

Hanafi Fuqaha on Public Property

The concept of public property, and its opposing category of private property, is well known today, due primarily to the centrality of the latter to liberal and capitalist thought and the former to socialist thought. However, the notion that certain things are owned by individuals, giving them exclusive disposal rights thereof, whilst others are for the common disposal of people collectively long precedes modernity. Modern thinkers were not the first to come up with these ideas. They but adopted them within or for certain broader ideological paradigms. John Locke, for instance, makes private property central to his (liberal) political theory, where for Karl Marx the abolition of private ownership of the means of production is central to ending capitalist exploitation.

Islam has its own notions of private and public property far removed from the associated ideological frameworks of modernity. Private property is neither the grounds for all individual rights on the basis of which humans move from a “state to nature” to civil society nor something inherently evil that needs to be done away with. Rather, on the Islamic view, all things are created by Allah (swt) and are His property first and foremost, from where they become the property of human beings by the delegation and permission of Allah (swt), affording them the right to dispose of them within parameters set by Allah (swt).

Within this framework, Islam affirms a place for both private ownership [*mulk khass*], defined broadly as the permission of the lawgiver (Allah) for an individual to have exclusive rights of disposal of a thing, and public ownership [*mulk ‘aam*], defined broadly as the permission of the lawgiver for a thing to be commonly benefited from by people at large with no one having exclusive rights. Both are discussed by classical Ulama (scholars). In this article, we look in particular at how the Hanafi fuqaha discussed public property.

The esteemed and erudite Hanafi faqih of the sixth century Burhan al-Din Abu al-Hasan Ali ibn Abi Bakr al-Marghinani (d. 593) says in *al-Hidaya*,

“لا يجوز للإمام أن يقطع ما لا غنى بالمسلمين عنه كالملاح والآبار التي يستقي الناس منها”

“It is not allowed for the ruler to grant (to a person/s) that which the Muslims collectively are in need of such as salt mines and large wells from which the people irrigate their lands.” [1]

In commenting on this the great Hanafi faqih and muhaddith of the ninth century Badr al-Din al-‘Ayni (d. 855) elaborates on a numbers of points in *al-Binaya Sharh al-Hidaya*. [2] First, he notes that “that which the Muslims collectively are in need of” is everything that they cannot do with as a community. Second, he explains that the ruler granting something [*iqtaa*], like a piece of land, is when he allots it to someone making it their private ownership. Third, he mentions that the jurists are agreed on this point, there being no difference of opinion on it. Fourth, he adduces as proof the hadith related by Tirmidhi and Abu Dawud:

عن أبيب بن حمّال: «أنه وفد إلى النبي ﷺ فاستقطعه الملح الذي بمأرب، فقطعه فلما أن ولى قال رجل من المجلس: أتدري ما قطعت له؟ إنما قطعت له الماء العذب. قال: فانتزع منه»

From Abyad bin Hammal (ra) that he went to the Prophet (saw) and asked him to allocate the salt reserve in Ma’rib to him so he (saw) did so. When he left a man from the gathering said, “Do you know what you just allocated to him? You allocated to him an unending (replenishable) [*idd*] reserve.” So he (saw) took it back from him.” [3]

The unending reserve [*al-ma’ al-idd*], Ayni says, quoting the linguist Asma’i, is the continuous one [*al-ma’ al-da’im*] that keeps producing its content like the water of a spring or well. Finally, ‘Ayni notes that based on this, “our scholars said that what the shepherds and pastoralists, then the rulers, take for giving access to water, pastureland, mountains, mines and mineral deposits, and salt reserves is from *suht*”. Suht is haram wealth gained through illegal means. Taking money for giving access to what people should have open access to is of this type because those taking it are acting as if it is private ownership or as if they have great disposal rights than others, whereas they do not. Commenting on this hadith in his

commentry on Tirmidhi, Allama Anwar Shah Kashmir (d. 1353) also notes that the granting of mines to individuals by the ruler is not allowed according to Hanafi fuqaha. [4]

What this hadith establishes is that replenishable reserves and mines are not allowed to be privately owned by individuals. They are for the common benefit of all people, i.e., public property. Everyone has the right to benefit from them. The narration of the same hadith in Ibn Majah makes this clearer:

It was narrated from Abyad bin Hammal that he asked (the Prophet (saw)) for a salt reserve called the Ma'rib Dam to be given to him, and it was given to him. Then Aqra bin Habis al-Tamimi (ra) came to the Messenger of Allah (saw) and said: "O Messenger of Allah (saw), I used to come to the salt reserve during Jahilliya and it was in a land in which there was no water, and whoever came to it took from it. It was (plentiful) like flowing water." So the Messenger of Allah (saw) asked Abyad bin Hammal to give back what he was allotted of the salt reserve. He said: "I give it to you on the basis that you make it charity given by me." The Messenger of Allah said: « هُوَ مِنْكَ صَدَقَةٌ وَهُوَ مِثْلُ الْمَاءِ الْعِدِّ مَنْ وَرَدَهُ أَخَذَهُ » "It is a charity from you, and it is like flowing water, whoever comes to it may take from it." [5]

In other words, natural occurring resources in large quantities are a common property of people who may all come to it and benefit from it. No one can own them and exclude others from using it.

Imam al-Tumurtashi (d. 1004) relates verbatim the same lines mentioned above from al-Marghinani in *Tanwir al-Absar*. Commenting on this, the erudite Hanafi faqih of the 11th century, Ala'-Din al-Hasaki (d. 1088) says in *al-Durr al-Mukhtar*:

"Know that the ruler is not allowed to allocate to individuals that which the Muslims collectively are in need of, such as things like surface mines and mineral deposits [*ma'adin dhahira*]: that whose content which Allah has placed inside the Earth is apparent such as mines of salt, antimony, bitumen and oil. Likewise, wells other than those which are dug or made by effort and thereby owned. If he does so, the grant will be invalid and both the grantee and others will be equal with respect of benefiting from them. If the grantee prevents others from it, he is transgressing by such prevention." [6]

The other primary, and even more explicit, text on public property is the statement of the Prophet (saw),

«الناس شركاء في ثلاث في الماء والكلأ والنار»

"The people are partners in three things: water, pastures and fire." [7]

Many of the Hanafi fuqaha discussed this hadith and used it as proof for designating certain things as being for the common benefit of people. Shams al-A'imma al-Sarkhasi (d. 483), one of the early Hanafi authorities, says in his *al-Mabsut*:

ولو استأجر بئرا شهرين ليسقي منها أرضه وغنمه لم يجز، وكذلك النهر والعين؛ لأن المقصود هو الماء وهو عين لا يجوز أن يتملك بعقد الإجارة، ولأن الماء أصل الإباحة ما لم يحزره الإنسان بإنائه وهو مشترك بين الناس كافة قال ﷺ: «الناس شركاء في الثلاث في الماء والكلأ والنار» فالمستأجر فيه والآخر سواء؛ فهذا لا يستوجب عليه أجر بسببه.

"If one leased a well for two months to irrigate his land and feed his sheep, this would not be allowed. Likewise, rivers and springs. This is because in all these cases the object being contracted over is water, which is a commodity that is not allowed to be owned through a lease. Further, the original hukm for water is permissibility (for all people to use) so long as someone does not take some in his container (then what he takes becomes his property). It is common property of all people, as the Prophet (saw) said, **"The people are partners in three things: water, pastures and fire."** [8]

Elsewhere in the book, he elaborates on the hadith as follows:

وعن رسول الله ﷺ قال «المسلمون شركاء في ثلاث في الماء والكلأ والنار» وفي الروايات: الناس شركاء في ثلاث، وهذا أعم من الأول ففيه إثبات الشركة للناس كافة: المسلمين والكفار في هذه الأشياء الثلاثة، وهو كذلك، وتفسير هذه الشركة في المياه التي تجري في الأودية، والأنهار العظام كجبحون وسيحون، وفرات، ودجلة، ونيل فإن الانتفاع بها بمنزلة الانتفاع بالشمس، والهواء ويستوي في ذلك المسلمون، وغيرهم، وليس لأحد أن يمنع أحدا من ذلك، وهو بمنزلة الانتفاع بالطرق العامة من حيث التطرق فيها. ومرادهم من لفظة الشركة بين الناس بيان أصل الإباحة، والمساواة بين الناس في الانتفاع لا أنه مملوك لهم فالماء في هذه الأودية ليس بملك لأحد.

The Prophet – Allah bless him and grant him peace – said, “**Muslims are partners in three things: water, pastures and fire.**” In other narrations he said, “**The people are partners in three things...**” which is more general than the first narration since the latter affirms the partnership for all people, Muslims and kuffar alike, in these three things. This is the correct position. The meaning of partnership in the waters that flow in valleys and great rivers like the Jeyhun (Amu Darya), Seyhun (Syr Darya), Euphrates, Tigris and Nile is that benefiting from them is like benefiting from the Sun and air, for the Muslims and others alike. No one can exclude others from it. It is like benefiting from public roads in terms of travelling on them. The intent of the word “partnership” [*sharika*] of people is to clarify that the original rule is permissibility and all people have the equal right in benefiting from it, not that they all jointly own it. The water in these rivers and the like is not ownership of anyone.” [9]

Imam ‘Ala al-Dinal-Kasani (d. 587) of the sixth century also discusses this matter in his famous Bada’i al-Sana’i, saying:

لأن الماء في الأصل خلق مباحا لقول النبي ﷺ «النَّاسُ شُرَكَاءُ فِي ثَلَاثِ الْمَاءِ وَالْكَأْلِ وَالنَّارِ» «الناس شركاء في ثلاث الماء والكأ والنار» والشركة العامة تقتضي الإباحة إلا أنه إذا جعل في إبناء وأحرزه به فقد استولى عليه وهو غير مملوك لأحد فيصير مملوكا للمستولي كما في سائر المباحات الغير المملوكة، وإذا لم يوجد ذلك بقي على أصل الإباحة الثابتة بالشرع فلا يجوز بيعه؛ لأن محل البيع هو المال المملوك وليس له أن يمنع الناس من الشفة - وهو الشرب بأنفسهم - وسقي دوابهم منه؛ لأنه مباح لهم.

“Water in origin has been created permissible for all due to the statement of the Prophet (s), “**The people are partners in three things: water, pastures and fire.**” General partnership necessitates permissibility. However, when anyone takes some of it in a container for himself then he has established his ownership over it since previously it was unowned, as is the case with all other unowned permissible things. If this does not happen, the origin ruling of permissibility, established by the Sharia, remain and hence selling it is not allowed. This is because only the owned thing can be sold. Further, no one can prevent others from drinking therefrom or feeding their animals, since it is permissible for all.” [10]

Imam Fakhr al-Din al-Zayla’i (d. 743) says in Tabyin al-Haqaiq:

لا يجوز بيع المراعي ولا إيجارها والمراد به الكأ دون رقية الأرض؛ لأن بيع الأرض وإيجارها جائز إذا كان مالكا لها، وإنما لا يجوز بيع الكأ وإيجارته؛ لأنه ليس بمملوك له إذ لا يملكه بنباته في أرضه ما لم يحزره لقوله ﷺ «المسلمون شركاء في ثلاثة: في الماء والكأ والنار» رواه أحمد وأبو داود ورواه ابن ماجه من حديث ابن عباس وزاد فيه «وثمنه حرام» وهو محمول على ما إذا لم يحزره، وقال ﷺ «لا يمنع الماء والنار والكأ» رواه ابن ماجه ومعناه أن لهم الانتفاع بشرب الماء وسقي الدواب والاستقاء من الأبار والحياض والأنهار المملوكة.

Grass and pasture [*mara’ii*] that grows of its own accord is not allowed to be sold or leased. This refers to *kala’*, as opposed to the neck of the land. This is because sale and lease of the land by its owner is allowed since he owns it. This does apply to the pasture since he does not own it, so long as he does not take it for his own use. This is due to the statement of the Prophet (s), “**Muslims are partners in three things: water, pastures and fire**”, related by Ahmad, Abu Dawud. Ibn Majah also relates it from Ibn Abbas (ra) with the addition, “**and its price is haram**” which is understood as applying it so long as he does not take it for his own use. He (s) also said, “**Water, fire and pastures are not prevented**”, related by Ibn Majah, which means that people have a right to benefit from these things by drinking the water and feeding their animals, and irrigating their land from wells, ponds and (small) owned rivers. [11]

وشرط لجواز الانتفاع به أن لا يضر بالعامه فإن كان يضر بالعامه بأن يميله بالكري أو نصب الرحي فليس له ذلك؛ لأن الانتفاع بالمباح لا يجوز إلا إذا كان لا يضر بأحد كالانتفاع بالشمس والقمر والهواء

“The permissibility of benefiting from it is conditional on not harming the public (their benefit of it). Thus, if he benefits from it in way that harms others, such as changing the direction of a river by digging or erecting a raha, this is not allow. This is because benefiting from the permissible things is not allowed except in a way that does not harm others, as is the case with benefiting from the sun, moon and air.” [12]

The great Shami scholar of the 13th century, Muhammad Amin Ibn Abidin (d. 1252) of Damascus, who is perhaps the most renowned of the latter Hanafi fuqaha, particularly in the Subcontinent also discusses the matter at length in his *Radd al-Muhtar* (also known as *Hashiyat Ibn Abidin*). He claries a number of points [13]:

1. The partnership (of the three categories mentioned in the hadith) is a partnership of permissibility [*ibaha*] not ownership [*milk*]. Everyone has the right to benefit from it. Whoever takes part of for his use that part is his ownership to the exclusion of others, which he can dispose of by any mean of disposal that is allowed for an owner.

2. Pasture [*kala*] is that which grows and spreads and has no trunk such as lemongrass, while trees as that which have a trunk. Three types:

a. Pasture growing in an area not owned by anyone – all people are partners in the right to graze their animals on this or to cut and gather it for their use.

b. Pasture growing in owned land without the effort of the owner – it is likewise open to use by all. However, the owner has the right to prevent entry on to his land.

c. Pasture growing in owned land with the effort of the owner – this is his private property.

3. Wood in areas not owned by anyone has the same rule and can be cut and gathered for use by anyone.

4. Fire in the hadith refers to fire lit by people, so if someone lights a fire in an open land, others have a right to benefit from it by using its light, drying their cloths from it or seeking heat from it. (According to other fuqaha, fire refers to the firewood used to produce fire).

Finally, the *Majallat al-Ahkam al-Adliyya* also lists those properties that the Shari'ah considers public properties. In its tenth book on partnership or shared ownership [*sharikaaf*], the fourth chapter is on partnership of permissibility [*shirkat al-ibaha*] which lists and discusses the rules relating to public properties, starting with mention of water, pastures and fire in article 1234. [14]

Thus, in summary, three categories of things are public property according to the Hanafi school of fiqh: one, all that which the people collectively are in need of like wells; two, natural mineral deposits occurring in large quantities; and three, water, pasture and fire as mentioned in the hadith and described above. These being public property means that all people have equal rights to benefit from them. All people are equal partners in them in the meaning that they are equally permissible for them all. No one can be excluded from utilising them and no one can profit from them as it were his private wealth. In turn, these cannot be privatised or granted to individuals or companies such that they make a profit from them.

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Notes:

[1] Marghinani, *al-Hidaya Sharh Biyyadat al-Mubtadi*, Dar al-Ihya: Beirut, 4:384.

[2] Ayni, Badr al-Din, *al-Binaya Sharh al-Hidaya*, Dar al-Kutub al-Ilmiyya: Beirut, 12:292-3.

[3] Abu Dawud, 3046; Tirmidhi, 1380.

[4] Kashmiri, Anwar Shah, *al-'Urf al-Shadhi Sharh Sunan al-Tirmidhi*, Dar al-Turath: Beirut, 3:101.

[5] Ibn Majah, 2569.

[6] Haskafi, 'Ala al-Din, *al-Durr al-Mukthar wa Hashiyat Ibn Abidin*, Dar al-Fikr: Beirut, 6:434.

[7] Abu Dawud, 3477; Ibn Majah, 2472; Ahmad, 23082.

[8] Sarkhasi, *al-Mabsut*, Dar al-Ma'rifa: Beirut, 16:33.

[9] Ibid., 23:163.

[10] Kasani, *Bada'i al-Sana'i fi Tartib al-Shara'i*, Dar al-Kutub al-Ilmiyya, 6:188-9.

[11] Zayla'i, *Tabyin al-Haqa'iq Sharh Kanz al-Daqa'iq*, Matba'a Kubra Amiriyya: Cairo, 4:48

[12] Ibid., 6:39.

[13] Ibn Abideen, *al-Durr al-Mukthar wa Hashiyat Ibn Abidin*, Dar al-Fikr: Beirut, 6:440.

[14] *Majallat al-Ahkam al-Adliyya*, Karkhana Tijarat Kutub: Karachi, 1:238.