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the parties. This means that either the bank or the amil or agent can be give notice to other for dissolution.

The notice must however be at a reasonable time. Reasonable time here depends upon the time and custom associated with the business.

According to Maliki, if there are unsold goods or the business manager has initiated the business, the contract of mudarabah cannot be brought to an end until and unless the goods are sold in accordance with the move made by amil

Where dispute arises on the mudarabah contract the statement of the amil or the rabb-mal shall be accepted as given until the contrary is ascertained or proved.

It should be noted that where an agent or amil in a mudarabah contract dies, his estate shall be made liable for the funds entrusted in his care.

CONCLUSION

Based on the analysis stated above it is evidently clear the al-mudarabah as one of the alternatives to conventional banking interest system (Ribbah) is fertile such that businessmen and women partaking in such will have no regret compared to the interest system where loans collected are hardly repaid due to the high lending interest rate.

This paper is therefore calling on all and sundry to abandon the conventional banking interest system and seek refuge in the alternative systems of which al-mudarabah is one amongst others. By so doing, business will thrive while profit will be rest assured. The Federal Government of Nigeria is appreciation of the value and advantages inherent in the non interest system of Islamic banking, has fully joined the Islamic Development Bank, while the Jaiz (Islamic) bank will soon begin operation in Nigeria.

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JURISPRUDENTIAL ANALYSIS OF THE RIGHT OF PROPERTY

*O.S. AFOLABI ESQ

It has been recognized long ago that certain order is necessary to regulate human affairs. There is no society no matter how primitive that will not recognize certain orders to regulate the social, legal or any other form of relation among its members.

Carins states:

*"Order is a necessary condition of human social life and it is impossible to imagine a society in which order of some sort does not exist"*¹

Every society at one time or the other in its development process has one form of order to suit its need, and which is capable of evolution.

Social order is the pre-condition of any society. Legal order represent an aspect of this order. Legal order regulates the conduct of man in relation to one another according to recognized standards, both as individuals and as members of the group.

In this order if social relations we find the basis of different types of institutions. Property is one such institution. The problem is how to differentiate the institution of property from other institutions.

The institution of property in addition to regulating the relation between individuals, ascertains their relation with reference to

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1 H. Cairns, *The Theory of Legal Science* (chapel Hills: the University of North Carolina Press, 1941) p. 15

object as well.

The meaning of the word "property" depends on the context in which it is used. In most times it is used to mean ownership or title; it may also mean the "res" (thing) and sometime it may mean an interest in the res (thing) which is less than actual ownership but nevertheless conferring certain rights such as the right of a mortgage in the subject matter of the security.

As Paton puts it;

*"In whatever sense the word property is used, property law or order is designed to regulate the relation of persons to things thereby providing a secure foundation for the acquisition, enjoyment and disposal of things or wealth."*²

Cairns structuralizes the property relations as follows;

*"The property relation is triadic; A owns B against C, when C represent all other individuals."*³

In other words, the institution of property implies the existence of an ordered relations which means the existence of normative order is an essential element for the existence of any institution.

In all the different meanings that may be given to the word property, ownership stands out as being established principally by norms of prohibitions which regulate conduct towards things. For example as the rightful owner of a thing, there is a prohibition imposing a duty on others not to interfere with the use of the thing i.e. the object of the property. Thus the owner of the property enjoy the use of it without interference for as long as he wants or the law permits depending on the mode of acquisition.

² Paton, *Jurisprudence* Third Edition Oxford 1972 chapter 21, p505

³ H. Cairns, *Law and the Social Sciences* (London, Ilagan Paul Trench Trubner & 1935) at 59

Viewed from a general perspective, one may tend to belief that the right of property is a personal one but the legal system create subjective rights to regulate inter-personal relations to property.

Turner refers to these relations when he writes:-

*"The law of ownership is not a set of rules fixing what I may or may not do to a thing but a set of rules fixing what other people may or may not prevent me from doing to the thing, and what I may or may not prevent them from doing to the thing"*⁴

It is therefore clear from the above that when the law creates relations between one and other persons in relation to a thing and vests the right of use in one or more persons to the exclusion of others from the use or disposal of the thing, the right is the right of property. Thus the elements constituting the right of property may be arranged as follows;

- I. The existence of an order in the society which recognizes the institution of property.
- II. The object of property
- III. The person in whom the ownership is vested
- IV. The person in whom the duty of non-interference is imposed.
- V.

Thus ownership is a right which the owners enjoy or exercise to use or control a thing to the exclusion of others.

Exclusion is the real essence of ownership and guarantee the continuous right of the owner on the thing against every other person.

In this regard, Holland remarks as follows:-

"The essence of all such right lies not so much in the enjoyment of the thing, as in the legal power of excluding others from interfering

⁴ J.V.C. Turner, *Some Reflections on ownership in English Law*, (1941) 19 Can. B.R 343

with the enjoyment of it.”⁵

For Dias,

*“Ownership is a right in itself distinct from its component jural relations, has always been useful for identifying certain group of interests and for distinguishing them from others”*⁶

From all the above comments, property and ownership are both interchangeable terms and identical. While ownership denotes the relation between a person and an object forming the subject matter of his ownership. It also consists in a complex of rights.

Property on the other hand means the object. It may be used in another sense to refer to rights i.e. ownership. Ownership is the right given to an individual with reference to a definite object for a definite purpose and for a definite or an indefinite time.

The right of exclusive use of an object is an essential element of ownership which means that the owner can use it as he wants and that his right over the property is superior over that of others. In other words, ownership does not exist when the object belongs to all.

According to Pollock;

*“What we call the law of property is in the first place, the systematic expression of the degrees and forms of control, use and enjoyment that are recognized and protected by law”*⁷

5 T.E. Holland; *Jurisprudence* (Oxford at Alaramdan Press, 1900 at 179.

6 R.W.M. DIAS; *Jurisprudence*, Fourth Edition, London Butter Worths 1976 at 406.

7 F. Pollock, *A First Book of Jurisprudence* (London, Macmillan & 10 1911.

Also Blackstone enumerates the right of property—

*“Right of free use, enjoyment, and disposal of acquisition”*⁸

Kruse makes his own assessment that;

*“The right of property is a definite set of powers and calls this set of powers, “the normal conception of the right of property”*⁹

Under the Roman law for instance, a person who is the owner of a thing has three rights namely ius Utendi, ius Frutendi, and ius abutendi i.e. a right of use and a right of disposal and of abuse. It is also believed that the rights cannot be separated and since they cannot be separated it is viewed that ownership is a bundle of rights (i.e. of the three rights as expressed above).

The English legal system evolved the right of property from the relationship between the landlord and tenant. Under the English feudal system, the landlord gives different rights over land to individual for their use. For example A might be given the right to use water over a piece of land, B might be given the right to blast stone on the same land, C for making use of sand, D for right of way etc. It was believed that since a man could exercise some of these rights on property, it therefore means that property is a collection of all these rights i.e. a bundle of rights.

The impression created from all the views expressed above is that property is a bundle of rights.

However, there are contrary views to the effect that property is a single right and not bundle of rights as widely believed.

This is the view taken by Markby when he states as follows;

8 V. Blackstone *Commentaries on the Law of England* (Christian Edward, ad. London; Thomas Thugs, 1830) at 138

9 V.F. Kruse, *The right of property* Volt runs P.T. Fadarspi-qcondary Oxford University press 1939 at 107-108

"The innumerable rights of a thing thus centered in the owner are not conceived as separately existing. the owner of land has not one right to walk upon it, and another right to till it; the owner of a furniture has not one right to repair it, and another right to sell it; all the various rights which an owner has over a thing are conceived as merged in one general right if ownership"¹⁰

There is however a limitation to the view that all the various rights in property are merged into one general right of ownership. For example a leaseholder is the owner of the lease and not of the land. The right of a leaseholder is for a limited period of time as he cannot enjoy right of use longer than the right of the actual owner. There is therefore a difference between property and proprietary rights. While property and ownership are of the same degree; proprietary rights are deemed rights and dependent on ownership.

But property rights are independent rights which can exist on its own or by itself.

Another important factor in determining right in property and essentially ownership is the form of legal system operative in given society.

For example in one legal system alienation is allowed whereas in other system it is restricted or not allowed at all.

According to Bhalla;

"These variation in legal consequence are the result of difference in social systems in which legal systems are to operate and whose values and ends they are to further and maintain"¹¹

¹⁰ Markby, *Elements of Law* (Oxford at the Clarendon press, 1889) at 154

¹¹ R.S. Bhalla, *Legal Analysis of the right of property* unpublished

The modes in which property can be used from one legal system to the other is therefore the right in it. The original concept that property is a single right may not be able to hold in all circumstances. As a result of development in commerce and industry property is now being used in different ways and all these different modes are regarded as the rights or bundle of rights in property. Unlike in the past when the use to which property can be put was narrow, in modern time the mode and production of property has increased, being a practical concept that makes trade possible. It is possible these days to own property without physical control of it. For example a shareholder who invested his money to buy the shares of a company is said to be the owner of the money invested but the control of the money is in the hands of the Directors of the company who manages the affairs of the company. In this situation property and control become separate.

Conclusion:

From the foregoing analysis, one can conclude that ownership is a single right; a whole absorbing within itself all the diversities.

However as a result of trade, commerce and industry, this single right referred to as primary legal consequences has within it other surrounding or secondary legal consequences, the form or mode of which differ from one legal system to another. It is instructive to note that the secondary elements of ownership has now expanded the narrow sense in which the institution of property was held to a more broader concept.

In order to maintain the institution of property, the legal system of any society must recognize the right of individuals to exclusive use of specific thing for a duration of time and the various secondary rights that the owner may create in favour of other persons in respect of the property termed. "secondary elements of ownership".