



AMERICAN JOURNAL OF SOCIETY AND LAW (AJSL)

ISSN: 2835-3277 (ONLINE)

VOLUME 2 ISSUE 2(2023)



PUBLISHED BY
E-PALLI PUBLISHERS, DELAWARE, USA

Reasons for Acquiring Defective Property in Afghan Civil Code and Islamic Shariah

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Article Information

Received: April 20, 2023

Accepted: May 08, 2023

Published: May 14, 2023

Keywords

Property, Defective Property, Easement, Usufruct

ABSTRACT

Defective property can only be interpreted as an object's property or only the property's benefits, which ultimately include easement and usufruct rights. This research paper discusses the means of acquiring the rights of usufruct in four states (contract, will, preemption (Shofa), time- lapse). The means of acquiring easement rights are discussed in three states (public sharing, contractility, and time- lapse). The research study aims to understand what points Islamic jurisprudence has focused on in the definition of defective property and by what means individuals can acquire defective property. This work employs doctrinal research methodology and a descriptive, explanatory, and analytical research approach. It is worth mentioning that this part of the research was entirely based on library sources. The primary sources included the Afghan civil code. The secondary sources included jurisprudential textbooks, scholarly published and unpublished journal articles, law reports, and online websites related to the research area. On the one hand, this research will solve the existing problems regarding the means of acquiring defective property to a certain extent, and on the other hand, it will pave the way for more research in this field. It is concluded that the reasons for acquiring defective property in terms of the right of usufruct include: contract, will, intercession, inheritance and others. in terms of the easement rights these reasons include common sharing, contractual requirements and the time-lapse.

INTRODUCTION

Almighty Allah has created the earth everything it is on it for human beings to fulfill their daily life needs, achieve their goals, and worship Almighty Allah in the best way possible. Almighty Allah says that He has not created mankind or the Jinn except to worship Him. (Az-Zariyat, 56). In order to accomplish and fulfill their daily needs, human beings have been trying to acquire property, so that the same subject matter of acquiring something and becoming its owner is called property. However, acquiring this property was sometimes in a perfect form and sometimes in a defective form. This research study examines defective property and the means by which it is obtained.

Significance of Research

We know that on the one hand, the resources available in the world are limited, and on the other hand, the needs of human beings are many and numerous. Therefore, it is necessary to determine the principles for using these resources. Determining the causes of defective property is therefore important to prevent confusion and conflicts by increasing the community's knowledge.

Research Questions

1. What are the causes of defective property?
2. Why is the recognition of defective property important?
3. How to protect private property through the identification of its means?

Research Objectives

1. To identify the causes of defective property.

2. To bring and maintain order between individuals through the recognition of defective property factors.

3. To protect private property through the recognition of defective property's means.

Defective Property and Its Types

In order to better understand defective property and its types, each of them is going to be discussed as follows:

Introduction to Defective Property

Linguistically, the term property is derived from the Arabic word milk, meaning wealth. (Ameed, 2010). Based on Islamic jurisprudence, property is defined as a relationship between man and property approved by the Sharia that makes it exclusive to him or her, and he disposes of it in all manners as long as there is no impediment to disposing of it. (Al-Zuhayli, 2012). According to property law, property is what a person owns, whether it is property or usufruct. Based on Article 1900 of the Afghan civil code, property is "a right on the basis of which a thing comes under the will and dominance of a person, and only the owner may, within the limits of provisions of law, use and utilize it and take any possessive actions on it." (Afghan civil code, 1976).

Types of Property

In terms of perfection and imperfection, property is categorized into two types: perfect property and imperfect (imperfect) property. Each of them is defined as follows.

Perfect (Proper) Property

It refers to the property in that the owner possesses both

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the property and its benefit, so that all the rights are related to the owner of the property. (Al-Zuhayli, 2012).

Imperfect (Improper) Property

It only refers to the property or the benefits of the property. If the benefit of the property is personal, it is called the right of personal benefit, or the usufruct. And if it is only related to the property, it is called the easement rights, which are only related to the property. (Taib, 2018).

Classification of Imperfect (Improper) Property

Imperfect (improper) property is divided into three parts. The ownership of a property, the right of private interest, or usufructuary rights, and easement rights. Each of them is going to be discussed as follows.

The Ownership of a Property

Meaning that the property is owned by one person and the benefit is received by another. For instance, someone who bestows or bequeaths my house to someone else to live in during my death or until I am alive. Moreover, if someone tells someone else to cultivate my land as long as I am alive or for a period of three years, if the trustee dies, the right to benefit is still with the legatee until the completion of the particular period. When the specified period is complete, both this right of usufruct and the real property also return to the trustee. It infers from the above discussion that the property is permanent and the ownership of the property's benefit is temporary because, according to the Hanafi school of Islamic jurisprudence, the right to benefit is not inherited and sometimes it is permanent, like in the contract of Waqf. (Al-Zuhayli, 2012).

Usufructuary Right (Right of Private Interest)

According to Article 2229 of the Afghan Civil Code, usufruct is defined as legitimate utilization," meaning the right of the utilizer to use and take advantage of the property until it remains in its original state, even though it is not owned by him." Moreover, the usufructuary right is to use and exploit the property as long as it remains intact, even if it is not owned by him. (Ghaznawi, 2019).

Easement Rights

Linguistically, the term easement means leaning on the hand or taking help or benefit from something. (Ameed, 2010). Based on Article 2340 of the Civil Code of Afghanistan, "easement is a right over real estate for the benefit of the real estate of another person." In other words, an easement is one of the rights according to which the owner of real property can use the property of another person on the basis of his property. (Almawsueuh Alfqhiah, 2000). Furthermore, the right of easement is to prove the right of one immovable property over another immovable property, and the second immovable property will be the property of someone else. For example, passing water from a neighbor's land to one's own land, draining water to a specific place, passing on another's

land, etc. (Al-Zuhayli, 2012).

Acquisition Causes of the Usufructuary Right

The acquiring factors of usufructuary rights are categorized into four types: contract, will, preemption, and time lapse. Each of them is going to be explained as follows.

Contract

A contract leads to the acquisition of usufruct rights in the following three situations.

First Case

In this instance, the contract creates usufruct rights through creation. This is a practical method, so that the owner sets the usufruct right on the property for the benefit of someone else. It is the same whether the property is movable or immovable. This is done with the contract, which is the source of the real right. This contract is usually in the form of a hiba (gift) or sell contract, but sometimes it is in the form of an exchange or sale with the option of redemption. The duration of the usufruct is specified in the contract. And if the beneficiary dies, it will expire before the specified period expires. But if the period was not specified in the contract, then the right of usufruct is calculated until the beneficiary's death.

Second Situation

In this case, the contract leads to the creation of usufruct by way of protection, which is an indirect method. Therefore, the owner of the property transfers the land to another on the basis of the contract and usually keeps the usufruct right for himself until his death. And in this case, the contract originates for the right of land, not for the right of usufruct, but it indirectly causes the right of usufruct. (Al-Sanhouri, 1950).

Third Situation

In this case, the contract refers to the right of usufruct, then its creation or composition, if prior. (Al-Sanhouri, 1950).

Will

A will is an act by which a person, directly or as a result of the dominance of others, takes possession of his property or rights after his death. (<https://ahmadbanijamali.com>). The Afghan civil code defines a will as taking action on an inheritance so that it takes effect following the death of the testator and must be in writing or verbal. There are other well-known signs that could indicate that the testator is unable to write or speak. Moreover, making wills for God and charitable causes without determining the intention shall be valid, and they shall be spent on charitable affairs. Also, in making wills for mosques, charitable organizations, and other directions, scientific institutions and public interests shall be valid. In these cases, the testamentary properties shall be spent on construction, the benefit of the poor, and other related

purposes, unless methods of spending may be determined on the basis of custom or indication. (Afghan civil code, Articles 2103, 2014, and 2109).

Preemption

Before selling property, a property owner must first determine whether anyone has the option to buy it before anyone else. Such an option is called a right of preemption. According to Article 2213 of the Afghan Civil Code, “preemption is the right of acquisition of ownership of all or part of a sold real estate in return for its price and the expenses incurred, even if by coercion.” It infers from the above article that a person might have a preemption right for the property as a whole or part of it. To acquire the property, the holder of a preemption right must pay the owner for it, but the owner must first offer to sell it to him.

Moreover, based on Article 2214 of the Afghan Civil Code, “the cause of preemption is the attachment of property of the preemptor to the sold real estate, either due to partnership or adjacency.” It infers from the above article that there are two types of preemption rights: preemption rights based on partnership and preemption rights based on proximity to the property. Preemption rights based on a partnership might arise if two people jointly own a business affiliated with a property. Preemption rights based on proximity arise when a person owns property that borders another person’s property, an adjacent neighbor.

There are three types of partnership-based preemption rights. First, a partner can be granted the right to preemptively purchase the entire property, including the land and structures. Second, a person can have the preemption right to purchase the land but not the structures. If a landowner wants to sell his property, he must first make it available to those who have partnership rights before making it available to the general public or his nearby neighbors. (Civil Code of Afghanistan, Articles, 2016, 2017, 2018).

According to Article 2221 of the Afghan Civil Code, “(1) In case of convergence of causes of preemption, the stronger cause shall be referred. On this basis, a partner in real estate itself shall have priority rights over a partner in the shared surrounding land, a partner in the shared surrounding land shall have priority rights over a partner in special rights over the sold real estate; and a partner in special rights over the sold real estate shall be given priority over an adjacent neighbor. (2) If one of the mentioned persons in the above item of this article relinquishes the preemption or his right extinguishes, the preemption right shall transfer to the person that comes immediately after his degree.”

Time Lapse

According to Article 2302 of the Afghan Civil Code, “right of usufruct shall be acquired through legal action, preemption, or lapse of time.” Moreover, Article 2284 of the Afghan Civil Code states that “No one may acquire

rights contrary to his document based on lapse of time.” “On this basis, no one may personally, to his own interest, modify the cause of his possession or the principle upon which this possession is based.”

Based on Article 2285 of the Afghan Civil Code, “Provisions of claim barring lapse of time shall apply to rights acquiring lapse of time on what relates to the calculation of the period, its stop and interruption, and reference to it before court, as well as on what relates to withdrawal from it and agreement on its modification, provided that the mentioned provisions do not conflict with the nature of rights acquiring lapse of time and provisions of Articles (2286) and (2287) of this Law.” No matter how lengthy the passage of time has been, it must end as soon as the causes are established. If the possessor relinquishes or loses it, even due to others’ actions, rights acquired during the lapse of time shall terminate unless the possessor restores his possession or files a lawsuit for restoration within one year. (Civil Code of Afghanistan, Articles 2286, 2287).

Causes of Acquiring the Rights to an Easement

Easement rights are acquired through the following means: common subscription, stipulation of agreements, and time lapse. Each of them is going to be discussed as follows:

Common Subscription

One of the causes of the easement rights is the common subscription, which means that the easement rights are common to the residents of a country in public places. For instance, public roads, public seas and canals, etc. Every person has the right to benefit from public places, but only on the condition that other people are not harmed.

Stipulation of Agreements

Placing a condition in agreements is considered the second factor or reason for the acquisition of easement rights. For example, at the time of selling the land to the buyer, the seller makes a condition that the right of passage on the land will be established.

Time Lapse

The third factor and reason for the acquisition of the right of easement is the continuity and stability of an action from the past or unknown time. For example, a person inherits a piece of land that has been irrigated by a neighbor’s land for a long time. Or that the used water flows onto the neighbor’s land. Therefore, the mentioned situations prove the right of easement rights in the case where the neighbor should not be harmed. (Al-Zuhayli, 2012).

CONCLUSION

It is concluded that the imperfect or defective property consists only of the property or the profits of the property. If the benefit of the property is personal, it is called the

right of personal benefit, or the usufruct. If it is related to the property, then it is called the right of usufruct, which is only related to the property. If it is related to the property, then it is called the right of easement, which is only related to the property. Therefore, it can be said that the defective property consists of usufruct rights and easement rights. Causes or factors of acquiring the rights of usufruct are: contract, will, preemption, and time lapse. The second type of defective property is easement rights, which can be acquired through common shares or subscriptions, stipulation of contracts, and time lapse.

REFERENCES

- Al-Sanhouri, A. R. A. (1950-1970). *Al-Wasit fi Sharh Qanun al-Madani, Ihya al-Tratah al-Arabi*, Beirut, Lebanon.
- Al-Zahili, W. (2012). *Alfiqh aliaslamiy wadalatuh*, Translation: Maulana Muhammad Yusuf Tanuli and Mufti Abrar Hussain, Printed, Darul-e-Sha'at, Urdu Bazaar, Karachi.
- Taib, B. (1396). *Theory of Property in Islam*, Salam Publishing Society, Nangarhar.
- Umid, H. (1389). *Farhang Farsi Umid*, Iran: Antarhat Rah Rushd.
- Ghaznavi, G. A. (1397 AH). *Property law*, Antarhat Saeed, Kabul
- Musawa F. (2009). Ministry of Awqaf and Islamic Affairs Kuwait, Translation, Islamic Fiqh Academy India, genuine, Publications and Media.
- Civil Code of Afghanistan. (1355). extraordinary edition.