Lands Conquered by Force with an Approach to the Principle of Domination in Jurisprudence and Law

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Abstract

This essay has discussed the judgements of lands conquered by force with an approach to the principle of domination in jurisprudence and Islamic law and analyzed the views proposed by the jurists in this regard. We begin with the explication of the meaning of the key words as well as the lexical notion of the lands conquered by force and continue our discussion with the categorization of the conquered lands and the conditions of ownership of lands and their types, Islam’s view of land and its ownership, the words of such jurists as Sheikh Horre Ameli and Imam Khomeini. The ways of demonstrating the lands conquered by force and their extensions in jurisprudence are analyzed. The lands conquered by force represent the lands that have been dominated by the Muslims via military action. These lands are of two types: 1- habitable lands after the conquest: these lands are public lands that belong to Muslim community as a whole and is something like a general endowment. In other words, these lands are out of personal ownership because as we will discuss in coming sections we have three types of ownership: personal ownership, governmental or state ownership and general public ownership. The last type of ownership is construed as nationalized ownership. In the habitable lands conquered by force the ownership is of the third type. The majority of jurists claim that the lands conquered by force are out of the personal ownership and belong to the general Muslim community. This Muslim community covers both the contemporary Muslims and the future ones. These lands are not owned by Imam like war trophies as in the latter case Imam has the right to trade them
but the lands conquered by force belong to the general Muslim community. They are neither owned by persons nor by the state or by the Imam. We continue with discussions on the general judgments of the lands conquered by force and the reasons of their general ownership based on the prophetic traditions and jurisprudential consensus. 2- Inhabitable lands conquered by force are war trophies. The ownership of these lands belong to Muslims and Immaculate Imams and we will discuss the conditions of their ownership as extensions of war trophies. Moreover, since domination is a sign of ownership we will discuss the principle of domination regarding these lands, construction on these lands, the judgments of possession, judgment of their trade, inhabitability and other related secondary judgements as issued by Imam, the lands conquered by force in jurisprudence and their reasons are among the issues discussed in this essay.

Key Words: Lands, conquered by force, ownership, jurisprudence, Islamic Law, Muslims, habitable lands conquered by force, inhabitable lands conquered by force.

Introduction:

Land is of a special place in the law and political regime of Islam and Iran. One’s domination over a land or territory is declared as the basis of ownership. Concerning the lands conquered by force there are certain disagreements among the jurisprudence and law. The ownership of the lands conquered by force varies depending on its habitability and inhabitability as well as on the permissibility or impermissibility of the war during which these lands have been conquered according to the Imam. If the land conquered by force is not habitable when it is conquered it is declared a war trophy and belongs to the Messenger of Allah (peace be upon him) and after him to his vicegerent Imam.1 Furthermore, if the land is habitable and its habitability is natural like jungles the latter is also the case.2 If the land conquered by force has been made habitable by man force and the war has also been arranged by the Imam the conquered land will belong to the Muslims until the Day of Judgement.3 However, there are different jurisprudential views regarding the meaning of the ownership of Muslims and the type of this ownership and naturally the benefits earned through the land. Apparently, and some argue, explicitly, the jurists choose the first alternative.4 Some have understood this ownership in terms of investment of the earnings of these lands on public projects like road and bridge construction, building schools and paying the army members. Then nobody is allowed to use them for personal purposes.5 Some others have said that the jurists may have the same meaning by the general ownership of the Muslims over these lands. That is to say Muslims do not own these lands collectively rather their ownership is of generic nature. In other words, the genus of Muslims is the owner like the ownership of the poor over the

2Eqtesad-e Ma, pp. 446-448.
alms and other special public revenues or like the ownership of the endowed over the endowment and so on and so forth.¹

Generally speaking, lands are divided into the lands conquered through the military action taken by the Islamic Army and the other lands.

The lands that have been conquered by the Islamic Army are divided into three types:

a- The lands conquered by force is the first type of these land. These lands stand for the lands that have been conquered via war and Jihad. The Islamic Army is involved in a sacred war and the land is conquered by force and violence.

b- The second type of lands are conquered peacefully. That is to say, when the Islamic Army invades a region the inhabitants become frightened and seal a pact with the Muslims and based on the pact a region or a whole country is annexed to Islamic territory.

c- The third type stands for those lands that have joined Islamic territory without any military confrontation. These are peaceful conquests that expand the domain of Islam. Islamic Army has not announced any war and the lands have peacefully converted to Islam.

Among Shia jurists only one of the contemporary jurists called Muhammad Hussein Al-e Kashef al-Gheta has explicitly declared the tributary lands the total property of the conquerors. He believed that there is no difference whatsoever between these lands and the other lands but the tax that is forced to the tributary lands. The legal basis of this view is that the public ownership that has been noted in the religious traditions is concerned with the earnings of the lands conquered by force not the land in general. In the same way that despite the views of jurists regarding the authorities of Imam as to the mentioned lands we do not have access to any dependable historical evidence that would attest that a land owned by someone has been confiscated and given to some other man or even after someone’s death any doubts to be casted regarding the ownership of the heirs over the inherited lands. Then collective ownership in this context refers to the joint share of the Muslims in the benefits of the lands and then there is no need to generalize this legal status to the land itself and turn the whole issue to a legal problem that we will allude to it in our coming discussions.²

The difference between the land that is a war trophy and the property of the Imam (PBUH) and the land conquered by force that is the general property of Muslim community as a whole, is as follows:

Firstly, it is incumbent upon the Muslim leader to use the earnings of public lands and properties for the benefits of the general Islamic community and providing the needs of all Muslims such as building medical and educational centers. Thus, these earnings are not allowed to be used in the

¹Javahir al-Kalam, vol. 21, p. 162.
²Ahkam al-Arz, p. 13.
interests of a certain group of Muslims; just against the trophies that can be used for general and special occasions.

Secondly, general ownership divests all individuals of any personal right over a certain property even if the individual has revived it; against the war trophies the revival of which brings about a right for the reviver according to verse: the man who revives a dead is the lord of it.

Thirdly, the Islamic leader cannot transfer the land that is the public property of Muslims to anyone neither via selling or by endowing; while there is no such limitation as to the war trophies.\textsuperscript{1} If the conquered lands are habitable as such and domination is the sign of one’s ownership over the land and the government has no objection, and the transferring has been done in a legal way that is itself a sign of one’s ownership over the conquered then for the construction of public buildings on it like roads and so on, the rule of dispossession should be observed.

Research Background

With reviewing the books, theses and articles published in peer reviewed journals on the lands conquered by force we reached the following conclusions: Ali Nazmian Fard in an article entitled \textit{Tamed Infidels in the Opening of Islam} that has been published in 2001 writes that after the decease of Prophet Muhammad the export of Islam to the lands of infidels turned to one of the key priorities of Khulafa. To this end, Muslim conquerors followed this policy of Dar al-Khilafa in the lands of Levant, Egypt, Iraq and Iran. Meanwhile the inhabitants of the lands that were invaded by Muslim Army had different reactions to the Muslim warriors. The latter essay seeks to assay the reaction of the defeated ones particularly the tamed infidels to the Muslim conquerors. It shows how the infidels from other creeds could continue to believe in their religious beliefs and live in peace within the lands dominated by Muslims save the House of God and Hijaz.

In the early days of Islamic state, the public lands were among the significant issues that needed to be addressed because they were transferred to people who can maintain them and make them habitable and a small amount of tax was earned too. With the expansion of Islam and the conquests, numerous lands were dominated by Muslims and they counted more on these lands and the tax that was earned through these lands was not describable. Since then many works and articles were authored regarding the conditions of these lands and their taxes but no single work was written regarding the domination over these lands.

\textsuperscript{1}Eqtesad-e Ma, p. 437-439.
Lexical and Terminological Meanings of Maftooh al-Onvah

Maftooh in Arabic refers to open and released (Nazim al-Atiba) open and free.⁠¹ Maftooh al-Onvah means opened by means of force.

In jurisprudence this term is used to refer to the habitable lands that Muslims have taken from other nations by means of force and violence (military action under the command of Imam) regardless of sealing a peace pact with the dominated people (according to which certain lands are transferred to the Muslims) or not. But if before taking any military action a peace is sealed and some lands are transferred to the Muslims these lands are not declared Maftooh al-Onvah rather they are war trophies. Moreover, if these lands have been conquered without the permission of Imam the lands are trophies too. The lands conquered by force are general property of Muslim community and no one can own them personally (i.e. they are subjected to the rules of public law and have nothing to do with civil rules and private law) and their earnings belong to the general public and are declared public treasure. Arab Iraq and Khurasan and Levant and Rey have been declared to be among these lands.⁠² This is a jurisprudential term and refers to the lands that have been conquered by Muslims with the force sword. Such lands are the property of all Muslims and are not tradable. No one can endow them and their earnings are spent for the general causes of the Muslim community. The inhabitable (dead) lands conquered by force belong to the Imam. In the history of Islamic wars, the lands of Iraq that were conquered during the reign of second Khalifa are lands conquered by force or Maftooh al-Onvah. These lands include Khurasan and Bahrain.

Definition of Land Conquered by Force:

The lands that have been annexed to Islamic territory via military confrontation is called Maftooh al-Onvah. Maftooh al-Onvah refers to the land that has been dominated by Muslims through a battle with the infidels. These lands are among various types of lands that are owned by the Muslims.⁠³

A Short History of Lands Conquered by Force:

The defeat of Iraq and Iran by Arabs caused firstly numerous farming lands that were then one of the key sources of revenues of Sassanid dynasty to be handed to the Arabs and secondly, a new taxation method, i.e. the taxation system of the lands, that was named as Kharaj (land tax) to be designed. The second Khalifa applied this system to the defeated lands. Of course, this system was

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²Legal Terminology, edited by Jafari Langeroodi.
revised according to the rules of Islamic religion because based on the method of Prophet Muhammad (PBUH) in the lands conquered in peace, the peace makers should pay alms and in the lands conquered by force the lands and the trophies have to be equally divided among the warriors. The first action taken by the second Khalifa in relation to the implementation of the system was canonization of the tax system. Then the land tax was included among the contracts of alms.¹

**Division of Lands according to Jurisprudence**

The land is either owned by people who have converted to Islam without contention and in this case the land is the owners’ personal property and it can be traded or it is conquered by means of force and in this case the land belongs to general community of Muslims provided that the land is habitable (alive) and owned by the infidels. Such lands against the other properties of infidels that are dominated and divided among the Muslims are not divided among the general Muslim community rather if the owners convert to Islam these lands can be owned by them again. It is needless to say that these lands are also charged with general taxes and alms paid by Muslim owners. But if the conquered land is dead and useless, according to Shia jurisprudence, it belongs to the Imam and can be transferred to people who can make them habitable under the supervision of a just leader. Of course it should be discussed if these transferred lands turn to the personal properties of the men who work on them or not like the lands conquered by force? There are also other questions to be asked in this regard. If the ownership of dead land depends on the revival, or it is absolute or it has a certain time? If the reviver is the absolute owner and does not pay alms and he is obliged to revive the land forever Imam would be only the permission issuer and he will not have any supervisory role and the lands will be transferred from one independent owner to the other of course based on the continual revival of the land. However, if a tax is set for the land Imam becomes the lifelong supervisor of the land and even if the owner can trade the land but in each trade the share of Imam should be paid as the tax. And if the right to trade is taken from the reviving owner of the dead land he will just have the priority and there will be no difference between the lands conquered by force, dead lands and war trophies.²

Generally speaking, lands can be divided to the lands that have been conquered via military action taken by Islamic Army and other lands.

The lands that are conquered by Islamic Army are of three types:

a- The first type is the lands that are conquered by force. In other words, these lands conquest is merely possible via the use of force and violence by Islamic warriors.

b- The second type of lands are conquered in a peaceful way. To put it otherwise, when Islamic Army invades a land the people turn frightened and surrender and seal a peace pact.

¹Abu Yusif, Kitab al-Kharaj, p. 28.
²Motahari, Economy from Islamic Point of View, pp. 149-152.
c- The third type of lands are those regions and countries that have willingly converted to Islam without any battle. They are conquests but peaceful conquests. The Islamic territory is expanded without any declaration of war on the behalf of Islamic Army against any land.

When the lands are conquered by force and battling the question is raised whether the conquered lands belong to the general treasury or the whole thing that lies within the range of the conquered land belong to the general public?

**The Ways of Demonstrating the Lands Conquered by Force:**

The state of being conquered with force and habitability based on the public opinion set the ground for the certification of the two just witnesses; insofar as sometimes the public opinion that is near to knowledge – where the knowledge and reasoning is difficult – can prove this state and even the certification of one just witness is enough in this issue.¹

Some have declared other suspicious signs like the words of dependable historians and the habits of kings in receiving alms from the land as demonstration of a land’s being a conquered by force.² Wherever there is no knowledge and authentic sign regarding the state of being conquered by force of a land we should declare it not to be *Maftooh al-onvah*.

A number of ways have been mentioned for a war to have occurred with the permission of Imam (PBUH) and the conquered land to belong to the Muslims in general, such as the Commander of Believer’s position regarding Iraq, which was transferred to Muslims and its earnings were used for general causes of Islamic community, or the prophetic traditions that speak of the consults that were taken by the second caliph from Imam Ali (PBUH) in the important and difficult affairs of the government, including military and war issues, or the presence of Imam Hassan (PBUH) and some special fellows in some wars; but these ways of demonstration have been objected.³

**Ownership of the Land Conquered by Force:**

The judgement of the land conquered by force varies according to its habitability, inhabitability and the existence or inexistence of the permission of Imam for the war. If the land conquered by force is not habitable in the time when it is conquered it is considered a war trophy and thus a property of the prophet Muhammad and Imam (PBUH).⁴ Moreover, if the land is of a natural habitability like the jungles the latter is also the case. If the land conquered by force has been made habitable by a man and if the war is arranged by the permission of the Imam (PBUH) the land will be the property of general Muslim community until the Day of Judgement. But what do

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¹ Kefaya al-Ahkam, vol. 1, p. 393.
³ Annotations on Makasib, vol. 3, pp. 43-44.
we mean by the general property in this context? If this depends on the ownership of the land itself and its respective benefits or any other thing? The jurists have different views in this regard. The first is the case according to the apparent face of the words of some jurists. Some have construed it as the spending of the revenues and earnings on the public interests of Muslims like development of roads, bridges, school construction and equipping the army. Then no one has the right to use it for personal affairs.¹

Some others have said that the jurists may have the same meaning by the general ownership of the Muslims over these lands. That is to say Muslims do not own these lands collectively rather their ownership is of generic nature. In other words, the genus of Muslims is the owner like the ownership of the poor over the alms and other special public revenues or like the ownership of the endowed over the endowment and so on and so forth.

**Prophetic Traditions that Declare the Lands Conquered by Force as the Property of all Muslims**

1- Abi Bardeh relates that once I asked Imam Sadeq (PBUH) what is your opinion of the tax paying lands? Imam said that who is doing that? These lands belong to Muslims and no one can trade them. The relator says I told that the man who owns the land as the tenant is selling it. Imam says that the land is supposed to pay tax what is supposed to happen to the tax after its trading? The man who owns the land can transfer it to another man but the tax that is the property of general Muslim community should be paid. Then the tax paying lands belong to the general Muslim community and five shares of them out the total six shares belong to Muslims.²

2- Halabi relates that once Imam Sadeq was asked to explain the status of the lands that have trees and gardens (Iraq) and to whom they belong. They belong to all Muslims both those who are Muslims by now and those who will convert to Islam in future or will be born as Muslims.³

**The Views of Jurists on the Ownership of the Lands Conquered by Force:**

Lands conquered by force are not tradable. Since this type of properties do not have any particular individual owner no one is allowed to trade them. The ownership of Muslims over the lands conquered by force has been demonstrated based on the jurisprudential consensus of experts and the prophetic traditions. In this regard the late Sheikh argues that these cases have been excluded based on the condition of ownership.

Sheikh Ansari states: jurists who have considered ownership in trades exclude some instances one of which is selling the goods in which the general public is shared such as water, pastures, fish, wild animals before hunting, because they are not actually owned and this is also the case with the

²Wasael al-Shia, vol. 15, p. 155.
³Wasael al-Shiah, Hore Ameli, vol. 17, p. 369; Abvab Aqd al-Bay'.
lands conquered by force. Whereas this type of lands do not belong to the people who reside in them just contrary to the ordinary properties that are considered the personal property of the owners regardless of their size and scope. Thus they cannot be inherited. They cannot also be endowed. Then Sheikh claims this to be held by the jurists as a whole and continues: the ownership of Muslims over these lands that have been declared as a matter of jurisprudential consensus and there is prophetic tradition endorsing it. Sheikh also discusses the types of these lands.

As to these lands, Seyyed Tabatabaei, the author of Riadh has casted doubts and states that there is a consensus that these lands are property of the Imam but if there was no consensus this would not be sound. Because the traditions concerned with the ownership of Imam over the dead lands are in contradiction with the traditions that say that the lands conquered via Jihad are the properties of Muslims. There is a relation of partial generality and specialty between these two types of traditions. The consensus is concerned with the dead lands that have been conquered by force and as a result due to the contradiction both sets of traditions are devaluated.

The criticism of Mohaqeq Najafi of this view:

Mohaqeq Najafi writes in his book on Jihad:

The claim of contradiction between the traditions of ownership of dead lands by Imam and the traditions of the lands that have been conquered by Jihad is not acceptable and we prefer the first set of tradition to the second set even if we resort to the jurisprudential consensus (whether it is traditional or acquired).¹

The latter remark of Moheqeq Najafi does not contain anything more than the theory developed by the author of Riadh, although in the book of revival of the dead he argues:

It is for sure that Imam is the owner of the dead lands that have been conquered even we can reach consensus in this regard though there are numerous prophetic traditions that endorse this fact and many of them have been cited in the book of Khums where we clearly announced that lands are not trophies because they did belong to Imam before the conquest.²

Mohaqeq Najafi’s claim that “as we know the lands are not among the trophies…” is short and probably aims at clearing the existing doubts. This claim has its own origin in the fact that when Muslims confiscate the properties of infidels through the battling, they are all invariably considered trophies while the ownership of some of them is clear but there are also some cases the ownership of which is not demonstrated. In those cases, that the ownership is demonstrated it is the building and trees on the lands that are owned and of course in some cases the lively lands can be owned with some conditions. As to the dead lands which were the property of Imam before the conquest no one is allowed to divest the ownership. For example, if a Muslim’s house that was confiscated

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¹Allameh Helli, Tazkarat al-Fuqaha.
²Sabzewari, Kefayat al-Ahkam.
by the infidels is conquered by Islamic Army it is far more clear that the house is not a war trophy rather it belongs to the Muslim to whom belonged. This is also the case with Imam’s property.

Ayatollah Khoi has offered other answer to the objections regarding the possible contradiction:

If we accept the traditions of the ownership of the Muslims there remains no occasion for the accepting the traditions concerning the ownership of Imam over the dead lands; because all lands belonged to the infidels which were confiscated.

The point is that since all dead lands that have been confiscated from the infidels and now belong to the Muslims now are not taken as the tax paying lands in order to have no occasion for the ownership of Imam rather there remains certain cases including the lands that have been conquered in peace or through a joint pact or those lands that are surrendered by the infidels themselves or those lands that are gained without the permission of the Imam or the dead lands that are given to the Muslims (like islands).

Anyway this idea is seamless only if the criterion was just “being an instance of the trophy” but there are some traditions that are speaking of the conquest in general and say: “whatever is taken by sword is considered the property of Muslims”. These traditions with their generality cover the dead lands too. The defeating of infidels is correct where the properties and lands belong to the infidels not that the latter were the owners of the lands that is against what has been assumed. If a land is confiscated by the infidels the traditions offer that the land belongs to the first owner but the confiscation is not applied to the dead lands that belong to the Imam.

**The ideas of the opponents regarding the ownership of Imam over the lands conquered by force:**

As to these lands, Seyyed Tabatabaei, the author of Riadh, has casted doubts as to the claim that there is a consensus that these lands belong to Imam but if there was no such consensus this was from being correct; because the traditions concerning the ownership of the Imam over the dead lands contradict the traditions that suggest that the lands conquered by Jihad and battling are properties of Muslims. There is a relation of partial generality and specialty between these two types of traditions. This causes both types of traditions lose their validity.

**The reasons of opponents**

1- If Muslims conquer possessions, they will take possession of the property as a trophy, and the trophy will be dedicated to the property that is religiously the property of the infidels. In this case, if we believe that the property of the Muslims will be, that is, the property of the infidels, will also be the property of the Muslims, but if the infidels were only "the rightful owner" due to the revival, the Muslims would have the right and not the ownership of the lands as well. The revival of the

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1Sheikh Ansari, Kitab al-Khums, p. 85.
infidels, like the revival of the Muslims, is the basis of a right, so after the conquest, these lands are the property of Muslims. But this basis is senseless, because the traditions that exit and say: "Every money that was taken with the sword and through the jihad is the property of the Muslims, and the dead land is theirs" is absolute and not specific to the infidels.

2- According to the absoluteness that we referred to before the reasons that say: “the properties that have been gained via battling and Jihad belongs to the Muslims” ownership is meant by these traditions of course not in the sense that we would say that the Muslims are also of a right and if they were owners they are still the owners; because in this case there will be a contradiction between the argument according to which whatever that is acquired by Muslims via conquest belong to Muslims and the argument that Imam is the owner of the dead lands. The consensus is regarding the dead land that has been conquered via force that absolutely belong to the Imam. The reason for ownership of the Muslims lies in the verse that reads: You should know that whatever you gain as trophy should be shared by Allah, Prophet and his household”.

If an objection is made to the effect that if a single tradition contradicts Quran in a partial way it will no longer have any authority or validity and as a result the reason for the ownership of Imam over the lands is baseless otherwise we should give priority to the first reason (in line with Quran) and insist on the ownership of Muslims. We could answer that the verse does not have such an implication.

3- Since the reason for the ownership of Muslims is in contradiction with the reason of the ownership of Imam we need to refer to a reason that says that Muslims are of certain rights regarding these lands. Of course these rights are not necessarily implying ownership so that they lose their validity due to contradiction rather its expression is more apt with rightfulness. The reason in this context refers to a tradition from Imam Sadeq as quoted by one of his disciples called Hammad Ibn Isa who quotes Imam to have said: “those lands that are conquered by force or via peace compacts they belong to those who revive them”. But since this tradition has not been heard directly from Imam it is not valid in this regard.

4- The correct reason is that the ownership can be meant by attributing something to someone. These lands are attributed to both Imam and Muslims and this shows that they can be belonged to both Imam and Muslims. This type of joint ownership is contradictive due to its absoluteness. However, the attribution of ownership to Muslims is not as such in contradiction with the Imam’s ownership. Because a land can be owned by Imam while Muslims have special rights regarding it. Then we can prove the special right of the Muslims based on the traditions regarding conquest. We should note that “all lands belong to Imam”.

Thus prophetic traditions endorse the ownership of dead lands by Imam. This judgment is demonstrated as long as there is no contradiction between it and other related judgements.
Fatwa Contradiction:

There are two renowned fatwas that are not seemingly consistent:

1. The dead lands belong to Imam.
2. The habitable conquered lands belong to Muslims.

Since in the second fatwa it is not clear if the lands were habitable when they were declared trophies or not then we should take them to be the property of Muslims even if they were dead when they are declared trophies; but the jurists does not accept that an infidel could own a land due to make it habitable then the land remains the property of Imam and it is hard to declare it a property of Muslims.

It is written in Kitab al-Khums: “the categorical declaration of the habitable lands conquered by force as the property of Muslims is indeed concerned with the dead lands that have been made habitable by the infidels before the time when Allah made them the trophies of the Prophet even if they were habitable when they were conquered”¹

But the author of Javahir has refuted his own word in the Book of the dead and explained that due to generalization the ownership of the infidels over the dead lands is correct.

After demonstrating the correctness of the infidels’ ownership over the dead lands and arguing that this is correct under the supervision of Imam the author of Javahir continues:

All these matters beside those matters of which one can reach certainty (that is to say, every property that is at the hands of infidels even if they have owned it via revival because there is no permission from the Imam if Muslims conquer them they will be the owners). However it is still necessary that the property to be declared as the Imam’s property but I do not think anyone would accept this.²

Answer: to avoid this conundrum we should accept one of the following alternatives (that are not adopted by the public):

First, we would claim that the dead lands that belong to Imam are those lands that are not owned by the infidels. But this is not endorsed by the traditions and words of disciples.

Second, we would accept what has been said by the author of Javahir in the book of Khums. But this is also against the prophetic traditions and words.

Third, in the properties that have been gained through conquest and Jihad no condition to be allocated as regards the previous ownership of the infidels and all the properties that belong to Imam to be attributed to Muslims. But this is not also accepted by the disciples.

Fourth, the revival of dead lands by infidels to be taken as one and the same with the revival of them by Muslims. As a result, they can be owners by means of revival. But after the conquest, the ownership is transferred to the Muslims. The author of Javahir repeats this position in the book of revival of dead although it is against the current view.

It is better to take the revival by infidels as equal with the revival made by Muslims though they cannot become owners via the revival in the same way that Muslims cannot become owners via revival. This revival just gives them some rights that we will discuss later. Then, with conquest Muslims are endowed with certain rights like infidels.

In other words, some believe that “Muslims own habitable lands that have been conquered by force. Thus it is proven that these lands belong to Muslims even if they were destroyed and dead when the rules of war trophies were revealed”.

**Habitable and Inhabitable Lands Conquered by Force**

The habitable lands conquered by force belong to the general Muslim community and this ownership is not limited to certain time. The Muslims as a whole own these lands not individually. No one can gain personal ownership over them by means of reviving. The dead inhabitable lands conquered by force belong to Imam and does not belong to the general community of Muslims. Then the judgements regarding these lands should be issued in view of their state of being habitable or inhabitable. The man who revives the dead land only receives some rights of priority and this domination is not tantamount to absolute ownership.¹

Even this partial ownership does also belong to our knowledge of the dead state of the land conquered by force in the time of defeating. Then if the dead land is revived by someone after conquest it remains as the property of Imam and only some priorities and rights are achieved via the revival. These are the points that have to be taken into account when decisions are made regarding the trophies including these lands.²

**Sameness of the Owned via and without Revival**

There is no apparent difference between the land owned via revival and the one that is owned via other ways but revival, because the revival (restoration) is consigned not limited, and by revival turns to one of the properties of the reviver; then there is no possibility that would let the land to

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¹Sheikh Ansari, Faraed al-Usul, vol. 4.
²Ayatollah Bahjat, Types and Judgements of Lands.
be owned due to secondary revival done by some other one following the destruction. This secondary ownership is against the content of existing traditions in this regard. The point is that the dead land belong to Imam and the revival just brings about certain rights without making someone the owner of the land that belongs to the Imam. Then even in the habitable lands conquered by force the right of owners should be observed.

**Difference between Dead Lands Conquered by Force and Public Land**

The difference between the dead lands conquered by force that are considered among the war trophies and the property of Imam and the public land that is the property of Muslims lies in the fact that firstly, it is incumbent upon Muslim leader to use the benefits and wealth acquired through the public properties of Muslims for the betterment of the Islamic community by construction of roads, bridges and clinics. These benefits have to be spent for general purposes and no single group can be prioritized in this regard. But this is not the case with the war trophies that can be of special uses.

Secondly, the public property denies any personal right even for the man who revives the land against war trophies whose restoration cause certain rights to be allocated for the restorer.

Thirdly, Islamic leader is allowed to sell or endow the land that is the public property; while there is no such limitation in the war trophies. 1

**Principle of Domination over Lands Conquered via Force:**

Undoubtedly, the control of the lands conquered by force that are considered the general property of Muslims is at the hands of Imam. Imam uses his primordial domination over these lands and take advantage of these lands in whatever way he finds helpful. He can put these lands out to lease in order to use their revenues for the betterment of life conditions of Muslims via constructing roads, bridges, mosques, paying the workers and army members. Insofar as he has the right to take the land back and give it to other one.

In the age of occultation the jurists have different opinions of the question if in the absence of Imam these lands should be managed by the social authorities or by the qualified jurist who is the vicegerent of the Imam (PBUH). 2 However, if there is no qualified jurist these affairs will be handled by the authorities and these lands will be under his control and without his permission no one is allowed to make any decision in this regard; Shia has the right to take advantage of these lands without the permission of the authorities or the qualified just. 3

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1 Eqtesad-e Ma, pp. 437-439.
From theoretical point of view, there is difference of opinion among the jurists on the legal status of the ownership of the lands conquered by force. A group of jurists regards these lands as the property of the conquerors and others consider them public property. Of course this intellectual difference did not have any effect on the ownership of the men who owned these lands. They were using them without any force. These lands were transferred easily since the early days of the Islamic conquests and Muslim jurists signed the documents and helped people with their daily affairs. However the differences remained unresolved as there was no useful jurisprudential means for better interpretation of the rules. The basic problem regarding these conquests was that their transfer required ownership. In jurisprudence, it is said that the man is allowed to sell something who owns it. The early Sunni jurists including the Hanafis, Zandis and Shafeis considered the lands conquered by force as the property of the conquerors. These jurists were not naturally faced no problem in this regard and permitted the trade of these lands. While other jurists from Shafeis, Malekies and Hanbalis did not allow these lands to be traded. Accordingly, these lands cannot be transferred in a legal way or endowed. Malekies were even of the belief that after the death of the owners of these lands they are not transferred to the heirs rather they become the property of Imam and Imam manages their affairs. Later sources are of moderate views. Some scholars from various schools of thought have allowed the exploitation of these lands.

To harmonize this view with the jurisprudential rules it was said that these transfers have not been indeed done on the lands themselves rather the seller has transferred his own right in using the land and taking advantage of it in the same way that the endower connives and endows. In the documents of the endowments it is noted that the endowed item is tributary in order to remind that the endowment has been done based on the rights of the endower over the endowed land, for example, not based on the land itself. As you can see for yourself, there remains no major difference between the followers of the first notion and those of the second one because both groups are saying the same.

Some scholars have declared these transfers correct because there was difference of opinion as to it among the jurists and since the traders were probably the followers of jurisprudential schools that would declare such trades permissible then the trade could be sound. Anyway, this was one of the difficult issues discussed in the Sunni jurisprudence and some of the jurists refrained from getting involved in such discussions.

In his book on Khilaf, Sheikh Ansari states, Shia scholars are unanimous that trading tributary lands is not permissible. This shows the state of Fatwas in that age. In the aforementioned book, Ansari has declared the mortgage of tributary lands and finally announced all transfers prohibited and in his detailed book he argues that not only all transfers as to the lands conquered by force are

2Ibid.
3Montafi, Baji, 3: 224; Sharh-e Saghir, 2: 313.
annulled rather any type of construction on these lands including construction of houses, mosques and the like, is prohibited and they are not either inherited by the heirs. The latter word implies that basically there will be nothing called priority right as to these lands and everyone is bond to the term mentioned in the contract sealed for these lands. There is no personal consideration in this regard and these lands cannot be declared some particular people’s heritage. Naturally based on the general principle that lands conquered by force belong to the Muslim community and it is only Imam who allots them to individual Muslims based on a contract after the expire of which it is allotted to other individual and no arbitrary allotment is allowed in this regard.

The Implication of Domination Principle for the Lands Conquered by Force

As we mentioned earlier, the habitable lands conquered by force are the properties of the general community of Muslims and cannot be transferred. The Late Mirza Naeini states that if the state of domination is clear and we know whether it is borrowed domination or custodial ownership, or religious trust in these cases we have to retain certainty over the domination because here domination is of no clear title and state and we do not know if this domination is ownership or trust or custody but retaining the past certainty of the ownership clears this ignorance by way of belief “certainty is not nullified by doubt”. We should suppose that the state of domination is clear and when the domination is clear one cannot demonstrate ownership by means of domination principle because there remains no issue for the principle to solve and then its contradiction with the retained certainty is addressed. If the ignorance is taken upon belief there remains no issue for the principle of domination and it is said that the previous certainty is established on the domination. Now if the emergence of domination is clear and if it is established that the dominated lands are habitable lands conquered by force though domination is a sign of ownership we cannot make a resort to the principle of domination and the previous certainty is endorsing the domination. Thus these lands belong to the general community of Muslims and they are managed by the Imam who can determine tax for them. However, if it is not established whether the conquered land was habitable when it was taken and the dominated man becomes suspicious over his ownership over these lands in this case the domination principle will be valid and the domination will serve as the sign of ownership. Then in the dead lands conquered by force the domination is the sign of ownership because Imam says that “whoever dominates something it belongs to him”. Something in this context is a general concept and includes the thing itself and its advantages and if the dominating man attests that he does not own the thing itself his domination over the advantages is established.

Conclusion

The lands conquered by force are lands that have been conquered by the Islamic Army and are of two types. The habitable conquered lands belong to the general Muslim community and cannot be traded and no one can inherit them. However, their advantages can be sold under the supervision of Imam and the tribute that is determined for these lands should be spent on public causes. These lands can be rented but after the expire of the tenancy it should be returned to
Imam and no one can have any ownership claim regarding these lands. If the land is inhabitable it belongs to Imam and it is Imam who decides over its selling or leasing.

Domination is the sign of ownership and the receiver of the habitable lands conquered by force can have priorities over these lands if no construction has been done on them otherwise he can have claims of ownership. If the lands are inhabitable the dominee can own the land and if there are constructions that have been done for revival purposes the dominee will own them.

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