred to in the case of *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)* 1994 I.C.J. 112 (July 1). See “Islamic Law & International Law”. (2010). International Law Association Reports of Conferences, 74, 119-171.

therefore necessary to understand what it says about expropriation of foreign investment and the host states' responsibilities in terms of compensation. Islamic law has been referred to in previous cases before the International Court of Justice and international tribunals, and it is expected to gain traction as the need grows.⁶⁹⁰

The subject is an interesting area to explore from an Islamic legal standpoint. It has been noted that writings on state responsibilities, investments, foreign treatment, expropriation, and compensation are in the form of independent studies, and that more articulation of the already established principles of Islamic law in the context of the current regime of international investment law is required. While there are literatures on expropriation for public interest and compensation issues, the writings are done in different contexts and do not correspond directly to foreign investments and international relations, which is the focus of this thesis.⁶⁹¹

⁶⁹⁰ The concept of trusteeship in Islam was mentioned in relation to earth resources in *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway) ICJ Reports 1993, 278, para. 243*; See also Separate Opinion by Judge Weeramantry in *Gabčickovo-Nagymaros Project (Hungary v Slovakia 1997)*, where he indicated that "...this survey would not be complete without a reference also to the principles of Islamic law that inasmuch as all land belongs to God, land is never the subject of human ownership, but is only held in trust, with all the connotations that follow of due care, wise management, and custody for future generations. The first principle of modern environmental law - the principle of trusteeship of earth resources - is thus categorically formulated in this system."; International Law Association Reports of Conferences (2010) *Islamic Law & International Law*, 74, 119-171. See also possible application of Islamic law in disputes involving Muslim countries such as in *Phelps Dodge Corp. v Iran 1986*; *Starrett Housing Corporation v Iran 1987*; *Sedco, Inc. v. National Iranian Oil Company 1986*; *Texaco v Libya 1977*; *LIAMCO v Libya 1979*.

⁶⁹¹ 'Abdel Kafi. M. (2015). "*Naz' Al-Mulkiyyah Li al-Manfa'ah Al-Khāshah wa Qadāyā Al-Ta'wīd fi Al-Fiqh Al-Islāmī wa Al-Qanūn Al-Madanī Al-Lībī*". International University of Islamic Sciences. Jordan. p. 30; Shamam. M. (1988). "*Naz'ah Al-Mulkiyyah li al-Manfa'ah Al-'Ammah*". *Majallat Majma' Al-Fiqh Al-Islāmī*. Issue 4. p. 1011; 'Abdullah. A. (1998). "*Naz'ah Al-Mulkiyyah li al-Manfa'ah Al-'Ammah*". *Majalat Majma' Al-Fiqh Al-Islāmī*. Issue 4. P. 934; Al-'Ajami, M & Belyah. M. (2020). "*Naza' Al-Mülkyyah li al-Manfa'ah Al-'Ammah mīn Wijhat Nazar Al-Fiqh Al-Islāmī*". *Majallat Kulliyah Al-Sharī'ah wa Al-Qānūn bi al- Tafhna Al-'Ashraf – Al-Daqahlyah*. 22(1). p. 750.

Highlights in previous literatures have focused on the legality of foreign investment and the extent to which Islamic law can be applied in arbitral disputes arising from foreign investment, without addressing the corpus of Islamic law on expropriation of foreign investment and compensation for it.⁶⁹²

As a result, it is important in this chapter to visit the basic principles of Islamic law related to the right of ownership, expropriation, and compensation of foreign investments from the primary and secondary sources of Islamic law and attempt an outline to understand the established principles of Islamic law in this regard. Islamic law can potentially provide insights into the most appropriate approach to determining indirect expropriation and compensation that takes into account all interests, including the public good, morality, and sustainability.

5.2. The Right of Ownership and the Legality of Expropriation in Islamic Law to Achieve Public Interest

This part of the study will deal with the position of Islamic law on the right to property and its protection, then it will address the concept of expropriation from the perspective of Islamic law, and finally it will talk about the practical practices of expropriation in the era of the Prophet –PBUH, and beyond, as follows:

⁶⁹² Sumiran, M. (2019); Isma'il, A'. (2010); Al-Zuqaili, A'. (2005); 'Afifi, A. (1995); Abu Ghuddah, A'. (n.d). "*Dalil Al-Istithmār Al-Islāmī*". [n.p]; Al-Kurdi, A. (n.d) "*Al-Istithmār fi Al-Duwal Al-Ajnabiyyah*". [n.p]; Maṣṣūr, M. (1998). "*Hukm al- Sharikāt Ma'a Ghayr Al-Muslimīn fi Al-Fiqh Al-Muqāran*", Majallat Al-Shari'ah wa Dirāsāt Al-Qānūn, Al-Jami'ah Al-Urduniyyah, Volume 25, Issue 1; Abu Al-Sa'ud, m. (1981); Al-Hawari, S. (1980).

5.2.1. Property Right, State Responsibility in its Protection, and the restriction of utilization of personal ownership under Islamic law

The right to property, the state's responsibility to protect it and then the restrictions of the personal property right in Islamic law are elaborated as follows:

5.2.1.1 Property Right and State Responsibility in its Protection

Islam presents a clear position on the right of ownership, as it recognizes the right of ownership for people and allows them to own property, whether it is real estate or movables, provided that it is acquired by legitimate means.⁶⁹³ Islam considers this right to be one of the fundamental rights of human beings, as it is innate in the instinct of ownership.⁶⁹⁴ The concept of ownership is mentioned in several places in the Qur'an and Sunnah, one of which is, "Do they not see that We have created for them from what Our hands have made, grazing livestock, and then they are their owners?"⁶⁹⁵ In another verse, "And those within whose wealth is a known right".⁶⁹⁶ The Prophet PBUH said in his last sermon, "No doubt your blood, property, (the sub-narrator Muhammad thought that Abu Bakra had also mentioned and your honor (chastity)), are sacred to one another as is the sanctity of this day of yours in this month of yours. It is incumbent on those who are present to inform those who are absent."⁶⁹⁷ In another hadith, the Prophet PBUH said, "You must

⁶⁹³ Al-Suwan, A. (2011). "*Al-Himāyah Al-Dustūriyyah wa Al-Qanūniyyah Li haq Al-Mulkiyyah Al-Khaṣah*". Bayt Zahran. Amman. p. 31; Zughdawi, m. (2005). "*Nizām Al-Mulkiyyah wa Naz' Mulkiyatihā fi Al-Sharī'ah Al-Islāmiyyah*". Majallat Jāmi'āt Al-'Amīr 'Abd Al-Qadīr li al-'Ulūm Al-Islāmiyyah. p. 38.

⁶⁹⁴ Bayez, H. (2013). "*Himāyat Al-Mulkiyyah Al-Khāṣah*". Maktabat Zayn li Al-Muḥāmāh. Beirut. p. 28; Alṣowan, A. (2011) p. 32.

⁶⁹⁵ Al-Qur'an. Yasin 36:71 (All Quranic translations in this writing are based on Sahih International).

⁶⁹⁶ Al-Qur'an. Al-Ma'ārij 70:24; Al-Nisa' 4:32; Al-Tawbah 9:103; Al-Baqarah 2:188.

⁶⁹⁷ Saḥīḥ al-Bukhārī, Vol. 1, Book 3, Hadith #105, Bāb Liyuballigh Al-'Ilm Al-Shāhid Al-Ghā'ib <https://sunnah.com/bukhari:105> (accessed on 15 February 2022).

not act oppressively, and a man's property may not be taken except with his goodwill".⁶⁹⁸ This was adopted in the Global Statement on Human Rights in Islam which recognizes individuals' ownership of property and the legitimacy of state's ownership of certain economic resources in public interest.⁶⁹⁹

The jurists have divided ownership into two types; the first is private ownership, and the second is public ownership.⁷⁰⁰ Private property refers to the specialization (ownership) of a person of something that legally authorizes him to use and dispose, unless there is any impediment to do so.⁷⁰¹ Al-Zuhailiyy refers it as the relationship between man and wealth, established by the Sharī'ah, which makes it specific or exclusive to him and governs all actions in it, unless there is an impediment to the act.⁷⁰² The nature of exclusivity here prevents others from having it and allows its owner to dispose of it from the start except if there are legal impediments that prevent this, such as insanity, dementia, foolishness, infancy, and the like. Others are preventing from benefiting from or disposing it unless there is a legitimate justification that allows him to do so such as by reasons of guardianship, trusteeship or agency.⁷⁰³

⁶⁹⁸ Mishkāt al-Masābih 2946. Book 11, Hadith #181. Bāb Al-Ghaṣb wa Al-‘Āriyah <https://sunnah.com/mishkat:2946> (accessed on 15 February 2022).

⁶⁹⁹ Article 15 (c), The Universal Islamic Declaration of Human Rights, adopted by the Islamic Council of Europe on 19 September 1981/21 Dhul Qaidah 1401; see also Article 15 Cairo Declaration on Human Rights in Islam, Aug. 5, 1990, U.N. GAOR, World Conf. on Hum. Rts., 4th Sess., Agenda Item 5, U.N. Doc. A/CONF.157/PC/62/Add.18 (1993) [English translation]

⁷⁰⁰ Bayez, H.; (2013). p.28; Al- Suwan, A. (2011) p. 32.

⁷⁰¹ Al- ‘Abadi, A. (2000). “*Al-'Aqārāt fi Al-Sharī'ah Al-Islāmiyyah*”. Mu'assasāt Al-Risālah lī al-Tibā'ah wa Al-Nashr. Beirut. p 150.

⁷⁰² Al-Zuhailiyy, W. (2006). “*Al-Fiqh wa Al-Adillatuh*”. Dar Al-Fikr Al-Mu’āṣir, Beirut. p 2892/4.

⁷⁰³ *Ibid.* p 2893/4; For more see Al-Khatīb, F. (2001). “*Tahwīl Al-Mulkiyyah Al-‘Āmmah ila Mulkiyyah Khāṣah*”. Jāmi’ah Al-Qahira, Cairo. p. 68; Bayez, H. (2013). p. 26; Al-Qaisi, M. 2005. p. 158; Sheikhoun, M. (2005). “*Mabādi' wa 'Aḥkam Al-Niẓām Al-Iqtisādi fi Al-Ḥukm Al-Malaki fi Al-Islam Al-Mubakkir*”. Majallat Al-'Ulum Al-Iqtisādiyyah wa Al-Siyāsiyyah wa Al-Iḥṣā'iyyah. pp. 106-107.

Islam has guaranteed the protection of the right of private property and has forbidden aggression against it, as stated in the Qur'an, "And do not consume one another's wealth unjustly or send it [in bribery] to the rulers in order that [they might aid] you [to] consume a portion of the wealth of the people in sin, while you know [it is unlawful]." ⁷⁰⁴ The Muslim jurists did not differ on the sanctity of the right of ownership and the inadmissibility of taking the property from its owner without his consent. ⁷⁰⁵ This is based on the injunction in the Qur'an that forbids transgressing people's wealth and consuming it unjustly, "O you who have believed, do not consume one another's wealth unjustly but only [in lawful] business by mutual consent. And do not kill yourselves [or one another]. Indeed, Allah is to you ever Merciful" ⁷⁰⁶ In order to protect property, Islam permits defense of property, as evidenced in a hadith, "Whoever is killed while protecting his property then he is a martyr" ⁷⁰⁷.

Islam also requires whomever in authority (*wali*) to protect the private property of the subjects and stipulates specific penalties abuse of these rights. Among these punishments is the punishment by the amputation of the hand of someone who infringes the property of others through theft. In the Qur'an, "[As for] the thief, the male and the female, amputate their hands in recompense for what they committed as a deterrent [punishment] from Allah. And Allah is Exalted in Might and Wise" ⁷⁰⁸ Islam also imposes

⁷⁰⁴ Al-Qur'an. Al Baqarah 2:188.

⁷⁰⁵ Abu Sa'da, a. (2012). "*Damānāt wa Hawāfīz Al-Istithmār Al-Zirā'i fī Al-Fiḥ Al-Islāmi*". Maktabat Al-Wafa' Al-Qanuniyyah. Alexandria. pp. 202-203. Al-'Abadi, A. (2000). p. 167.

⁷⁰⁶ Al-Qur'an. Al-Nisā' 4:29.

⁷⁰⁷ Sahih al-Bukhari 2480. Vol. 3, Book 43, Hadith #660. Bāb Mān Qatala Dun Malīh. <https://sunnah.com/bukhari:2480> (accessed on 15 February 2022)

⁷⁰⁸ Al-Qur'an. Al Ma'idah 5: 38.

punishments of reprimand (*ta'zīr*) on whoever usurps the property of others.⁷⁰⁹ In such cases, the state authority may punish him with whatever punishment is deemed appropriate, such as flogging or imprisonment, and the usurper is required to replace or return the property taken if it still exists. The same is true for aggression against land, which is prohibited by Islamic law. The Prophet PBUH said, “Whoever usurps unlawfully even a hand span of land a collar measuring seven times (this) land will be placed around his neck on the Day of Resurrection.”⁷¹⁰

Individuals' property rights are protected equally by Islam, regardless of whether they are citizens or foreigners, in accordance with the Islamic law's encouragement of the principle of justice and equality. In classical jurisprudence and practice, Islam does not differentiate between a non-Muslim subject in a state governed by Islam (*dhimmī*) and a Muslim in treatment, which explains the reason for the spread of Islam.⁷¹¹ This is in line with the commandment of justice in the Qur'an, “O you who have believed, be persistently standing firm for Allah, witnesses in justice, and do not let the hatred of a people prevent you from being just. Be just; that is nearer to righteousness. And fear Allah; indeed, Allah is Acquainted with what you do”.⁷¹² Justice is the foundation of stability and security, and it is reinforced by the obligation to uphold the contracts and covenants granted, including to non-Muslims, to protect and preserve their property from aggression. In relation to

⁷⁰⁹ Al-Qur'an: Al Mā'idah 5:33.

⁷¹⁰ Riyāḍ aṣ-Ṣaliḥin 206. Introduction, Hadīth #206. Bāb Taḥrīm Al-Zulm wa Al-Amr Biradd Al-Mazālim. <https://sunnah.com/riyadussalihin:206> (accessed on 15 February 2022)

⁷¹¹ Jum'ah, A. (2014). “*Tanzīm Al-Istiḥmār Al-'Arabi fi Al-'Araḍi Al-Ṣaḥrawiyyah fi Al-Fiqh Al-Islāmi wa Al-Qanun Al-Urduni wa 'Aliyat Faḍ Al-Munāza'āt Al-Nāshi'ah 'anhu*”. *Dirāsāt fī Al-'Ulum Al-Shari'ah wa Al-Qanun*, Volume 41 Supplement 1. p. 490.

⁷¹² Al-Qur'an: Al Mā'idah 5:8.

sanctity of contracts, the Qur'an states, "O you who have believed, fulfill [all] contracts."⁷¹³ Non-Muslims and foreigners were safe under the Islamic state, and they had protection in both themselves and their property. Non-Muslims were treated well, which encouraged them to convert to Islam.⁷¹⁴ They are allowed to possess portable belongings that they use in their everyday life or instruments that they use at work, however they must adhere to specific Islamic law regulations while dealing with certain portable belongings, such as the prohibition on the exhibition of alcohol and pig products.⁷¹⁵

Although Islamic law recognizes the right of ownership and grants adequate protection to it, this right is not absolute. There are some exceptions to this rule in Islam, such as the permissibility of expropriating property from its owner if there is a public interest and an urgent need that necessitates it, or if there is harm that will be caused to the community if the owner does not sell his property consensually.⁷¹⁶ The subsequent parts, will show an effort to explain the expropriation of private property to achieve the public interest and some of its practices in Islamic history.

⁷¹³ Al-Qur'an: Al Mā'idah 5:1.

⁷¹⁴ Jum'ah, A. (2014). p. 484.

⁷¹⁵ Al Sayyed., A. (2014). "*Aḥkām Tanzīm Markaz Al-Ajānib*". Maktabat Al-Wafā' Al-Qanūniyyah, Alexandria. p. 464.

⁷¹⁶ Al-Abadi, A. (2000). p. 167; Bayez, H. (2013). p. 32; Isma'il, h. (1978). "*Al-Mulkiyyah Al-Khaṣah fi Al-Islam*". Majallat Al-Sharī'ah wa Al-Qanūn. p. 109; see also Article 16 of The Universal Islamic Declaration of Human Rights, adopted by the Islamic Council of Europe on 19 September 1981/21 Dhul Qaidah 1401; see also Article 15 of The Cairo Declaration on Human Rights in Islam, Aug. 5, 1990, U.N. GAOR, World Conf. on Hum. Rts., 4th Sess., Agenda Item 5, U.N. Doc. A/CONF.157/PC/62/Add.18 (1993) [English translation].

5.2.1.2 Restrictions on the right of personal property under Islamic law

Although the right to property for individuals is authorized in Islamic law and this right has been granted a lot of protection, this right is not absolute. Islamic law places some restrictions on this right, including what is related to the prohibition or prohibition of owning some types of ownership on individuals, whether because of a specific characteristic of the property or the owner person, and taking into account what is related to achieving the public interest and repelling harm from society as a whole. This covers nationalization, limitation of ownership and expropriation of private property to achieve the public interest.⁷¹⁷

This study will deal with the restrictions placed by Islamic law on personal property in two parts as follows:

First: Restrictions related to the prohibition of private ownership.

The prohibition of ownership may result from the availability of a certain quality in the property itself that makes its ownership prohibited for individuals in Islamic law, as is the case with public funds, endowments and mineral wealth inside the ground.

⁷¹⁷ Al- Sharkawi, Jamīl. (1978). *Al-Mulkiyyah fi al- Shari'ah Al- Islāmiyyah*. Law and Shar'ia Journal. Kuwait. p. 104; Abu Bakr, Sati. (2015). *Al-Mulkiyyah wa Dawābiḥuḥa fi al-Fiqh al-Islāmī*. Zaytunah University Journal. Amman. p. 393.

The prohibition of ownership may also result from a characteristic related to the owner himself, whether he is a foreigner or a dhimmi, and it is prohibited to own specific types of ownership.⁷¹⁸

1- Restrictions related to property attributes.

Islamic law prohibits individuals from owning certain types of property, such as public property that is owned by the state and is intended to achieve a public benefit necessary for society in the entirety of roads, forts and rivers.⁷¹⁹

It also prohibits individuals from owning charitable endowments designated, or its proceeds, to a specific charitable body. The same applies to the mineral wealth found in the ground, where Islamic law prohibits individuals from owning or monopolizing them and made them their property of the State. As for the treasures and burials that are found, Islamic law requires whoever finds them to give the State one-fifth of what he finds.

As for the properties that Islam forbids Muslims to deal with, such as wine and pork, Muslims are not allowed to own and possess them, and the Islamic law does not grant any property rights or protection to its holder. All actions that take place on them are considered null and void. As for non-Muslims residing within the Islamic state, there is a jurisprudential dispute about the permissibility of their ownership of such properties within the Islamic countries. There are views that it is not permissible for them to own it because the Shari'ah has forbidden it to Muslims and the principle is that non-Muslims who are

⁷¹⁸ Al- Sharkawi, Jamil. (1978). p.104; Khalif, Muhammad. (2017). *Falsafah al-Mulkiyyah wa Quyūdiha wa Wasā'il Himāyatiha fi Dau' Wathiqat Al-Madīnah Al Munawwarah*. Journal of Saleh 'Abdullah Kamel Center for Islamic Economics. Azhar. p. 34.

⁷¹⁹ Al- Sharkawi, Jamil. (1978). p.112; Khalif, Muhammad. (2017). p. 53; Abu Bakr, Sati. (2015). p. 401.

inside Muslim countries are treated without discrimination inside the country, so they have what Muslims have and they have the rights and duties of Muslims.⁷²⁰

2. Restrictions related to the owner's capacity.

Islamic law may prohibit some people from owning certain types of property, as is the case with foreigners and dhimmis. The Islamic law prohibits foreigners and dhimmis from owning what gives them power and dominance over the Muslims, such as weapons designated for wars, military equipment, or the main sources of production in the state, which makes them control important and vital sectors of the state. Nevertheless, this does not deprive them to own what is necessary for life and earning for livelihood within the Muslim States.⁷²¹

Second: Restrictions related to achieving the public interest.

As this study indicates, the public interest of the state and society often takes precedence over the private interest of individuals. Therefore, the Islamic law has placed some restrictions on the personal property of individuals, whether they are citizens or foreigners, and these restrictions are to achieve the general interest of society and to prevent harm from society. Islamic law permits the state to limit the personal property of individuals within certain limits that they may not exceed.⁷²² It has also allowed the state to nationalize the main sources of production within the state, making them public property of the state,

⁷²⁰ Al- Sharkawi, Jamil. (1978). p.106; Abu Bakr, Sati. (2015). p. 393; Al Sayyed., A'. (2014). "*Aḥkām Tanẓīm Markaz Al-Ajānib*". Maktabat Al-Wafa' Al-Qanūniyyah, Alexandria. p. 464.

⁷²¹ Al- Sharkawi, Jamil. (1978). p.106.

⁷²² Sharkawi, Jamil. (1978). p 106.

and not allowing a certain group of society to monopolize them. Due to the widening of the discussion about defining the personal property of individuals and the nationalization of the main sources of production, this study will not address the concept of these terms and the legal problems surrounding them. This study will be limited to studying the restrictions on personal property related to personal expropriation to achieve the public interest by clarifying the concept of private expropriation to achieve the public benefit and the position of Islamic law regarding it, especially in the context of its conditions and compensation in the later part of this chapter.

5.2.2. The Concept of Expropriation in the Islamic Perspective

The Islamic classical texts contain very little discussion about expropriation as an independent subject matter. Expropriation is a contemporary term that is used in international law, and developed by legal jurists. However, reference to the concept of expropriation in the Islamic perspective is discussed through various other terms including taking of wealth, taking of property, taking of the rights and acquisition.⁷²³ The scholars did not put a separate and clear definition for it; rather, they referred to some of its rulings on many issues in jurisprudence.⁷²⁴

Generally, expropriation for public interest is referred to as “the expropriation of private property to achieve a public benefit in exchange for a just and legal compensation.”⁷²⁵ It was also referred to as “the forcible expropriation of private property from its owner to achieve a public benefit in exchange for a fair compensation”.⁷²⁶ Linguistically, it refers to the taking of private property for a public need with compensation by the authority (*wali*).⁷²⁷ Al-'Ajami described it as “the state taking certain property from its owner forcibly at its fair value in order to benefit from

⁷²³ Kassani Abu Bakr. M. (1986). “*Badā' i' al-Ṣanā' i' fi Tartib al-Shara' i'*”. 2nd Ed. Vol. 4. Dar Al-Kutub Al-'Ilmiyyah, Beirut. p. 40; Al-Ḥamwi Aḥmed. M. (1985). “*Ghamz 'Uyūn Al Baṣā' ir Sharḥ of Al Ashbāh wa al- Naṣā' ir'*”. 1st Ed. Vol.2. Dar al-Kutub Al- 'Ilmiyyah, Beirut. p. 435; Al-Qarafi Aḥmed. I. (1994). “*Al-Dhākhira*”, edited by Muḥammad Hajji. 1st Ed., Vol.10, Dar Al-Gharb Al-Islami, Beirut. p. 28; Ibn Juzay Muḥammad. A. (n.d). “*Qawānīn Al-Fiqh*”. edited by Muḥammad Moulay. (n.p). p. 378; Al-Mawardi Ali. M. (1994). “*Al-Hāwi Al-Kabīr*”. Investigated by Ali Mu'awad and Adel 'Abdul-Mawjud. 1st Ed. Vol.7, Dar Al-Kutub 'Ilmiyyah, Beirut. p. 177; Al-Ghazali, M. (1997). “*Al-Wasīt fi Al-Madhab*”. Investigated by Aḥmad Maḥmūd. 1st Ed. Vol.7 Dar Al-Salām Cairo. p. 413; Ibn Qudamah 'Abdullah. M. (1997). “*Al-Kāfi*”. investigated by 'Abdullah al-Turki, first edition, part two, Dar Hajar, Cairo. p. 91; Al-Bahūti, Maṣṣour. Y. (2000). “*Sharḥ Muntaha Al-Irādāt*”, annotated by 'Abdullah Al-Turki, 1st Ed. Vol.4, Maktabat Al-Risālah. Beirut. p. 6.

⁷²⁴ 'Abd Al-Kāfiyy. M. (2015). p. 30.

⁷²⁵ Shamam. M. (1988). “*Naz' Al-Mulkiyyah lī al-Manfa'ah Al-'Āmah*”. Majalat Mū'jm Al-Fiqh Al-Īslamy. Issue 4. p. 1011.

⁷²⁶ 'Abdullah. A. (1998). P 934.

⁷²⁷ Umar. A. (2008). “*Dictionary of the Contemporary Arabic Language*”. World of Books. V1. Part 3. P. (3\2114).

it for a public interest which necessitates that, as if the property was expropriated to build a road or to expand it a mosque or to build a school or hospital or something else.”⁷²⁸

It is possible to state that expropriation consists of a set of basic elements. Firstly, expropriation of ownership can only be conducted only by the authority, or its legal representative. In this context, authority means “the person who disposes of the nation’s affairs, who owns the reins of affairs and leads the nation.”⁷²⁹ Secondly, expropriation can only be enforced within specific procedures in the event that the owner of the property refuses to sell it by consent. Here, the mutual consent of the owner is given emphasis, and only if he refuses, can the property be taken from him by force.⁷³⁰ Thirdly, expropriation must achieve a legitimate public interest. Public interest can be defined as “bringing benefit and repelling harm.”⁷³¹ The Islamic jurists emphasized that public interest should only be a matter of bringing a benefit or repelling a harm. The determination of public interest in the Islamic perspective operates within the framework imbued in the objectives of the shari’ah (*maqāṣid al- shari’ah*). The *maqāṣid al- shari’ah* stands on five pillars, which are protection of faith, life, progeny, maintenance of intellect (mind) and preservation of property and wealth.⁷³² Whatever is done within the preservation of the objectives is an interest, and everything that

⁷²⁸ Al-A jami, Mohamed. H. & Mohamed Balyyah. H. (2020). p. 750.

⁷²⁹ 'Abd Al-Rahman. A. (2021). “*Huqūq Walī Al-'Amr 'alā Ra'āyah*”. Hay'yat Al-'Amr bi Al-Ma'ruf wa Al-Nahī 'an Al-Munkar (Saudi Arabia). p. 13.

⁷³⁰ Abu Zaid. B. (2020). “*Muthmanah fi Al-'Aqārāt lil Manfa'ah Al-'Āmah*”. Majallat Majma' Al-Fiqh Al-Islāmī. Al-Maktabah Al-Shāmilah Al-Ḥadīthah.

⁷³¹ Ibn Manẓūr. (n.d). “*Lisan al-'Arab*”. Dar al-Ma'ārif. Cairo Part IV. p. 2475; Al Muḥīt Dictionary. p. 233; 'Abdul, M. & Al-Razi, H. (1999). “*Mukhtar Al-Ṣaḥaḥ*”. Edited by: Yusuf Al-Sheikh Moḥammed, Al-Dār Al-Namudhjiya, Beirut. p. 200.

⁷³² Ibn 'Ashūr. (2006). “*Risālah fi Maqāṣid al- Sharī'ah*”. trans. Muḥammad Al-Tahir Al Mesawi, (Petaling Jaya: Şunduq Al-Kutub Al-Islāmiyyah. P. 87.

deviates these objectives is a spoiler.⁷³³ Imām Al-Ghazālī also defined public interest as “bringing a benefit or repelling a harm”,⁷³⁴ and Al-Shāṭibiyy explained interests further as “what is related to the rise of a person’s life and the completion of his life and the attainment of what is absolutely required by the characteristics of sensuality and rationality, so that it may be of them at all.”⁷³⁵ Finally, compensation must be paid to the owner of the property, or otherwise it will be considered unlawful usurpation.⁷³⁶ The definition of compensation to be paid and its characteristics will be discussed in detail in the second part of this chapter.

Through the foregoing, a legal definition of expropriation for the public interest can be proposed as, the act of the authority or the government agency authorized to act in his place, to forcibly expropriate the ownership of an individual or a group of individuals in accordance with the procedures determined by the sharī’ah in the event that they refrain from selling it consensually, in order to achieve a permissible public interest legally, and in return for material compensation to be paid to the owner, determined in accordance with the provisions of the sharī’ah. It should be noted that discussions about expropriation for the public interest in the Islamic perspectives provides no difference between the citizens or foreigners, whether directly or indirectly. This explains the scarcity of writings in the area, especially that in relation to the modern international relations and states responsibilities towards foreign investors.

⁷³³ Abu Zaid. M. (1964). “*Al-Ihtimām bi Al-Tashri’ Al-Islāmī*”. Dar Al Fikr Al- ‘Arabi. V2. P. 47.

⁷³⁴ Imām Al-Ghazali. (n.d). “*Al-Mustasfī min ‘ilm Al-Uşul*”. (n.p). Vol.1. p.139.

⁷³⁵ Ibid; See also Aḥmad al-Raisuni. (n.d). “*Naẓariyyah Al-Imām Al Shāṭibi fī Maqasid al-Shari’ah Al-Islamiyyah*”. (n.p).

⁷³⁶ Adam. I. (2009). p. 87.

Nationalization is one of the forms of expropriation relating to foreign investments that occur in the modern world, a number of it involving Muslim countries, and has received a lot of attention. Nationalization refers to replacement of ownership of individuals (private ownership) with the ownership of states (public ownership) for projects of public interest including taking over its management and exploitation. It is based on the idea of preventing individual ownership of society's basic means of production, achieving material equality and economic balance within society.⁷³⁷ Nationalization is often applied to production projects such as factories, commercial companies and agricultural sector. The state undertakes it by issuing a decision according to which the ownership of the economic project is forcibly transferred from private ownership to state ownership and becomes public property.

Contemporary jurists have differed in its legal ruling, where some of them forbade it⁷³⁸ and some of them permitted it.⁷³⁹ However, by extrapolating the evidence of those who permitted it, what they infer does not apply to the meaning of nationalization that is meant by the adherents of the socialist doctrine, which decrees by expropriating private property and transferring it to state ownership without paying any compensation to the owners, as nationalization in this sense is a usurpation of funds and

⁷³⁷ 'Abdu. I. & Aḥmed. I. (1984). "*Al-Mulkiyyah fi Al-Islām*". Dar al-Ma'ārif, Cairo. p. 79; Muḥammad. B. (1987) "*Iqtisāduna*". Edition 20, Dar al-Ta'ruf, Beirut. p. 225; 'Abd al-Salam. A. (2000). "*Al-Mulkiyyah fi Al-Sharḥ Al-Islāmiyyah*". 1st Ed., Vol. 2, Mu'assasāt Al-Risalah, Beirut. p. 394; Daghy. A. (2013). "*Muqaddimah fi Al-Iqtisād Al-Islāmi*". Second Edition, Part IV, Dar Al-Bashair, Beirut. p. 185.

⁷³⁸ 'Abdullah. K. (1964). "*Al-Mulkiyyah Al-Fardiyyah fi Al-Islam, Baḥth Fiqhī*". Al-Mu'tamar Al-Awal li Majma' Al-Buhuth Al-Islāmiyyah bi Al- Azhar.p.186.

⁷³⁹ Al-Sibā'i. M. (1960). "*Ishtirākīyyāt Al-Islām*". 2nd Edition, Mū'asasat Al-Maṭbu'āt Al-'Arabiyyah, Damascus. p. 161; Al-Mawdūdi Abu Al-A'lā (1969). "*Mulkiyyah Al 'Arḍ, fi al-Islām*". 2nd Ed. Dar Al-Qalam, Kuwait and Sheikh Muḥammad Al-Ghazali.

a violation of rights and does not comply with the legal texts and rules that indicate the sanctity of private property and the necessity of protecting it.⁷⁴⁰

5.2.3. Guidelines and Examples During the Prophetic Era PBUH and beyond

1- The Prophetic Era

Taking of private property for public interest has taken place since the time of the Prophet PBUH. At the outset, it should be noted that the Prophet, PBUH, did not forcibly expropriate real estate for the public interest from its owners, rather, agreements were reached between the Prophet (peace be upon him) and the property owners in all cases in which expropriation for public interest took place.⁷⁴¹

The first occurrence of expropriation of private property for public interest was on the first day of the arrival of the Prophet PBUH to Medina, in the famous story where the camel of the Prophet PBUH settled at the site of the Prophet's mosque today. The property was a barn (*mirbad*)⁷⁴² and a passage for Sahl and Suhail, two orphan boys, in the trusteeship of As'ad ibn Zurara. The Prophet PBUH, said when his camel stopped

⁷⁴⁰ Daghy, A. (2013). p. 188; 'Abd Al-Salām. A. (2000). p. 463.

⁷⁴¹ It should be noted that during the era of the Messenger, may God bless him and grant him peace, no one refused to expropriate property in order to achieve the public interest, as most of them accepted it for the sake of God and did not take compensation, while some of them accepted compensation. Whereas the Muslim treasury at that time did not exist and the Messenger did not have enough money to buy that property or compensate its owners, so the Messenger used to urge the owners of the property to give it up for the sake of God, or urged the companions, may God be pleased with them, to buy it and grant it to the Muslims.

⁷⁴² Al-Mirbad is the place where the camels and sheep are kept; Ibn Athīr Al-Jazari. (1979). “*Al Nihāyah fī Gharīb al Hadiya wa al-Athār*”. Al-Maktabah Al-Ilmiyyah, Beirut, Lebanon. Part 2. p. 182.

at the house, “This place, Allah willing, will be our abiding place” then the Prophet PBUH called the two boys and consulted them in al-Mirbad (barn) to take it as a mosque, and offered them to buy it. They said, “No, but we will give it as a gift, O Allah's Messenger” The Prophet PBUH refused to accept it as a gift from them, and bought it from them, then built it as a mosque.⁷⁴³

As for the second case, the Prophet PBUH valued Banu al-Najjar on their wall, and offered to buy it at a price, for the purpose of building a mosque. When the Prophet PBUH came to Medina, he stayed in the neighbourhood of a people called the people of 'Amr ibn 'Awf, in which the Prophet PBUH stayed there for fourteen nights. The Prophet PBUH then sent to Bani al-Najjar, and they came to him, then he said, “O Bani An-Najjar! Suggest to me a price for this garden of yours.” They replied, “By Allah! We will demand its price from none but Allah.” So the Prophet PBUH accepted it from them.⁷⁴⁴

In another hadith, the Prophet PBUH came to Medina and ordered a mosque to be built and said, “O Bani Najjar! Suggest to me the price (of your land).” They said, “We do not want its price except from Allah”, i.e. wishing for a reward from Allah for giving up their land freely. The Prophet PBUH then ordered the graves of the pagans to be dug out and the land to be levelled, and the date-palm trees to be cut down. The cut date-palms were fixed in the direction of the Qibla of the mosque.”⁷⁴⁵

⁷⁴³ Saḥīḥ al-Bukhari. Hadith #3906. Book 63, Hadith #131. Bāb Hījrat Al-Nabi s.a.w wa 'Aṣḥabīh ila Al-Madinah. <https://sunnah.com/bukhari:3906> (accessed 14 February 2022).

⁷⁴⁴ Saḥīḥ al-Bukhari. Hadith # 2771. Bāb Iza Awqafa Jama'at 'Arḍan Masha'an Fahuwa Ja'iz. Book 55, Hadith 34. <https://sunnah.com/bukhari:2771>; Ibn Hajar al-'Asqalāniyy. (1988). “*Fath Al-Bāriyy, Sharḥ Saḥīḥ Al-Bukhari*”. 2nd Ed. Vol. 1. Dar Al Rayan. p. 625.

⁷⁴⁵ Saḥīḥ al-Bukhari. Hadith #2771. Book 55, Hadith #34. Bāb Idha 'Awqafa Jama'at 'Arḍan Mashā'an Fahuwa Jā'iz. <https://sunnah.com/bukhari:2771> (accessed 14 February 2022).

As for the purchase of the well of *Rumah*, it was reported in a hadith that when the Prophet PBUH and the immigrants came to Medina they denounced its water, they did not find water in the city that tasted sweet except the water of a well that was called '*Rumah*', and the owner was selling water from it. The Prophet PBUH asked him, "Will you sell it for a waterhole in Paradise?" He said, "Oh, Prophet of God, me and my family have nothing but this well", then he PBUH, said, "Who will purchase the well of *Rumah* and place his bucket alongside the buckets of the Muslims, in exchange for better than that in Paradise?" Othman bin 'Affan RA bought it and gave it away to the Muslims.⁷⁴⁶

It can be inferred from these occurrences that it is permissible to take property for the participation of all Muslims in the basic sources of public needs.

2- The Era of the Rightly Guided Caliphs

The permissibility of expropriating private property to achieve the public interest can be inferred from the actions of the Rightly-Guided Caliphs, may Allah be pleased with them.

In relation to its authoritative nature, the Prophet PBUH said, "I enjoin you to fear Allah, and to hear and obey even if it be an Abyssinian slave, for those of you who live after me will see great disagreement. You must then follow my sunnah and that of the rightly-guided caliphs. Hold to it and stick fast to it."⁷⁴⁷

⁷⁴⁶ Jami' al-Tirmidhi. Hadith #3703. Bāb fi Manāqib Uthman bin 'Affan r.a Kunniyatān, Vol. 1, Book 46, Hadith #3703. <https://sunnah.com/tirmidhi:3703> (accessed 14 February 2022).

⁷⁴⁷ Sunan Abi Dawud 4607. Book 41, Hadith #4590. Bāb fi Luzūm Al-Sunnah. <https://sunnah.com/abudawud:4607> (accessed 14 February 2022).

A notable example during the era of the Rightly Guided Caliphs was the expansion of the Prophet's Mosque and the Masjid al-Haram during the caliphate of 'Umar bin Al-Khaṭṭab, RA when there raised a need to expand it for the public need. In order to make place for the expansion, the houses surrounding the mosque were removed, and the owners were compensated.⁷⁴⁸ This includes an incident the house of Al-'Abbas bin 'Abd al-Muṭṭalib RA who refused to pass the possession, and led to a dispute between al-'Abbas bin 'Abd al-Muṭṭalib and 'Umar bin Al-Khaṭṭab. The parties appointed 'Ubayy bin Ka'b RA as their judge, and he told them a story similar to theirs that happened during the time of Prophet Dawūd PBUH, when Allah SWT commanded His Prophet Dawūd PBUH to build a house, and the location of this house at the time was a "Andar" for a boy of Israel's descents.⁷⁴⁹ Prophet Dawūd PBUH, came to him and told him that he was commanded to build a house in this place, so the young man said to him, "Has God commanded you to take this place from me without my consent?" He said to him, "No." He refused to give it to him. Allah SWT revealed to Prophet Dawūd PBUH that he should offer him a quintal of gold as a replacement, but he refused. He then offered him three quintals of gold, which he declined. He stayed that way until he was satisfied with nine quintals of gold. When Al-'Abbas RA heard this story, he said, "I will not take its price, and I give it in charity to the group of Muslims." 'Umar RA accepted it from him and annexed it into the mosque of the prophet PBUH.⁷⁵⁰

⁷⁴⁸ Al-Buhīqi. (n.d). "Shadharāt Al Dhahab". Part III. (n. p.). p. 304.

⁷⁴⁹ Al Andar is the place in which the harvested wheat or the harvested grains are combined. Al-Fairouz Abadi *Qamus Al-Muḥīt*. p. 618.

⁷⁵⁰ Al-Buhīqi. (n.d). p. 304.

During the reign of 'Uthman bin 'Affan RA in the year 24 AH, the people complained about the difficulties to pray on Fridays at the two holy mosque that they had to pray in the “*al-rihab*”. The state expanded the mosques by purchasing the adjacent houses. A consultation was held with the people, and they collectively agreed to proceed with the expansion by removing the neighbouring houses and granted them with compensation. This stirred the people’s anger. He said to them, “Umar RA did this to you, so you agreed to him and you were satisfied.” This indicates that the state may forcibly take possession of the property if there is a need to address public interest.⁷⁵¹

It is also narrated that the Prophet PBUH gave Bilal bin al-Harith al-Muzny RA a piece of land near Medina, but he could not fully develop it due to its large size. During the reign of 'Umar RA, he mentioned about the matter to Bilal and said, “Whatever of the land you can use, I leave it to you, and what you cannot do with it, give it to us, and we will divide it among the Muslims.” Bilal RA initially refused and so 'Umar RA for public interest took from him what he could not exploit from the land and divided it among the Muslims.⁷⁵²

This indicated a case of compulsory expropriation, in which the taking was not to build a mosque or open a road or a public place, but rather to achieve another public interest, which is the exploitation of unused land and its distribution to Muslims.

⁷⁵¹ Al-Mawardi. Ali. M. (1973). p. 162.

⁷⁵² Abu Yusuf. Ya'qoub. A. (n.d). “*Al Kharaj*”. Dar Al-Ma'rafa, Beirut, Lebanon. p. 62; 'Ali.W. (1972). “*Al- Wafi*”. 3rd Edition. Dar Al-Ma'rifah, Cairo. p. 90.

3 - Post Era of the Rightly Guided Caliphs

Upon reviewing the Islamic history and the Caliphs' practices after the era of the Rightly Guided Caliphs, there are some examples that reflected the need of taking private property for public interest. These practices are historical account that supports the adherence of the Muslims to the authoritative sources of Al-Qur'an and prophetic traditions. Illustrated below are selected examples of such adherence.

An example that can be noted is the expansion of 'Abdullah bin Al-Zubayr RA of the Masjid al-Haram, where he bought people's houses and attached them as with the premise of the mosque. According to records, he bought the house of al-Azaraq, which was adjacent to Masjid al-Haram. He bought half of it for 10,000 dinars, and attached it to Masjid al-Haram.⁷⁵³

Similarly, was the expansion of the Prophet's Mosque during the reign of Al-Walid bin 'Abd Al-Malik who instructed 'Umar bin 'Abd Al-'Aziz RA, his governor of Medina, the reconstruction of the Prophet's Mosque. 'Umar bin 'Abd Al-'Aziz bought the houses adjacent to the Prophet's Mosque and added them to it. Al-Walid was reported to send the money to 'Umar and said to him: *"Whoever sold you, give him his price, and whoever refused, demolish his house and give him the money. If he refuses to take it, give it to the poor."*⁷⁵⁴

Another example was the expansion of the Masjid al-Haram during the reign of Caliph Abu Ja'far al-Manşur who bought from people their homes adjacent to the

⁷⁵³ Al-Azrāqi. (1983). *"Akhbar Makkah"*. Dar Al-Andalus. 3rd Ed. pp. 69-70; Al-Fassi, Muḥammad. A. (2000). *"Shifā' Al Gharam bi Akhbār al Balad Al Haram"*. Dar al Kutub al 'Ilmiyyah. 1st Ed. p. 224.

⁷⁵⁴ Al-Samanhouri, Nour Al-ddin. A. (1986). *"Wafā' al Wafā' bi Akhbār"*. Dar Al Mūstafa. Investigated by Muḥammad Muḥyiddin 'Abd Al-Ḥamid. Bayt Iḥya' Al-Turath Al-'Arabī. p. 513; Al-Mawardi Ali. M. (1973). p. 206.

mosque.⁷⁵⁵ It is mentioned that some of the people of Mecca refused to sell at first, despite being persuaded. Al-Manşur asked Imam Ja'far Al-Şadiq about the matter, and Al-Şadiq explained to Al-Manşur quoting a Quranic verse, "...the first House [of worship] established for mankind was that at Bakkah."⁷⁵⁶ Al-Manşur showed his disagreement and said to him, "Do what you like".

There are other cases in which property was expropriated, such as the expansion of the Grand Mosque during the era of Caliph Al-Mahdi,⁷⁵⁷ the expansion of the Basra mosque in the province of 'Ubaydah bin Ziyad,⁷⁵⁸ as well as the expansion of Prophet's Mosque by Al-Walīd bin 'Abd Al-Ḥakam.⁷⁵⁹

5.2.4. Legality of Expropriation of Private Property for the Public Interest

The following section captures the opinions by jurists from the four Sunni schools, the Hanafi, Maliki, Shafi'i and Hanbali schools of jurisprudence regarding expropriation for the public interest, in addition to the application of Islamic legal maxims (Al-Qawā'id al-Fiqhiyyah) on the expropriation for the public interest.

⁷⁵⁵ Al-Azraqi. (1983). p. 72; Al-Fasy, Muḥammad. A. (2000). p. 224; Al-Māwardi Ali. M. (1973). P. 206.

⁷⁵⁶ Al-Qur'an. Al Imran 3:96.

⁷⁵⁷ Al Azraqi. (1983). p. 74.

⁷⁵⁸ Al-Ḥamawi, Shihāb Al-Din. A. (1995). "*Mu'jam al Buldān*". 2nd Ed. Dar Şader Lī Al-Nashīr, Beirut. p. 1/434.

⁷⁵⁹ Ibn Kathīr, Ismail. K. (1990). p. 152; Al Thahabi. (1992). "*Siyār A'lām al Nubala'*". 8th Ed. Vol.4. Al Mu'assasah Al- Risalah. p. 347.

5.2.4.1. Juristic Discussions on Expropriation of Private Property for the Public Interest

The Muslim jurists discussed the issue of expropriation of private property for public interest, in various headings. The jurists generally agree on the permissibility of expropriating private property for the public interest, whether it is to expand a mosque or a road or provide water and food or any necessary public benefit, as long as the conduct of expropriation is lawful. The following section captures the opinions by jurists from the four Sunni schools, the Ḥanafi, Maliki, Shafi'i and Hanbali schools of jurisprudence.

1- The Hanafi School of Jurisprudence

There are texts in the extensive collections of the Hanafi school of thought that establish the permissibility of expropriating private property for the public good. In the exegesis of *Fatḥ al-Qadīr* by Ibn Hammām, it is mentioned that “If the mosque is narrow and there is a plot of land next to it with a shop on it, it is permitted to take it and enter it, even if it belongs to a man who took the value unwillingly, and if it is a public road, enter some of it as long as it does not hurt others.”⁷⁶⁰

Ibn 'Abidin further said that if the mosque is narrow, and next to it is a waqf land or a shop, it is permissible to take it and enter it, and he added that it must be taken by the order of the judge.⁷⁶¹ Similar juristic opinion appears in “*Fatāwā al-Khaniyah*” which mentions, “If the mosque is narrowed to people, and a man’s land is next to him,

⁷⁶⁰ Ibn al-Hammam, Kamal al-Din Muhammad ibn Abd al-Wahed. 1970. Explanation of Fatah al-Qadīr. First Edition. Muṣṭafa Al-Babi Al-Halabi Press, Egypt. p. 6/235.

⁷⁶¹ Ibn 'Abidin. (1966). “*Hashiyāt Rad al-Muhtār 'Alā al-Durr al-Mukhtār, Sharḥ Tanwīr al-Abṣār*”. 2nd Ed. Dar Al Fikr. Beirut. p. 4/379.

his land will be taken for value by force.”⁷⁶² In the context of monopoly of food, Ibn Najm in *Al-Ashbāh wa Al-Nazā'ir* permitted the monopolist's food to be sold by compulsion upon his refusal to sell in order to prevent public harm.⁷⁶³ It is also mentioned in *Al Ikhtiyār li Ta'līl al Mukhtār* that it is legal to expropriate what is required by the mosque or public roadways to enlarge them from neighbouring land owned by individuals, and if they refuse, it is forcibly expropriated at the property's value.⁷⁶⁴

Based on the excerpts, the Hanafi school of jurisprudence is generally consistent on the permissibility of expropriation in the public interest, whether it is to expand a mosque or a road, or to prevent monopoly or other public interests.

2- The Maliki School of Jurisprudence

The same line of thought exists in the collections of the Maliki school of jurisprudence. In many circumstances, expropriating property in the public interest is permissible. As recorded in the book *Al-Tāj Wa Al-Iklīl*, “there is nothing wrong with selling the house and others, and the Sultan compels its owners to sell it if people need it for their mosques in which the sermon is located, and also the way to it.”⁷⁶⁵

⁷⁶² Nizām, al-Shaykh. (2010). “*Fatāwā al-Hindiyah al-Ma'rūfah bi-al-Fatāwā al-'Alamkiriyyah fī Madhhab al-Imām al-A'zam Abī Ḥanīfah al-Nu'mān*”. Vol. 6. Dar al-Kutub al-'Ilmiyyah, Beirut. p. 3/293.

⁷⁶³ Tāj al-Dīn al-Subkī. A. (1991). “*Al-Ashbāh wa al-Nazā'ir*”, researched by 'Adel 'Abd Al Mawjud and Ali Mu'awad. 1st Ed. Dar al Kutub al 'Ilmiyyah. Beirut. p. 121.

⁷⁶⁴ Mawṣili, 'Abdullah (1969). “*Al Ikhtiyār li Ta'līl al Mukhtār*”. Vol. 4. Beirut, Dar al-Risalah al-'Alamiyyah. pp. 383-384; Fakhruddin 'Uthman. A. (1896). “*Tabyīn al Ḥaqā'iq, Sharḥ Kanz Al Daqā'iq*”. 2nd Ed. Part III. Al Amiri, Beirut. p. 333.

⁷⁶⁵ Al-Muwafaq Al-Maliki. (1994). p. 42.

Another reference on the matter is in *Tabṣirāt al Ḥukkām* which contains similar description, that if the mosque becomes narrow, the owner of the neighboring land is to sell what is needed to expand, and so does the owner of the feddan at the top of the mountain if the people needed to need to a take shelter in it.⁷⁶⁶ In the book *al-Muwāfaqāt*, it illustrates that if a general harm arises as a result of a man's refusal to sell his house or land, and if the people is forced to cramp in a mosque or elsewhere, then it is considered a public harm. This is because public interests take precedence over private interests. When the mosque of the Prophet PBUH was expanded by adding in new properties, there were owners who were satisfied and those who were not satisfied. This requires putting the public interest ahead of the private interest and is not intended to harm to private property.⁷⁶⁷ *Al-Tāj Wa Al-Iklīl* also stated that "...just as a person is compelled to sell his property as a right over him, so the owner of the property is compelled to sell it to expand the Friday mosque, and the owner of the land adjacent to the road that there is no passage for people except from it is forced to sell a road from it to them from the treasury (Muslim House of Fund)."⁷⁶⁸ Moreover, Ibn Rushd,⁷⁶⁹ Al-Ḥaṭṭāb,⁷⁷⁰ and other Maliki jurists⁷⁷¹ issued fatwas of the same regards.

The Maliki jurists have unanimously agreed on the permissibility to compel the owner to sell his property in several cases, including:⁷⁷²

⁷⁶⁶ Bin Farḥun, Burhan Al-Din. A. (1995). "*Tabṣirāt Al Ḥukkām fi Uṣūl Al 'Aqdiyyah wa Manāhij Al Aḥkām*". Dar Al Kutub Al 'Ilmiyyah. Beirut. p 150.

⁷⁶⁷ Al-Shāṭibi, Ibrahim. A. (1975). "*Al Muwāfaqāt*", 2nd Ed. Vol. 3. Dar Al Fikr. Beirut. pp. 255-257.

⁷⁶⁸ Al Muwāfaq, Muḥammad. A. (1994). pp. 252–253.

⁷⁶⁹ Ibn Rūshd, Abu al-Walid. R. (n.d). "*Shatharāt al Dhahāb*". (n.p) Part IV. p. 64.

⁷⁷⁰ Al-Ḥaṭṭāb, Muḥammad. A. (1995). "*Mawāhib al Jalīl li Sharḥ Mukhtaṣar Khalīl*". 1st Ed., Part IV. Dar Al Kutub Al 'Ilmiyyah. Beirut. p. 253.

⁷⁷¹ Al-Tsouli, Ali. A. (1951). "*Al-Bahja Sharḥ al Tuḥfa*". 1st Edition. J. Maṭba'at Al-Ḥalabī. Cairo. p. 74; Al-Qarāfi Aḥmed. I. (1994). p. 6/331.

⁷⁷² Al-Ḥaṭṭāb, Muḥammad. A. (1995). p. 255.

- Compelling the owner to sell his water to someone who is thirsty;
- Compelling the owner to sell water to his neighbor whose well has collapsed and fears that his crops will perish. It is recorded that the neighbor should give water in these circumstances without price.
- Compelling the monopolists to sell his monopolized items.
- Compelling the owner of space (e.g land) to the mosque if the mosque's space is insufficient, what the mosque expansion requires.
- Compelling the owner to sell the top of the mountain (*al-fanār*) if the people (public) need it for fortification.

It is apparent from the discussion that the Maliki jurists are also in agreement about the permissibility of expropriation for public interest, whether when there comes a need to expand a mosque or a road, to ward off harm such as thirst or the destruction of crops, or to prevent monopoly or fortification.

3- The Shafi'i School of Jurisprudence

A stark similarity of approach can be found in the Shafi'i school of jurisprudence, acknowledging the permissibility of expropriation for the public interest. It is notably mentioned in a classical reference, *Qawā'id al Ahkām fi Maṣāliḥ al Anām* to give precedence to public interest when it contradicts private interest. The legal ruling applicable on this matter is that the public interest is similar to a private need, and if that need requires the taking of a private person's wealth, it is permissible to do so. In fact, the permissibility is extended to the situation if a person fears death from hunger, heat, or cold. It is further added that if it is necessary to revive one soul, then it is even

necessary to revive souls.⁷⁷³ Al-Māwardiyy acknowledged the permissibility of expropriation for the public interest, and inferred from what 'Umar bin Al-Khattab and 'Uthman bin 'Affan RA did during the time of their caliphate.⁷⁷⁴ Al-Suyūṭiyy also stated in *Al-Ashbāh wa Al-Nazā'ir* that the owner can be forced to sell his property in many cases, including compelling an infidel to sell his Muslim slave. In relation to this matter, Ibn al-Ṣalāh issued a fatwa regarding a woman who bought a slave-girl and carried her to corruption, she was later forced to sell her. The *fatwā* permitted forcing the sale, that whoever costs his servant what is unbearable is forced to sell the servant in order to protect the servant from humiliation.⁷⁷⁵

It is well established that the Shafii jurisprudence prioritize public interest over private interest, and accordingly, it is permissible to expropriate property for public interest when necessary, because the harm to the public is greater than the harm to the individual.

4- The Hanbali School of Jurisprudence

The Hanbali jurisprudence is likewise in accord with permitting expropriation to meet public good. Ibn Taymiyyah mentioned forms of compulsion to sell, including selling food forcibly for a price if necessary.⁷⁷⁶ The Hanbali school allows such takings if it is permitted by the legal authority. Examples given for expropriation of private

⁷⁷³ Abu Muḥammad 'Izz al-Din. A. (1991). "*Qawā'id Al-Aḥkām fī Maṣāliḥ al-Anām*". Dar al Kutub al 'Ilmiyyah. Beirut. p. 162.

⁷⁷⁴ Al-Māwardi Ali. M. (1973). pp. 205-206.

⁷⁷⁵ Al-Suyūṭi, Jalal Al-Din. A. (1959). "*Al-Ashbāh wa al-Nazā'ir*". Maṭba'at Muṣṭafa Al-Ḥalaby. Egypt. p. 453.

⁷⁷⁶ Ibn Taymiyyah, Aḥmed. A. (1963). "*Majmu'āt Fatwa Sheikh Al-Islām*". 1st Ed. Maṭba'at Riyadh. pp. 29/189-190; Ibn Qudāmah, 'Abdullah. M. (1963). "*Al-Muqni' fī Fiqh Imām Al-Sunnah Aḥmad bin Ḥanbal Al-Shaibāni*". Maṭba'at Al-Salafya wa Maktabatha. p. 2/4.

property for the public interest, is compelling an owner of the house next to a mosque to expand it when the need calls for it.⁷⁷⁷

Ibn al-Qayyim emphasised the importance of protecting individuals' property rights, stating that no one can take anything from them without their consent. This right is however not exclusive, as there are exceptions that make it necessary to take it.⁷⁷⁸ It was reported from Imam Aḥmad bin Ḥanbal that he approved the action of 'Umar bin Khaṭṭab RA for the purchase of a house to build a prison, justifying that it was for the Muslims' interest to maintain peace and morality, by imprisoning the convicts.⁷⁷⁹

Ibn al-Qayyim explained the permissibility of expropriation for public interest by giving the scenario of a warring state. He noted that if people need weapons for *jihad*, the owners must sell them, and they cannot refrain from selling it except at the price they want. He further added that since Allah SWT has enjoined *jihad* with life and wealth, how would the owners of arms not sell the weapons to the people at its value?⁷⁸⁰

5.2.4.2 The Application of Islamic Legal Maxims (Al-Qawā'id al-Fiqhiyyah)

The legality of expropriation of private property to achieve the public interest can be inferred by considering the principles in Islamic jurisprudence. *Al-Qawā'id al-Fiqhiyyah* are principles taken from the body of Islamic jurisprudence (*fiqh*) which are developed by Muslim jurists from the sources of the shari'ah. This section will explain the relevant rules for the discussion:

⁷⁷⁷ Ibn al-Qayyim, Shihab al-Din. S. (n. d.). p. 256.

⁷⁷⁸ Ibid. p. 249.

⁷⁷⁹ Muḥammad. F. (2000). "*Al Aḥkām al Sulṭāniyyah Li Al-Farra'*". 2nd. Ed., Dar Al-Fikr. p. 190.

⁷⁸⁰ Ibn al-Qayyim, Shihab al-Din. S. (n. d.). pp. 249- 260.

1- Public interest takes precedence over private interest (*al-Maṣlahah al-'Ammah Tūqaddam 'ala al-Maṣlahah al-Khaṣah*)⁷⁸¹

Putting the public interest ahead of private interest is a common practice among jurists.⁷⁸² In order to avoid societal harm, the Islamic jurisprudence permits the infliction of private damage. Consideration of public interest (*maṣlahah*) is a key juristic device to promote public interest. This relates closely to the achievement of the objectives of the shari'ah, referred to as the *Maqāṣid al Shari'ah*, where the jurists will determine the priority of one interest over the other.

Accordingly, the public interest that is achieved in expropriation must be assessed, whether it is building a mosque or extending it to Muslims, or building roads, or providing basic sources of water and food, preventing their monopoly, or taking the necessary measures to protect the state and society, prioritizing the individual's interest in preserving and benefiting from his property.⁷⁸³

2- Specific harm to be borne in order to ward off public harm (*Yuḥtamal al-Darar al-Khāṣ li Daf' al-Darar al-'Ām*)⁷⁸⁴

This rule asserts that it is allowed to impair an individual's interests in order to protect the wider public's interests. Harm in the context of expropriation is the deprivation of the use and benefit of foreign investors' property to make way for the

⁷⁸¹ Al-Shāṭibī, Ibrahim. A. (1975). p. 2/630.

⁷⁸² 'Abd Al-Karim. Z. (1982). "*Quyud Al-Mulkiyyah Al-Fardiyyah lī al-Manfa'ah Al-'Āmah fi Al-Shari'ah Al-Islāmiyyah*". Maktabat Al Risālah. Oman. p. 28.

⁷⁸³ Al-Shāṭibī, Ibrahim. A. (1975). p. 2/630.

⁷⁸⁴ Ibn Najm, Zinedine. M. (1986). "*Al-Ashbāh wa al- Naḏā'ir fi Madhahīb Abu Ḥanīfa Al-Nu'mān*". Investigated by 'Abd Al-'Aziz Muḥammad Al-Wakīl. Maṭba'at Al-Ḥalabi. Cairo. p. 87.

public interest. Whereas general harm refers to the damage, danger or hardship to the community due to the unavailability of the necessary public benefits, whether it is road construction, securing food or protection. This is the case if the property is retained by the individual and the general public is unable to benefit from it.⁷⁸⁵

3- Bearing the lower harm in order to avoid whichever is more severe/ The greater harm shall be removed by the lesser harm (*Al-Ḍarar al-Ashadd Yuzal bi al-Ḍarar al-Akhaf*)⁷⁸⁶

This rule stipulates that if a harm must occur from among two or more harms, and one of them has less effect than the other, the less effective harm must be borne in order to repel the more effective harm. Harm includes both essence and consequence, and as a general rule, harm must be repelled (*al-ḍarar yuzal*). However, when one harm is greater than the other, repelling the bigger harm takes precedence over the lesser harm.

In the context of expropriation in international investment law, the potential harm must be weighed, both the harm toward the society in the event of inability the state to expropriate and the lesser harm which would befall the owner of the property. In such situation, the action that results to the lesser harm must be taken, to avoid the more severe harm to the public.⁷⁸⁷

4- Necessities permit prohibitions (*al-Ḍarurāt Tubīhu al- Maḥzūrāt*)⁷⁸⁸

The right to own property is a well-established principle in Islam. However, this right is not absolute and may be violated in cases of necessity. This includes traditional

⁷⁸⁵ Abu Zahra Muḥammad. (1996). “*Nazariyyāt Al-Mukiyyah wa Al- ‘Uqūd*”. Dar Al Fikr. Egypt. p. 163.

⁷⁸⁶ Ibn Najm, Zinedine. M. (1986). p. 89.

⁷⁸⁷ *Ibid.* p. 89.

⁷⁸⁸ *Ibid.* p. 85.

examples such as the Muslims' need for mosques for prayer, the fear of dying due to a lack of water and food, and the need to defend the country from enemies. In such cases, only the proper authority has the authority to take things away from their owners in exchange for a fair compensation.⁷⁸⁹

5- It is an obligation if responsibility cannot be completed without it. (*Ma La Yatim al-Wajib illa bihi fahuwa Wājib*)⁷⁹⁰

It is well known that among the duties of the authority or a state is to look after the affairs of people, achieve their public interests, and ward off harm from them, such as building roads and providing them with food and water, providing protection, managing and exploiting state resources, building hospitals, and other things that serve the interests of the nation.⁷⁹¹

According to this legal maxim, if this duty is not achieved except by the states' expropriation of an individual or group of individuals, then the expropriation becomes a duty on the state.⁷⁹² Thus, the duty itself becomes an obligation. An illustration of this would be, if some persons owned (monopolizes) food, and there is fear that the general public would perish because of lack of food, but the owner of the food sell the food at a much higher price than its original value, it is permissible and even obligatory for the ruler to take food from him forcibly at a reasonable price and give it to the general public.

⁷⁸⁹ Wahbah. A. (1985). "*Nazariyyāt Al-Darurah*". Mu'assasāt Al Risālah. Beirut. 4th Ed. p. 232.

⁷⁹⁰ Al-Ghazali Muḥammad. A. (1906). "*Al-Muṣṣafā min 'Ilm al Uṣūl*". Al-Maṭba'ah Al Malakiah. Egypt. p. 1/71; Banani, 'Abd Al-Raḥman.B. (2018). "*Ḥashyāt of Al- 'Alāma Al-Banani fi Tafseer Al Jalal al Maḥalli 'ala Jamī' al Jawāmi*". By Imām Ibn Al-Sabki". Dar Ihya' al-Turath al- 'Arabi. Muṣṭafa Al-Babi Al-Halabi et al. Egypt p. 1/193.

⁷⁹¹ Al-Darini, Muḥammad.F. (1966). "*Al-Haq wa Taqyīdh*". 1st Ed. Maṭba'at Damascus. Syrian Arab Republic. p. 235.

⁷⁹² *Ibid.*

5.2.5. Conditions of Expropriation of Private Property for the Public Interest in the Islamic Jurisprudence

The Islamic jurisprudence puts certain conditions in order for expropriation to be permissible. In Islamic jurisprudence, it is not acceptable to expropriate private property for the public good unless specific requirements are met, failing which expropriation becomes a form of oppression or encroachment over the land, which is prohibited in Islam.⁷⁹³ The conditions are as follows:

5.2.5.1 The person who expropriated the property must be the authority (*wali*) or his legal representative.⁷⁹⁴

The issue of expropriation for the public interest is very sensitive and delicate. Therefore, only those who have the highest authority in the state or whoever represents him has the power to expropriate. In the context of international investment law, the authority (*wali*) refers to the state or the relevant authorities attributed to the state. Allowing just anyone the capacity of expropriation will lead to chaos that sweeps and corrupts the society.⁷⁹⁵

One of the fundamental rules of *shari'ah* is that the state is responsible for addressing any conflicts of interests.⁷⁹⁶ This means that every decision or action by the state must constantly be taking into account of what brings benefits and what repels

⁷⁹³ Islamic Fiqh Council No. 29 (4/4), para 2.

⁷⁹⁴ *Ibid.* para (2/2).

⁷⁹⁵ Husni. B. (1999). p. 90; Adam. I. (2009). p. 101.

⁷⁹⁶ Ibn Najm, Zinedine. M. (1986). p. 123; Al-Sayūṭī, Jalal Al-Din. A. (1959). p. 121; See also Majallat Al-Qawānīn Al-Qaḍā'iyyah. Article (58).

evil. Especially in the question of expropriation of property for the public interest, the state has to analyse whether the measure is appropriate before enforcement. In such cases, seeking the assistance of experts to ensure the necessity of expropriation becomes necessary.

The state must initially negotiate with the owners and offer them to buy it at a price. If the owners refuse to sell their property for the price, the state may take the property forcibly, on the condition that the state pays them a fair compensation from the Treasury of the Muslims.⁷⁹⁷ Al-Juwainiyy states that according to the shari'ah law, if a person abstains from exercising a right imposed on him, that right is fulfilled by subjugating the guardianship.⁷⁹⁸ In this case, it is advisable to refer the matter to the judiciary to prevent an error in assessing the public interest, and making sure that it was the last resort to achieve public interest, without miscalculation of the compensation amount.⁷⁹⁹

5.2.5.2. Expropriation must be for the public interest.⁸⁰⁰

It is not permissible to expropriate property to achieve a private interest unless there is a public interest that is necessary. The interest is necessary in the event that people fall into embarrassment, distress and distress, if the disposition is not achieved. Moreover, as it is well known, the severity of the need descends into the rank of

⁷⁹⁷ Husni. B. (1999). p. 90.

⁷⁹⁸ Al-Juwainiyy, 'Abd Al-Malik. A. (2007). "*Nihāyat al Maṭlab fī Dirāyāt al Madhhab*". Investigation by 'Abd Al-'Azīm Al Dīb. 1st Ed. Part 14. Dar Al Manāhij. Beirut. p 450.

⁷⁹⁹ Adam. I. (2009). p. 102; Husni. B. (1999). p. 91.

⁸⁰⁰ Islamic Fiqh Council, para (2/3).

necessity.⁸⁰¹ Ibn al-Qayyim added that people's need for food, clothing, and other things is considered a necessary public interest.⁸⁰²

In determining public interest, there should be a necessity that leads to taking the expropriation. Necessity (*al-darurah*) is described as a situation when an individual or group afflicts a state of danger or severe hardship that leads to committing a prohibited or abandoning an obligation.⁸⁰³ This means that the expropriation carried out must be to achieve a public interest, either to avoid causing great harm, embarrassment or distress to the community. Expropriation must be an urgent necessity. It is not permissible to expropriate property for a supplementary purpose that is not required, or for a repugnant purpose that is not required at all.⁸⁰⁴ If the expropriation is for a complementary or repugnant purpose and does not aim to achieve a necessary public interest, it is regarded as arbitrariness.⁸⁰⁵

The expropriation must by itself a necessary action to justify interference with the property of others. If there is other recourse, expropriation becomes unnecessary.⁸⁰⁶ Take for example, if there is another mosque nearby that the Muslims can go to without embarrassment and hardship, interference of property of others for the expansion of the

⁸⁰¹ Ibn Najm, Zindin. M. (1986). p. 91; Al-Sayūṭī, Jalal Al-Din. A. (1959). p. 88; See Majallat Al-Aḥkām Al-'Adliyyah. Article (22).

⁸⁰² Ibn al-Qayyim, Muḥammad ibn Abi Bakr. (2007). "*Turūq al-Hākimiyyah fi al-Siyāsah al-Shar'iyyah*". investigated by Nayef Al-Ḥamad. 1st Ed. 'Alam Al-Fawaid. Makkah. p. 262.

⁸⁰³ Wahba. A. (1985). pp. 67–68.

⁸⁰⁴ Al-Darini, Muḥammad F. (1966). p. 572; Al-Nabhan, Muḥammad. F. (1984). "*Al-Ittijāh Al-Jamā'i fi Al-Tashrī' Al-Iqtiṣādī Al-Islāmī*". I 4. Muassasāt Al-Risālah. Beirut. p. 218.

⁸⁰⁵ Muḥammad, Al-Ḥaj Naṣer. (1988). "*Mūṣaddarāt Al-Mulkiyyah li al-Manfa'ah Al-'Āmmah. Baḥṭh Muqaddam li Majma' Al-Fiqh Al-Islāmī*". 4th Ed. Majallat Al-Majma' Al-Fiqhi. Jeddah. p. 173.

⁸⁰⁶ Al Muwāfaq, Muḥammad. A. (1994). p. 252.

mosque is not necessary.⁸⁰⁷ It is also not permissible to expropriate a road if there is another road that can be used.

Another golden rule in the application of necessity is that it must be more than necessary. The Islamic legal maxim on necessity is determined according to (*al-ḍarūrah tūqaddar bi qadariha*) that expropriation of private property for the public benefit is originally prohibited, but it is permissible in case of necessity.⁸⁰⁸

This means that the harm must be paid only to the extent necessary. If the state authority wants to expand a mosque and prevents him from having a house adjacent to the mosque, it is permissible for him to expropriate this house only by force, and it is not permissible for the state to expropriate and demolish all the houses adjacent to the mosque if it can expand by demolishing only one house. The jurists also illustrated that in the situation where a public road is demolished by a river, it is permissible to take the adjacent land to build the road, only to what is sufficient to restore the road.⁸⁰⁹

5.2.5.3 Expropriation must be with compensation.⁸¹⁰

The Islamic law ordains the payment of compensation in the event of expropriation. A clear legal authority on this can be derived from the practice of the Prophet PBUH when expropriation of property was resorted to achieve public interest.

⁸⁰⁷ Ibn 'Ābidīn. (1966). p. 379.

⁸⁰⁸ Ibn Najm, Zindin. M. (1986). p. 87; Al-Sayūṭī, Jalāl Al-Din. A. (1959). p. 84; Also see Majallat Al Ahkām Al 'Adliyyah. Article (22).

⁸⁰⁹ Al Muwāfiq, Muḥammad. A. (1994). p. 252.

⁸¹⁰ Islamic Fiqh Council, para (1/2).

The Prophet PBUH paid the price of the place on which the Prophet's Mosque was built to the two boys.⁸¹¹ The same applies to the expropriation of the well of *rumah*.⁸¹²

The Muslim jurists emphasized the necessity for compensation. Al-Zaylā'iy highlighted the payment of compensation of the value of the land expropriated forcibly.⁸¹³ Similarly, when describing the expansion of the mosque, Ibn Hammām urged for compensation to be paid in return to the taking of the land by expropriation.⁸¹⁴ Ibn al-Qayyim also said if people need weapons for jihad, then their owners must sell them for the same, and they cannot refrain from selling them except at the price they want.⁸¹⁵

A contemporary fatwa issued by the Islamic Fiqh Academy, Jeddah, Kingdom of Saudi Arabia in its 4th session 1988, provided the conditions of expropriation for the public interest as follows:

“Real estate may not be expropriated for the public interest unless the following rules and conditions are observed: 1. The expropriation of the property shall be in return for immediate and just compensation estimated by the experts, not less than the price of the same. 2. The person who expropriated the property should be the guardian or his deputy in that field. 3. That the expropriation is for the public interest to which it is called by a public necessity or a public need such as mosques, roads and bridges. 4. The property

⁸¹¹ Refer previous discussion of this chapter: The Prophetic Era.

⁸¹² *Ibid.*

⁸¹³ Al-Zaylā'i. (1896). p. 333.

⁸¹⁴ Ibn al-Hammām, Kamal. A. (1970). p. 6/235.

⁸¹⁵ Ibn al-Qayyim, Muḥammad ibn Abi Bakr. (2007). 249.

expropriated from its owner should not be used for public or private investment.”⁸¹⁶

By studying the subject of expropriation for the public interest, it is found that all the provisions related to it are general provisions that apply to all forms of private expropriation for the public benefit. It was not found in the jurisprudence anything that indicates the expropriation of the investment, whether it is foreign or local. Nor any reference was found to indirect expropriation and its provisions. Therefore, what applies to the expropriation for the public interest, in terms of its legality and conditions, will apply on the indirect expropriation of foreign investment.

5.3. Compensation for Expropriation in Shari'ah

5.3.1. Definition of Compensation

Compensation is described in various forms by the scholars. Ibn 'Abidīn explained compensation as “*daman*”.⁸¹⁷ The *Majallah al-Ahkam al-Adliyyah* defined compensation as “giving something like a thing if it is one of the similarities and its value if it is one of the values.”⁸¹⁸ Other descriptions of compensation is as the following:

- the obligation to compensate others for the harm incurred in property or loss of benefits, or for partial or total harm to the person.⁸¹⁹

⁸¹⁶ Resolution No. 29 (4/4), regarding expropriation of property in the public interest. Al-Majma' Journal (p. 4, vol. 2, p. 897). The Islamic Fiqh Academy held during its fourth conference session in Jeddah in the Kingdom of Saudi Arabia from 18-23 Jumada Al-Thani 1408 AH corresponding to February 6-11, 1988 AD.

⁸¹⁷ Ibn 'Abidīn. (1907). “*Majmū'ah min Rasā'il Ibn 'Abidīn*”. Edited by Muḥammad Al-'Azzāzi. Maṭba'at Othman. Astana. p. 2/177.

⁸¹⁸ Article 416, *Majallah al-Ahkām al-Adliyyah*.

⁸¹⁹ Wahbah. A. (1998). p 15.

- removing the harm, repairing the defect that befell the aggrieved party, and returning it to its financial condition to what it was before the harm occurred.⁸²⁰
- giving consideration the replaced object or the replacement.⁸²¹
- a restitution of the same of a lost item or its value.⁸²²
- a fine of a harmed item.⁸²³
- payment for the harm done to the injured.⁸²⁴
- the money that is judged against someone who has inflicted harm on others in life, wealth or honour.⁸²⁵
- obligation to pay financially for the harm to others.⁸²⁶
- covering the harm caused by the infringement and errors⁸²⁷
- paying the due replacement for the property expropriated for the public interest, forcibly to its owner.⁸²⁸
- what a person must pay in terms of money or value because of causing harm to others, whether this harm is by force, destruction, self-harm or something else.⁸²⁹

⁸²⁰ Adam. I. (2009). p. 156; Husni. B. (1999). pp. 92–93.

⁸²¹ Mayyārah. A. (2000). “*Al- Itqān wa Al- Ahkām fi Sharḥ Tuḥfāt Al- Ḥukkām*”. Investigation by 'Abd Al-Latif Hassan, 1st Ed. vol. 2, Dar al Kutub al 'Ilmiyyah. Beirut. p. 113.

⁸²² Al-Ḥamwiyy Aḥmed. M. (1985). p. 2/211

⁸²³ Al-Shawkāni. Muḥammad. M. (1983). “*Nayl Al Awṭar*”. Dar al Kutub al 'Ilmiyyah. Beirut. p. 6/41.

⁸²⁴ Ṣalah. K. (1990). p. 6.

⁸²⁵ Maḥmud. S. (1983). “*Al- Islam 'Aqīdah wa Sharī'ah*”. Dar Al-Shuruq. Cairo. p. 415.

⁸²⁶ Muṣṭafa. A. (2004). “*Al Madkhal al Fiḥi al- 'Ām*”. 2nd Ed., vol.2. Dar al Qalam. Damascus. p. 1035.

⁸²⁷ Wahbah. A. (1998). p. 87.

⁸²⁸ Husni. B. (1999). p. 93.

By analysing all these definitions, it becomes clear that the elements of the definition of compensation are, money to be paid, whether it is cash or in-kind, harm and two parties i.e the one who caused and the one who is affected (injured). The essential element of compensation is restoring the situation to the way it was before the harm occurred. It is submitted that compensation is the obligation of the person who causes harm to pay money to the harmed person in order to compensate the harm suffered by the harmed person and restore the situation to the way it was before the act of harm occurred. Whether the harm is due to a lawful or unlawful act, the basis is the occurrence of the harm, not the legitimacy of the act causing it.

In the context of direct and indirect expropriation of foreign investment, compensation refers to the obligation of the state (the one who caused) to pay money to the investment owners (injured) in order to redress the harm incurred as a result of expropriation of his investment, whether the expropriation was direct or indirect, to return the situation to what it would have been had it not been for the state's expropriation, whether the expropriation is lawful or unlawful.

5.3.2. Wisdom of compensation

Compensation is considered a mean of preserving and protection of property which constitutes an important purpose of the shari'ah.⁸³⁰ It is a form of reimbursement for the harm suffered by the aggrieved person, and the return of his financial position to what it was before the harm occurred.⁸³¹ Compensation prevents the risk of conflict

⁸³⁰ Muṣṭafa Al-Zarqā. (2004). p. 342; Wahbah, A (1998). p. 88.

⁸³¹ Wahbah, A. (1998). p. 88; Ḥusni. B. (1999). p. 95; Adam. I. (2009). p. 158.

and enmity between people, and it generates peace. It helps parties to restore relationships and encourages positive relation between individuals and the state,⁸³² and enabling the achievement of a greater public cause. Compensation for expropriation for the public benefit specifically leads to the provision of blessing in the project to be established. If the project is based on injustice and consuming people's property unlawfully, according the Islamic perspective, there is no good in it and its blessing is taken away.⁸³³ Moreover, compensation clears the responsibility of the one who caused the harm and avoid situations of usurpation.⁸³⁴

5.3.3. Compensation for expropriation for the public interest

Compensation for harm is obligatory in the shari'ah whether this harm results from expropriation of property for the public interest or otherwise. This can be inferred from the texts of Al-Qur'an, *ahādith* and the unanimity of jurists.

Al-Qur'an contains important messages on compensation in its narration about to Prophets Dawūd and Sulaimān when they judged the issue of sheep that ate the crops at night. Allah SWT says "We bestowed the same favour upon Dawūd and Sulaimān. Recall, when they gave judgement regarding a tillage into which the sheep of some people had strayed at night, and we were witnesses to their judgement."⁸³⁵

The interpreters of Quran, when interpreting this verse, mentioned the story of two men who entered upon Prophet Dawūd PBUH one of them was a farmer, and the

⁸³² Husni. B. (1999). p. 95. Adam. I. (2009). p. 158.

⁸³³ *Ibid.*

⁸³⁴ *Ibid.*

⁸³⁵ Al-Qur'an. Al-Anbiyā' 21:78.

other was a sheep-owner. The owner of the plantation said to Dawūd: O Prophet of Allah, this sheep has grazed and ate at night in my field, and there was nothing left of it. So Prophet Dawūd PBUH ruled for the owner of the plantation to take the sheep of his opponent in return for destroying his plantation. And when they left, they met Prophet Sulaimān PBUH and told him of his father's ruling. So Prophet Sulaimān PBUH entered upon his father and said to him: O Prophet of God, the justice is not what you have decided. He said to him: How? He said: Give the sheep to the owner of the farm so that he can benefit from it, and give the farm to the owner of the sheep so that he can rise on it until it returns to how it was. Then each of them returns to his owner what is under his hand, so the owner of the cultivation takes his crops, and the owner of the sheep takes his sheep. So Prophet Dawūd PBUH said, justice is what you have decided, O Sulaimān.⁸³⁶

A hadith on the authority of Abu Sa'īd Al-Khudrī, Ibn 'Abbas and 'Ubadah bin Al-Ṣamī, narrated that the Prophet PBUH said: "There should be neither harming nor reciprocating harm (*la ḍarar wa la ḍīrār*)."⁸³⁷ The interpretation of this hadith is that reciprocating harm with harm is forbidden in Islam. Harm must be compensated, which is indicated by the phrase "nor reciprocating harm".⁸³⁸

In another hadith, Samra bin Jundub narrated: The Prophet PBUH said: "On the hand is what you took in order to perform it."⁸³⁹ This hadith can be applied to

⁸³⁶ Ibn Kathīr. (1997). p 181; *The Interpretation of al-Qurṭūbī*, part 11. p. 203; For more see. Ibn al-'Arabīyy Muḥammad. A. (2003). "*Aḥkam Al-Qur'an*". Edited by Muḥammad Aṭā. 3rd Ed. Dar al Kutub al 'Ilmiyyah. Beirut. p. 267; Muṣṭafa. A. (1988). p. 21.

⁸³⁷ Sunan Ibn Majah, Bāb mān Bana fi Ḥaqqih ma Yaḍur Bijārih, Vol. 3, Book 13, Hadith #2341. <https://sunnah.com/ibnmajah:2341> (accessed on 14 February 2022)

⁸³⁸ Muṣṭafa. A. (1983). "*Sharḥ al Qawā'id Al Fiqhiyyah*". 1st Ed. Dar Al-Gharb Al-Īslamī. p. 113.

⁸³⁹ Dawūd, Suleiman. A. (1997). "*Sūnan Abi Dawūd*". Investigation by Ezzat Obaid and 'Adel Al-Sayed. First Edition. "*Al-Bay'a wa Al-Ijārah Bab Fi Taḍmīn Al- 'Āriyah*". Vol. 3. Dar Ibn Ḥazm. Beirut. p. 526;

compensation, and that is that whoever takes something is obligated to compensate for it.⁸⁴⁰

The Prophet PBUH said when one of his wives gave him food in a bowl, 'Aishah RA, hit the bowl with her hand and broke it. The Prophet PBUH, said: "Food for food, and vessel for a vessel."⁸⁴¹ This hadith contains clear evidence that whoever harms something for another, he is obliged to compensate.⁸⁴²

The jurists of the four school of thoughts unanimously upheld the principle of compensation for expropriation for the public interest. The Hanafi jurists, al-Zaylā'iy,⁸⁴³ Ibn Hammām,⁸⁴⁴ and 'Abdullah Al-Mausīly supported the importance of compensation that it is permissible to expropriate what is needed for the expansion of mosques or public roads from adjacent land owned by individuals, and upon refusal, the state can forcibly expropriate the property provided that the compensation value must be equivalent to the value of the property.⁸⁴⁵

The Maliki school of thought in *Al-Tāj Wa Al-Iklīl* highlights the permissibility of reimbursing from the treasury (state fund) to pay for property that is expropriated for

Al-Nasa'i, Ahmed. S. (2001). "*Sunan An-Nasā'i*". Investigation by Hassan Shalabi. 1st Ed. Kitab Al-*"A'riyah wa Al-Wadī'ah"*. Bab Al-Maniḥa. Vol.5. Mū'asat Al-Resalah. Beirut. p. 333.

⁸⁴⁰ Mubārakfuri, Muḥammad. A. (1997). "*Tūḥfah Al – Ahwādhi bi Sharḥ Jām'i Al- Tirmīdhi*". Investigated by 'Abd Al-Wahab 'Abd Al-Latif, 3rd Ed. vol 4. Bayt al Fikr. Beirut. p. 483; Al-Ṣan'āni, Muḥammad. I. (2006). "*Subul Al-Salām Sharḥ Bulugh Al-Maram*". Comment by Muḥammad Al-Albāni. Edition1.Part 3. Maktabat Al Ma'arif. Riyadh. p 180.

⁸⁴¹ Jamī' at-Tirmidhy 1359. Bāb Ma Ja' fiman Yuksar lahu Al-Shay' Ma Yuḥkam lahu mīn Mal Al-Kāsir, Vol. 3, Book 13, Hadith #1359. <https://sunnah.com/tirmidhi:1359> (accessed on 14 February 2022)

⁸⁴² Al-Ṣan'āni, Muḥammad. I. (2006). p. 190.

⁸⁴³ Fakhrud-din 'Uthman. A. (1896). p. 333.

⁸⁴⁴ Ibn al-Hammām, Kamal. A. (1970). p. 6/235.

⁸⁴⁵ Al-Mausīli, 'Abdullah. A. (1969). Pp. 383-384; See also Al-Shāṭibi, Ibrahim. A. (1975). pp. 255-257.

public use.⁸⁴⁶ Imam Al-Qarāfi also highlighted compensation as something that should be given as a return for the taking of the private property for the public use.⁸⁴⁷

In the Shafi'i school, Al-Jamal claimed that it is not permissible to forcibly own the property of a person, whether a Muslim or a non-Muslim without paying compensation.⁸⁴⁸ Muslims, non-Muslims, foreigners, and citizens are all treated the same. Al-Mawardiyy cited the practice of caliphs 'Umar bin al-Khaṭṭab RA and 'Uthman bin 'Affan RA⁸⁴⁹ on the necessity of paying compensation for expropriation for the public interest. In *Al-Ashbāh wa Al-Nazā'ir*, it illustrates circumstances in which the owner is forced to sell his property and with compensation, one of which is when an infidel is forced to sell his Muslim slave.⁸⁵⁰

It is interesting to note that Ibn Rajab from the Hanbali school of law regarded forced expropriation without payment of compensation as corruption. Therefore, compensation must be paid for the harm caused to the owner, as harm cannot be eliminated by harm (*la ḍarar wa la dīrār*).⁸⁵¹ Ibn al-Qayyim said, explaining the obligation to pay compensation for expropriation for the public interest as follows: “If people need a weapon for jihad, then its owners must sell it for the price of like.”⁸⁵²

⁸⁴⁶ Al Muwāfiq, Muḥammad. A. (1994). pp. 252-253.

⁸⁴⁷ Al-Qarāfi, Shihūb Al-Din. A. 2014. “*Al-Furūq aw Anwār Alburuq fi Anwā'i Al- Burūq*”. Investigated by Omar Ḥasan Al Qiyām. 3rd Edition. Mu'assasāt Al Risālah. Beirut. p. 1/196.

⁸⁴⁸ Al-Jamal, Suleiman. A. (2013). “*Hashyāt Al-Jamāl 'Ala Sharḥ Al-Manhaj*”. Investigated by 'Abd al-Razzaq Ghalib al-Mahdi. Dar al 'Ilmiyyah. Beirut. p. 2/263.

⁸⁴⁹ Al-Mawardi 'Ali. M. (1973). P. 205-206.

⁸⁵⁰ Al-Suyūṭi, Jalal Al-Din. A. (1959). p. 453.

⁸⁵¹ Ibn Rajab, Zain al-Din. S. (1998). “*Al Qawā'id*”. Investigated by Abu 'Ubaydah Mashhūr bin Ḥassan Al Salman”, 1st Ed. Dar Ibn Affān. Saudi Arabia. p. 73.

⁸⁵² Ibn al-Qayyim, Muḥammad ibn Abi Bakr. (2007). p. 249.

5.3.4. Estimating compensation for expropriation

The basis on which the idea of compensation in sharī'ah is justice, and justice in compensation requires restoration of the situation to what it was, as near as possible. The Prophet PBUH said, “Out of amusement and out of earnest. If anyone takes the staff of his brother, he should return it.”⁸⁵³

If the taking is legitimate to achieve a public interest, or if it is not possible to respond due to harm or loss, or if the response carries a great burden, it is permissible to pay fair compensation.⁸⁵⁴ which is in the following form:

5.3.4.1. Forms of Compensation

1- Monetary Compensation

Compensation in monetary form refers to the estimation of the value of the expropriated property and paying it to its owner in cash. This is an effective way in situations where compensation in kind could not be performed, or in the inability to find actual replacement of the loss. This is a legitimate method, as can be seen from the practice of the Prophet PBUH where compensation of 10 dinars were paid to the orphan boys for their land taken to build a mosque in Madinah.⁸⁵⁵ This practice was followed

⁸⁵³ Abu Dawūd, Suleiman. A. (1998). “*Sūnan Abi Dawūd*”. Investigation by Muḥammad Naṣir al-Din al-Albāniyy. 1st Ed. Vol. 3. Maktabat Al Ma'arif. Riyadh. pp. 228-229.

⁸⁵⁴ Ibn Al-Munthir, Muḥammad. I. (2004). “*Al Ishrāf 'Ala Madhāhib Al 'Ulamā'*”. Investigation by Abu Ḥammad Al-Anṣari. 1st Ed. Part 8. Maktabat Makkah Al-Thaqafiyyah. Ras Al Khaimah. p. 325; Ibn Qudāmah 'Abdullah. M. (1997). p. 361; 'Abd Al-Kāfiyy. M. (2015). p. 95.

⁸⁵⁵ Ṣaḥīḥ al-Bukhari. Hadith #3906. Book 63, Hadith 131. Bāb Hījrat Al-Nabi s.a.w wa 'Aṣḥābīh 'ilā Al-Madīnah. <https://sunnah.com/bukhari:3906> . (accessed on 14 February 2022)

by the caliphs including 'Umar bin Al-Khaṭṭab RA for the expansion of the Masjid al-Haram,⁸⁵⁶ and 'Uthman bin 'Affan RA during his reign.⁸⁵⁷

2- Compensation in kind

Compensation in kind refers to circumstances where compensation in the form of similar subject matter is possible.⁸⁵⁸ An illustration of this is when the state gives the owner a house in exchange for the house that it has expropriated, or gives the owner of the land and shops that have been expropriated for the public interest with other lands and shops after estimating the value of the expropriated properties.

The legitimacy of this type of compensation is demonstrated by the practise of 'Umar bin Al-Khaṭṭab RA, who expropriated the houses and lands adjacent to the Prophet's mosque in order to expand it, and gave the owners the option of receiving cash compensation or other houses and lands in exchange. Some chose to accept its price, while others exchanged it for another property, and it is from this that 'Umar bin Al-Khaṭṭab RA offered Al-Abbas bin 'Abd al Muṭṭalib RA to build him another house similar to the one he wanted to expropriate.⁸⁵⁹

⁸⁵⁶ Al-Bayhaqi. (n.d). p. 304; Al Azraqi. (1983). pp. 28-69.

⁸⁵⁷ Al-Mawardi 'Ali. M. (1973). p.162.

⁸⁵⁸ 'Abd al Kafi. M. (2015). p. 96; Ḥusni. B. (1999). p. 100; Adam. I. (2009). pp. 177-178.

⁸⁵⁹ See previous discussion in this chapter: Post Era of the Rightly Guided Caliphs.

3- Compensation in cash and in-kind

Compensation in cash and in kind is an alternative to allow appropriate return in exchange to the property expropriated. An example of this is when the state gives the owner whose land was expropriated a land with a lower value than the expropriated land, in addition to money to cover the difference in value between the two lands.⁸⁶⁰

5.3.4.2 Conditions of compensation for expropriation for the public interest in the Islamic jurisprudence

Compensation for expropriation for the public interest in the Islamic jurisprudence must fulfil certain requirements as follows:

1- Justice and Fair Assessment

Islam emphasises on the adherence to the principle of justice (*'adalah*) in granting compensation. The evaluation of the amount of compensation must be based on what is just and reasonable. If the compensation is just, the owner may not refuse it, but if the compensation is less than the value, it is considered unjust and that is forbidden by Allah SWT.⁸⁶¹ Scholars have been deliberating the matter, and were of the view that compensation must be equal to the actual value of the expropriated property.⁸⁶²

In order for the compensation to be fair, Islam promotes reaching a consensus with the affected owners to reach an appropriate amount of compensation. This is

⁸⁶⁰ Husni. B. (1999). p. 101; Adam. I. (2009). p. 178.

⁸⁶¹ *Ibid.*

⁸⁶² Husni. B. (1999). p. 101; Adam. I. (2009). p. 178.

encapsulated in the Islamic practice to allow the owner bargaining and negotiating over the price of his property.

The Prophetic practice affirmed this, when the Prophet asked the appropriate price for the price for the land owned by two boys on which he wanted to build his mosque.⁸⁶³ Likewise, the Prophet PBUH asked Banu Al-Najjar to specify the price of the wall he wanted to demolish in order to build a mosque.⁸⁶⁴ Likewise, 'Umar bin Al-Khaṭṭab RA and 'Uthman bin 'Affan RA followed the example of the Prophet PBUH upon the expansion of the Prophet's mosque, by offering to the owners of the owners to determine the price they wanted.⁸⁶⁵

The second aspect is fair assessment, especially in the circumstances where the price is not agreed upon. In such cases, the state shall forcibly expropriate the property from its owners and pay them fair compensation estimated according to past standard practice. This was observed by 'Umar bin Al-Khaṭṭab RA and 'Uthman RA when some of the property owners refused to sell the properties, and it was later forcibly expropriated the properties with the payment of fair compensation according to what the experts estimated at the time.

⁸⁶³ Ṣaḥīḥ al-Bukhari. Hadith #3906. Book 63, Hadith 131. Bāb Hījrat Al-Nabi s.a.w wa 'Aṣḥabīh 'ilā Al-Madīnah. <https://sunnah.com/bukhari:3906> (accessed on 14 February 2022).

⁸⁶⁴ Ibn Ḥajar al-'Asqalani. (1988). p. 625.

⁸⁶⁵ Al-Baihaqi. (n.d). p. 304; Al Azraqi. (1983). pp. 28-69; Al-Mawardi 'Ali. M. (1973). p. 162.

2- Payment of Prompt Compensation

Postponing the payment of compensation or paying it in instalments violates the justice of compensation, because justice requires that compensation be paid in full and promptly. There is no justification for delaying the payment of compensation or paying it in instalments because this often harms the expropriated owner,⁸⁶⁶ unless if the owner's approval of the delay or instalment is obtained. This is evidenced by the actions of the Prophet PBUH and the Rightly Guided Caliphs, who paid compensation immediately after expropriation without delay.⁸⁶⁷ In the case of the two orphan's land, the Prophet PBUH estimated the value at ten dinars and ordered Abu Bakr to pay it in full to its owners at once. Likewise, 'Umar bin Al-Khattab, when he demolished the houses that were forcibly expropriated from their owners and entered them with the expansion of the mosque, he put their prices in advance and did not postpone them nor pay them in instalments to the owners of the expropriated houses.⁸⁶⁸

5.3.5. The Conduct of Estimating the Value of Compensation

The shari'ah has set a special conduct for estimating the value of compensation, including what is related to the valuator, the estimation procedures, and the date of estimating the value of compensation.

⁸⁶⁶ Husni. B. (1999). p. 103.

⁸⁶⁷ Şaḥīḥ al-Bukhari. Hadith #3906. Book 63, Hadith 131. <https://sunnah.com/bukhari:3906> (accessed on 14 February 2022)

⁸⁶⁸ Al-Baiḥāqī. (n.d). p. 304; Al Azraqī. (1983). pp. 28-69; Al-Mawardī 'Ali. M. (1973). p. 162.

1-The Valuator

The valuator must be a reference or expert in the field. He should be a trustworthy and reputable person,⁸⁶⁹ and that he does not have an interest related to the estimation of the value of the compensation, either as the owner of the property whose value is to be assessed, or a relative to the owner.⁸⁷⁰ The general characteristics of a valuator does not require a valuator to be of a specific gender or religion.

If the expropriation is concerning land matters, the valuator is expected to have reasonable knowledge about land price, land dealings and the like.⁸⁷¹ Similarly, if the expropriation involves taking of houses or buildings, the valuator must be aware of the cost of construction, quality of materials, and if it is relating to shophouses and commercial projects, the specific knowledge thereof.⁸⁷²

As for the number of assessors, the jurists differed in two opinions. The first opinion is that it is sufficient for one person to perform the evaluation. This view was taken by the jurists from the Hanafi school of law,⁸⁷³ and some Malikis, and Imām Malik himself in one of the two narrations.⁸⁷⁴ The proponents of this view believe that there is nothing to prevent the evaluation from being carried out by one person of integrity and good reputation (just or righteous). It is mentioned in *Al-Ashbāh wa Al-Nazā'ir* that the saying of the one who is just is accepted in eleven places, one of which is the

⁸⁶⁹ Ibn 'Abd al-Salām, 'Izz al-Dīn. (2001). "*Al Ahkām fī Iṣlāḥ al Anām*". Investigated by Nazih Ḥammad. 1st Ed. Dar al Qalam, Damascus. p. 269; Farḥun, Burhān Al-Dīn. A. (1995). pp. 80-81; Al-Qarāfī Aḥmed. I. (1994). p. 82.

Ibn 'Abd al-Salām, 'Izz al-Dīn. (2001). p. 269.

⁸⁷¹ Farḥun, Burhān Al-Dīn. A. (1995). p. 79.

⁸⁷² *Ibid.* p.80.

⁸⁷³ Ibn Najm, Zindin. M. (1986). p. 391.

⁸⁷⁴ Al-Qarafi, Shihab Al-Din. A. (2014). Pp. 9-10; Ibn 'Ābidīn. (1966). p. 563.

evaluation of *the damage*.⁸⁷⁵ Ibn 'Ābidīn stipulated on the method of measurement that one person is sufficient for evaluation, as in the rights of servants.⁸⁷⁶ There is no doubt that estimating the value of the expropriated property is an intervention in the rights of the servants.

The second opinion requires that the number of valuers to be two or more. This opinion was taken from the Shāfi'īs⁸⁷⁷, Hanbalis⁸⁷⁸, some Mālikis and Imām Mālik⁸⁷⁹ in one of the two narrations. Those who hold this view believe that the number of assessors should be at least two of trustworthy and reputable people (just or righteous). In addition, Imām Al-Suyūṭī of the Shāfi'i school of law said that the evaluator is conditioned by number, because evaluation is a pure testimony.⁸⁸⁰ Al-Māwardi of the Shāfi'i school also said, "the modification in allocation is considered by two as in the evaluation, and it does not work in the evaluation except according to the words of two evaluators."⁸⁸¹ Al-Furūq by Al-Qarāfi said that as in evaluation for commodities, one in the evaluation is sufficient, unless the evaluation is related to theft, then there must be two, and in another narration, there must be two in every place.⁸⁸²

It is submitted that the views of the parties should also be taken into account. If both the parties agree to one evaluator, it should be accepted. In the case where both parties do not agree on a specific valuator, each of them may choose an evaluator. If

⁸⁷⁵ Ibn Najm, Zinedine. M. (1986). p. 391.

⁸⁷⁶ Ibn 'Ābidīn (1966). p. 563.

⁸⁷⁷ Al-Suyūṭī, Jalāl Al-Din. A. (1959). p. 391.

⁸⁷⁸ Al-Bahūti, Manşour. Y. (1983). "*Kashaf al Qīn'a*". A'lām Al Kutub. Beirut. p. 6 / 380.

⁸⁷⁹ Al-Qarāfi, Shihāb Al-Dīn. A. (2014). p. 9; Al-Qarafi Aḥmed. I. (1994). p. 188; Al-Ḥaṭṭab, Muḥammad. A. (1995). p. 418.

⁸⁸⁰ Al-Suyūṭī, Jalāl Al-Din. A. (1959). p. 391.

⁸⁸¹ Al-Māwardi 'Ali. M. (1973). 2 / 176-177.

⁸⁸² Al-Qarāfi, Shihāb Al-Dīn. A. (2014). pp. 9-10; Husni. B. (1999). pp. 106-107.

both evaluators did not agree on an opinion, they should choose a third evaluator to make the final decision between them.

2- Valuation procedures

There are conditions related to the procedures of estimating the value of compensation that must be observed. First and foremost, the estimation should be in the currency or deliverable that is transferable and used in the country where the expropriated property is located. Al-Suyūṭi mentioned in *Al-Ashbāh wa Al-Nazā'ir*, “and among the provisions of the evaluation is that it must be in dealable cash.”⁸⁸³

The evaluation must be done with proper examination of the property to be expropriated, knowing all of its attributes, and making a comprehensive evaluation of its fair value. In this regard, Ibn Abi al-Dam said in *Adāb Al Qaḍā'*, “the appraiser must base his assessment on the sight of the expropriated property and his knowledge of its full attributes, and it is not permissible for him to evaluate based on others' description of it.”⁸⁸⁴

In the situation where the valuers differ in estimating the value of the expropriated property, the scholars are divided into two views, the first is to adopt the highest estimate, while the second is to adopt the lower estimation.⁸⁸⁵ Others are of the opinion that the majority opinion should be taken, and if the number of valuers is

⁸⁸³ Al- Suyūṭi, Jalāl Al-Dīn. A. (1959). p. 253.

⁸⁸⁴ Ibn Abi al-Dam, Shihāb al-Dīn. A. (1982). “*Adāb al Qaḍā'*”. Investigation by Muḥammad Al-Zuḥaili. 1st Ed. Dar Al-Fikr. Damascus. p 458.

⁸⁸⁵ Al-Suyūṭi, Jalal Al-Dīn. A. (1959). p. 355.

equal, an expert is to be appointed to judge between the two proposals.⁸⁸⁶ This approach is the most appropriate as it addresses both parties equally.

3- The time of valuation

The time for estimating the value of compensation is important because the value may vary from time to time, increasing and decreasing. This is so especially if the period between taking the decision to expropriate the property and the occurrence of the expropriation, as well as the date of estimating the value of compensation is prolonged.⁸⁸⁷

The jurists differed about the time when compensation was estimated, and they had three opinions. The first opinion is based on the value of the compensation on the day the expropriation decision was issued. Supporters of this view⁸⁸⁸ believe that the value of compensation should be estimated based on the price of the expropriated property on the date of issuing the expropriation decision. Among those who supported this opinion, is al-Mawṣili in *Al Ikhtiyār*, where he said that if compensation is not reciprocated, the value of the compensation is estimated on the day the decision to expropriate is made.⁸⁸⁹ Other scholars sharing the same view is Al-Mardawi⁸⁹⁰ and Al-Ḥaṭṭāb⁸⁹¹ in estimating the value of compensation.⁸⁹² Applying this view in the context of indirect expropriation, the value of the compensation is to be estimated on the day of

⁸⁸⁶ Bin Farḥun, Burhan Al-Dīn. A. (1995). p. 74.

⁸⁸⁷ 'Abd al Kāfi. M. (2015). p. 143.

⁸⁸⁸ Al-Mawṣili, 'Abdullah. A. (1969). p. 59; Al-Ḥaṭṭāb, Muḥammad. A. (1995). p. 179.

⁸⁸⁹ Al-Mawṣili, 'Abdullah. A. (1969). p. 59.

⁸⁹⁰ Al-Mardawi. (1995). p. 262.

⁸⁹¹ Al-Ḥaṭṭāb, Muḥammad. A. (1995). p. 179.

⁸⁹² Al-Dasūqi, Muḥammad. A. (n.d) “*Ḥashiyāt Al Dasūqiy 'alā al Sharḥ al Kabīr 'alā Mukhtaṣar Khalīl*”. 1st Ed. Vol.3. Dar Ihya' al-Turath al-'Arabiy. Cairo. p. 443.

the regulation decision that led to the deprivation of the investment owner from benefiting from his investment.

The second view is based on the estimation of value on the day the confiscated property was seized, destroyed or destroyed. This view is upheld by Al-Zarkashi in *Sharḥ Al-Khiraqī* that the value of compensation for the expropriated property must be estimated on the day the property is destroyed, on the occurrence of the harm, and not before.⁸⁹³ Thus, if a house was expropriated to expand a mosque, the date for determining the compensation value is the date of the demolition of the house.

The third view is based on an estimate of the value of compensation based on the higher value from the date the expropriation decision was issued until the date of the assessment.⁸⁹⁴ The value of the property may change between the issuance of the expropriation decision and the seizure and destruction of the property, whether by increase or decrease; the valuator must estimate the value of the property based on the highest value it reached during this period. Among those who supported this view was Al-Nawāwī who mentioned in his book *Rawḍāt al-Ṭalībīn* that the valuator must estimate the value of compensation at the maximum value reached by the property from the date of the issuance of the decision to expropriate until the date of the harm.⁸⁹⁵ Al-

⁸⁹³ Al-Zarkashi, Shams Al-Din. Z. (1993). “*Sharḥ Al-Zarkashi ‘alā Mūkhtaṣar Al-Khiraqī*”. Investigated by 'Abdullah bin 'Abd al Raḥman bin 'Abdullah bin Jibreen. 1st Ed. para. 4. Dar 'Ubeikan. Riyadh. p. 181; Al-Bahuti, Maṣṣūf. Y. (1983). p 4/334.

⁸⁹⁴ Al-Nawawī, Yaḥya. S. (2003). “*Rawḍāt Al Ṭalībīn*”. Investigation by 'Adel 'Abdel Mawjūd. Dar al Kutub. Saudi Arabia. p. 262; Al-Suyūṭī, Jalal Al-Din. A. (1959). p. 344; Al-Ḥaṭṭāb, Muḥammad. A. (1995). p. 179.

⁸⁹⁵ Al-Nawāwī, Yaḥya. S. (2003). p. 262.

Suyūṭī in *Al-Ashbāh wa Al-Nazā'ir* noted similarly that if the estimated property is harmed, the most important value is the maximum value reached from the date of the decision of expropriation to the date of the destruction referring to the value in the country in which it was harmed.⁸⁹⁶

5.4. Conclusion

The study of the Qur'an, the Prophetic guidance, followed and developed by practises and opinions of jurists, revealed that Islamic jurisprudence contains a well-established foundation for the protection of individual property. Individual rights are not absolute in Islamic jurisprudence, which ensures a greater responsibility to the public interest. These principles apply equally to both Muslims and non-Muslims, citizens and non-citizens. The basis of this is the fulfilment of the greater objective of the shari'ah, the principle of non-discrimination and justice (*adālah*). The shari'ah regards all takings similar, and does not differentiate between the forms of expropriation, whether it was expropriation of real estate or investment. As the general notion of Islam in *'adālah*, the Islamic jurisprudence made no difference whether takings are in the form of direct or indirect expropriation. Any taking deserves a just assessment of compensation which encourages expert assessments. Meticulous assessments must be done to ensure legitimacy, all conditions fulfilled and and just compensation.

⁸⁹⁶ Al-Suyūṭī, Jalāl Al-Dīn. A. (1959). p. 253; Al-Ḥaṭṭāb, Muḥammad. A. (1995). p. 179; see also Shirāzi, Ibrahim.A. (1995). "*Al Muhathab fi Fiqh al Imam al Shafi'i*". Investigated by Zakaria 'Amirat. 1st Edition. part 2. Dar al Kutub al 'Ilmiyyah. Beirut. p. 197; Al-Ramli, Aḥmed.H. (2003). "*Nihāyāt Al Muḥtāj 'alā Sharḥ al Minhāj*". 3rd Ed. Vol.5. Dar al Kutub al 'Ilmiyyah. Beirut. p. 164.