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Interest in Land and Right of Occupation in Western Tort Law on Private Nuisance: An Islamic Tort Law Perspective

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Abstract: In private nuisance, the central idea is that of interference with the enjoyment of the Plaintiff's land generally speaking by the defendant's causing some sort of deleterious invasion of it for example by noise, smell, smoke, fumes, gas, vibration, water or chattels. Wrongful interference with the exercise of an easement, profit or other similar right affecting the use and enjoyment of land also come within the rubric of private nuisance. The Plaintiff who is entitled to sue in this case must prove that he/she has interest in land involved and also has a right of occupation. The basis of the law of nuisance is the legal maxim; sic utere tuo ut alienum non laedas which means a man must not make such use of his property as unreasonably and unnecessarily to cause inconvenience to his neighbor. The main aim of this research is to explore in Islamic law the foundation and basis for legal action in private nuisance, especially in cases relating to immoveable property. Is the foundation in the Islamic law concurrent with the Western law? This study is written through arm-chaired research. As an outcome of this study, it could be perceived that the foundation of legal action in private nuisance based on interest in land and right of occupation is not entirely alien in the Islamic law of tort.

Key words: Nuisance, private nuisance, interest in land, right of occupation, ownership, possession, actual possession, Malaysia

INTRODUCTION

In general, the principle position in the English law has been that only a Plaintiff with an interest in the land affected could sue in private nuisance. As we have known that as to private nuisance, the central idea of it is that of interference with the enjoyment of the Plaintiff's land generally speaking by the defendant's causing some sort of deleterious invasion of it. The problem here is to determine the real party who has interest in the land. This is because the word interest in the land brings obscure when it is linked to such a party whether he/she is only a real owner freeholder or lessee.

How about the party who is also living together with the real owner like husband/wife and also their children and may be including any relative. When this discussion is referred to English cases, it is clearly up until 1993 even though, there were a few cases adversely held, the decisions made by the English courts have preferred to follow in so-called narrow view of the scope of litigation in private nuisance. They required that only those who have a legal interest in the land affected can sue in private nuisance not others even though their spouses or children. This is emphasized by a common rule of the private nuisance which is recorded by Winfield *et al.* (1979) in his writing:

> Private nuisance has traditionally been a remedy available only to a person who has suffered an interference with an interest in land. It is clear that to give a cause of action for private nuisance, the matter complained of must affect the property of the Plaintiff. He alone has a lawful claim who has suffered an invasion of some proprietary of other interest in land

The important thing is the Plaintiff in order to maintain his action in private nuisance to the defendant must show some title to the thing to which the nuisance is alleged. However if we refer to a few cases held by courts in Canada and Australia, they have accepted a broader approach based on the fact or actual of occupation rather than only interest in the land whether founded on a legal title or not. Afterwards, the discussion will come across to the perspective of Islamic law of tort. Even though, the Islamic law of tort is not world widely referred to as a source of law but it would still be able to be made comparatively study when it is looked into the opinions of Muslim jurists of schools of law.

The important subject matters which should be looked at in the Islamic law of tort for the discussion are the terms of ownership and possession. After that the discussion could go further for comparing either extremely based on the cases highlighted.

INTEREST IN LAND

It is obviously in the English law of tort that when researchers refer to a few cases of private nuisance, the element of interest in land had been an important element for the Plaintiff to found his legal action against the defendant. Thereby, a question has aroused what is the interest? According to Osborn's Concise Law Dictionary, interest which is related to a person signifies that where he is considered to have an interest in a thing when he has right, titles, advantages, duties, liabilities connected with it whether present or future, ascertained or potential, provided they are not too remote (Burke, 1976).

Based on this definition of interest is a wife or husband considered to be a part of interest in land whereas the land owned by one of them? When this discussion is related to a famous case Malone v. Lasky (1907) 2 Q.B. 141, it could be said that a spouse who has no interest in the land occupied, means that she does not have a legal title of such a land having no right of suit against the defendant. Moreover, the spouse has been held that she has also no any legal right of occupation. Therefore, an injury resulting from private nuisance, the Plaintiff may bring an action for a tort if he has both an interest in land and a right of occupation of the land, the place where the injury suffered by him therein. Therefore if both elements could not be proved the Plaintiff would not be success in the law suit.

Those who have a legal interest in the land affected means according to Markesinis *et al.* (1994) is freehold owners and it also includes tenants in occupation and even reversioners (Winfield *et al.*, 1979) if they can prove permanent injury to their interests. For example, a leaseholder can sue provided the nuisance can be shown to damage his reversionary interest. This is because when it is related to a question who can sue in private nuisance it seems that private nuisance protects interests in land and as such only the owner or occupier with an interest in the land affected may maintain the law suit (Winfield *et al.*, 1979). The Plaintiff's interest in the land, inter alia is according to Heuston *et al.* (1992) to protect the right to use and enjoyment of his land. So, the Plaintiff must be able to show an entitlement to use and enjoyment in the land. Thus, the Plaintiff is freeholders, licensors, licensees in exclusive occupation and lessees. All of them can show such entitlement (Heuston *et al.*, 1992).

Therefore, visitors, guests, lodgers and licensees without exclusive possession are not considered those who have a legal interest in the land lived-in and they have no proprietary or possessory interest in the land and they can not make a legal suit as cases Malone v. Laskey, Cunard v. Antifyre (Markesinis *et al.*, 1994; Heuston *et al.*, 1992). That's why, Markesinis *et al.* (1994) said that:

> It might not be sensible to extend it to anyone who did not have a substantial and permanent occupation of the premises. Mere visitors would, therefore, be continued to be denied an action, their legal position being determined solely by whatever rights they were accorded by the tort of negligence

In general, a person who has an interest in land could be called as occupier and the term of occupier consists of a person who possesses the land or the building as its owner, tenant or trespasser. By that the word of occupation means the exercise of physical control or possession of land (Burke, 1976). So, the status of a tenant's wife is placed into visitor or guest and then if she suffers injury while staying therein, she can not bring an action like the case stated before.

A visitor or a guest can not sue in private nuisance because he merely has the right to use of the land without possession of it or without any possessory or proprietary interest in it (Winfield *et al.*, 1979). However if they suffer personal injuries, the law opens to them to sue in negligence.

The fact of the case is the defendants leased a property to a tenant who then sub-let it to a company whose manager (occupier) and his wife (the Plaintiff) lived on the premises. The defendants were not liable to do repairs but following various complaints they repaired the cistern in the lavatory. A short while later the bracket used for the repair fell on the Plaintiff due to the vibrations caused by the defendant's generator installed in the premises next door. The court of appeal held that the Plaintiff had no claim and no cause of action against the defendants in private nuisance for being the wife of the manager as she had no interest in the land nor any right of occupation or in other words she did not have the requisite possessory or proprietary interest in the land involved. Relating to this Barnes said:

> No authority was cited, nor in my opinion can any principle of law be formulated to the effect that a person who has no interest in property, no right of occupation in the proper sense of the term can maintain an action for a nuisance arising from the vibration caused by the working of an engine in an adjoining house

In the same sense, Fletcher Moulton LJ said:

> The Plaintiff was in the premises as a mere licensee and a person who is merely present in the house can not complain of a nuisance which has in it no element of a public nuisance

The decision which was made in Malone v. Lasky caused to appear displeasing and unsatisfactory feeling among lawyers about the terms of right of occupation and licensee until it was stated by a lawyer (Kodilinye, 1989):

> Malone v. Lasky is an unsatisfactory authority in that no attempt was made by their Lordships to explain what was meant by a right of occupation in the proper sense of the term nor to distinguish between the various categories of licensee, of which some are entitled to possession of premises and others not

The similar decision has been followed by the case of Nunn v. Parkes and Co. (1924) 59 L.J. 806. In this case, the defendants had stopped up ditches on their land and thereby caused water to escape into adjoining premises and caused damage to the Plaintiff's chattels. It was held that the Plaintiff's action in nuisance was unsuccessful as the premises affected were owned by his wife, not by him. Likewise in the case of Cunard v. Antifyre (1933) 1 K.B. 331. In this case, Talbot J. said that:

> The Plaintiff in order to maintain an action must show some title to the thing to which the nuisance is alleged to be and it would be inconvenient and unreasonable if the right to complain of such interference extended beyond the occupier

Likewise in the case of Metropolitan Properties Ltd. v. Jones (1939) 2 All E.R. 202 especially, per Goddard L.J. insisted that Malone v. Lasky had laid down in terms that unless the Plaintiff in an action in nuisance has a legal interest in the land which is alleged to be affected by the nuisance, he has no cause of action. In summing up, the person under the term of interest in land is the owner or occupier, who includes freeholder, licensor, licensee in exclusive occupation, lessee (tenant) and reversioner in the right sense of the term.

ACTUAL OCCUPATION

Actual occupation could be referred to a person who has merely a legal authority or a statutory right to do something on the land even though he has no legal title to such a land. So, a possessory right is sufficient to establish an action in private nuisance. One of the English cases which upholds this view is Newcastle-under-Lyme Corporation v. Wolstanton Ltd. (1947) Ch. 92 where Evershed J. said:

> That though the cause of action may consist in an unlawful interference with land or with property in land, prima facie possession is sufficient to maintain the action

He rejected the decision made in Malone v. Lasky which needs to establish the Plaintiff must have a legal title to the land affected. The case was where the defendant did working of a coal and ironstone mine caused the interference with the natural right of support for the land with the result that the corporation's gas mains and pipes were damaged. Although, the corporation had no title to the land, it did have exclusive possession through a statutory right to lay pipes under the surface of land and accordingly the Plaintiffs had the area occupied by the pipes even though they had no title to the land itself.

In the same line was the decision made in the case of Foster v. Warblington Urban District Council (1906) 1 K.B. 648 where the Plaintiff sued for a nuisance afflicting his oyster pond. There was much controversy over his legal right of occupancy. Vaughan Williams L.J. said:

> Even if title could not be proved, there has been such an occupation of these beds for such a length of time-not that the length of time is really material for this purpose as would entitle the Plaintiff as against the defendants to sustain their action (Kodilinye, 1989)

Likewise, the decision made in the above case was followed by the court in the case of Motherwell v. Motherwell (1976) 73 D.L.R. (3d) 62. In this case, a wife had been harassed and annoyed in her matrimonial home by telephone calls persistently and abusively. The court held that she had a good reason to take a court of action in private nuisance in virtue of she had a status and a right to live therein with her husband and children. It would be unreasonable and absurd to maintain that her occupancy with her family in the matrimonial home was insufficient to found a court of action.

In the same sense in Paxhaven Holdings Ltd. v. Attorney-General (1974) 2 N.Z.L.R. 185, the Supreme Court of New Zealand held that even if the Plaintiff was only a licensee, he had exclusive possession of land on which he used it for grazing his stocks and this exclusive possessory right was considered sufficient to establish an action in nuisance. In this kind of tort, the defense of ius tertii was excluded and it was no answer to the Plaintiff's claim to affirm his lack of title to the land involved (Kodilinye, 1989). Contrariwise in Vaughan v. Halifax-Dartmouth Bridge Commission in 1961, 29 D.L.R. 523 Ilsley C.J. described the position of the Plaintiff as a licensee without possession that's why he was not entitled to his claim of private nuisance. Relating to this a person who has a mere permission to park his car in a parking lot does not have a right to sue in private nuisance for damage of his vehicle due to painting operations conducted by the

defendant. Based on this case, park a car for sometime could not be named as actual occupation as such. Other than that if an occupier of a land suffers such a damage he of course is not a licensee or merely present on the land but he should have substantial or actual occupation and then may have right to sue in private nuisance for damage caused to his car. From the above cases, it could be perceived that private nuisance is primarily a wrong to the enjoyment of land so, as the general rule in tort law about private nuisance a person who is in actual occupation of the land can usually sue the tortfeasor neither an owner who is not in occupation nor anyone whose interest in the land involved is less direct than actual occupation normally can. As such a guest, a lodger or a member of an occupier's family living in his house are not (James and Brown, 1978). All of them are not regarded having de facto possession. So, according to Salmond, de facto possession is sufficient to the Plaintiff in order to sue the defendant (Heuston *et al.*, 1992).

Thus, a tenant who is in occupation of the land affected is regarded as a competent Plaintiff. In Metropolitan Properties Ltd. v. Jones (1939) 2 All E.R 202, the landlord installed an electric motor in a flat in order to circulate hot water. Its tenant used it in the only way it could be used and thereby noise was resulted as a nuisance. It was held that the landlord was liable in nuisance. However, Goddard LJ still applied the decision of the case of Malone v. Lasky in the case of Metropolitan before where the Plaintiff should have a legal interest in the land affected in order to give him entitlement to sue the defendant [(1939) 2 All E.R 202]. By that it could be seen that Stephen J. disagreed with the opinion of Goddard LJ and he said that in suing in private nuisance, the Plaintiff needs not to have a legal interest in the land affected. That's why he contradicted that the Plaintiff should at first have a legal interest of the land in his suing in Malone v. Lasky and he argued the Goddard LJ's interpretation of that case in Metropolitan case. It seems to be proved that in Mc Leod v. Rub-A-Dub Car Wash (Malvern) Pty Ltd. (Kodilinye, 1989) he (Stephen J.) in the Supreme Court of Victoria held that a proprietary company which was neither the owner nor the lessee of shop premises which were affected by a nuisance constituted by noise was in actual occupation of those premises and then he could sue.

The decision in Mc Leod case was primarily based on actual occupation, or in other word de facto possession was a sufficient factor to maintain an action in private nuisance. This could also be seen in Ruhan v. Water Conservation and Irrigation Commission (1919) 20 S.R. (NSW) 439 as stated by Gilbert J. where the New South Wales District Court decided that the defendant was not entitled to set up the precariousness of the Plaintiff's title to occupancy of land as an answer to claim in private nuisance. The Plaintiffs were in possession of land without any title or even license but as long as the Plaintiffs' occupancy of the adjoining land was left undisturbed, the defendant can not.... absolve itself from such responsibility for injurious acts as an occupier of land owes to an adjoining occupier' (1919; 20 S.R. (NSW) 444; Kodilinye, 1989). From the cases of Motherwell v. Motherwell and Vaughan v. Halifax-Dartmouth Bridge Commission, Gilbert remarked that:

> The Canadian courts have been in the forefront of the expansion of the right to sue in private nuisance and actual occupation of land has been accepted as sufficient in numerous cases. It has been emphasized, however that a distinction must be drawn between being merely present and being in substantial occupation (Kodilinye, 1989)

ISLAMIC LAW PERSPECTIVE

When we refer this discussion to the Islamic law perspective it would be noteworthy to discuss first the terms of ownership and possession before we go further in touching up the terms of interest in land and also actual occupation. This is because even though, the fact that tort law has developed rapidly and internationally each state in all over the world bases its tort law on its common law like Malaysia for example bases its tort law decisions on its statutes if available or referred to English common law if unavailable or necessary.

Back to the term of ownership according to the Islamic law it is defined as a legal right which awarded by the law to a person regarding a thing who is solely entitled to use exploit and discharge it within the framework of law (Al-Khafif, n.d.). It is also defined as the expression of the connection existing between a man and a thing which is under his absolute power and control to the exclusion of others. In relation to the definitions of ownership before, researchers might say that it has an exclusiveness that keeps others out of a land for instance and enables the owner to do whatever he likes on or with it except for any legal hindrance as the case of in expediency or any other legal hindrance pertaining to public or private interest. With regard to the ownership it can be divided into two parts, viz.:

- Perfect or complete ownership (milk tamm)
- Imperfect or incomplete ownership (milk naqis)

Perfect or complete ownership means the right to own a thing and its benefits, thereby entitling the owner to all

legal right (Al-Khafif, n.d.). Including into it are right of proprietry (milk al-raqabah), right of possession (milk al-yad) and right of disposition (milk al-tasarruf). Perfect or complete ownership has certain conditions, namely:

- The owner is absolutely free to dispose his own property through every legal means such as selling, leasing, granting, mortgaging, lending, etc.
- The owner has the right to use his corporeal property such as using the land for agriculture, the house for dwelling, etc., within the framework of Islamic law
- The right of ownership is not temporary and does not cease except in case the property is passed to another through inheritance upon the death of the owner or through a legal disposal transferring the ownership as in case of selling or granting
- The owner is not permitted to claim any compensation with regard to his own action to his property. His own action is bound upon his own responsibility not to others

Imperfect or incomplete ownership is that which entitles a person to one only of the two. It is of two kinds, ownership of the thing alone whereas the benefit goes to another person and the ownership of the benefit alone whereas the thing is owned by another person such as in the case of lease where an owner of a house leases his house to a man. The owner of the house owns his house by a legal title but the benefits of the house are enjoyed by the man and vice-versa that is the man owns its benefit only but the legal title of the house is absolutely owned by the owner. Hence, the imperfect ownership is of three kinds:

- The ownership of the property only
- The ownership of the benefit alone (haqq al-intifa^{c}). Here is a usufruct and it is a personal one, namely given to a certain person and he can not pass it to another. Like in a case of a person gives the right to benefit from his property to another after his death. That another person being an owner of the benefit, but the corporeal property itself is owned by the person's successors
- The ownership of the benefit only, the usufruct here follows the property not directly focusing on the person who gets the benefit from such property like right to get water for drinking, right to flow water and right of way. This right is known as haqq al-irtifaq (right of utilization/usufruct)

With regard to the term of possession, it means that a legal right of control to take or to gather a thing for a person's interest. As such the possession of a house is to be meant to preserve or to guard or to control and to get all of its benefit and usufruct even though, the house itself is not owned by oneself. In regard to the possession, the Islamic scholars have classified it to three classifications, namely:

A thing has never been owned by anyone. It may therefore, be possessed and owned by any person who found and grasp it such as a fish in the sea. It will be possessed and owned by a sailor which caught it. This is a fundamental basic rule in regard to this discussion because a thing previously is owned by an owner it can not be owned by way of possession. Like in the case of sell and purchase, a buyer is not called as possessor because he got a thing from the owner of the thing that is the seller. In this case, a thing could be passed through to another by selling, bequest or rent, etc.

A thing which is under another's ownership, but at the time it has been found by another its owner is not available with it. The lost thing in this part is called as luqtah. A person who found it should preserve it as a trustee until he finds its owner. It is a duty of every person who found it to pick up and take cake of luqtah in order to return it to the owner when he claims it. The finder never becomes the owner of luqtah. After publication continued during a whole year, the finder of luqtah has the choice either to retain it and keep it until the owner should make his claim; to give it in alms either in his own name or in that of the owner to appropriate it as a possessor and an owner.

Possession through the action of the de factor (actual action). Possession of moveable things could be acquired by grasp or put a hand on it such as put a hand on the table or grasp a pen and put it in pocket. Otherwise possession of immoveable things it could be possessed by occupying or the like which can be meant possession such as the action of cultivation of own less land. By this action it may be regarded as possession. Regarding the discussion of possession, it may also be divided into two categories (al-Khafif, n.d.):

- Actual possession (haqiqi), like a man takes a thing with his hand
- Symbolical possession (hukmi), like a person has only a symbolical possession of his house, land, etc.

A wrongful possessor or occupier has better title to be sued in the eyes of law than all others except the true owner but the true owner himself will not be recognized by the court unless clear proof is given that the possession by the other is adverse (Qureshi, n.d.). As regards the concept of possession in the Islamic law no doubt that law attaches so much importance to a

possessor or occupier that he is presumed to be the owner. What is necessary to constitute possession is the will to exclude others plus the power to retain possession. That means for possession not only the thing possessed should be fully under the control and use of the possessor but also there should be the intention to exclude others and resist any outside interference in its use and enjoyment. From the discussion above, it could be summed up as follows with a little bit comparing to the ownership:

- In certain activity, the power of possession and ownership are available together such as a landlord. He is a possessor and an owner of the land. He could usufruct and controls it and at the same time, he owns it
- In certain activity, there is only a power of ownership not possession. For example in a case of tenancy. If a landlord rents his house to a tenant he merely has right of ownership not possession because the right of possession is under the tenant. The tenant has a power to control usufruct and do anything whatever he likes under renting agreement
- In certain activity, there is only a power of possession, not ownership. For example in the case of a person usurps a thing from another person. A usurper now merely has a power of control, usufruct and doing whatever he likes to the thing but he cannot do something which involves transferring the entitlement. The right of ownership is still under its real owner

Generally speaking, possession is an action to produce an ownership. The concept of possession is wider that ownership. Ordinarily, the right of ownership should be preceded by the right of possession and the right of possession can be possessed whether by legal or illegal means but the right of ownership definitely exists by a process of legality. Based on the discussion above surely the Islamic law of tort gives a full legal right to the owner of a land to claim damages for any unreasonable interference to another in any case of private nuisance. This could be highlighted with linking to a celebrated case in Islamic history. The case occurred when the Prophet was confronted with a case brought by a man of Ansar Community from Madinah against Samurah bin Jundab. The Plaintiff was claiming injury from a date tree owned by the defendant which extended to the Plaintiff's land and caused injury to him and his family. The Prophet granted an injunction to the Plaintiff with decision that the tree should be removed. The removing of the tree is deemed a lesser matter than the severe injury sustained by the Plaintiff. The judgment of the case is in conjunction with an Islamic legal maxim, severe injury is removed by the lesser injury. The kind of injury in private nuisance which could arise liability to the defendant not just happening through a direct act but it also could happen in an indirect act. This could be linked to a case of al-Dahhak v. Muhammad bin Maslamah.

In this case, the Plaintiff wanted to reach water by digging a canal passing through the defendant's land. However, after consultation between each other the defendant refused. When the case was brought to the Caliph ʿUmar bin al-Khattab he asked the defendant, Why do you prevent your brother from something beneficial to him and of benefit to you without impairment. Subsequently, the Caliph ʿUmar decided in favour of the Plaintiff notwithstanding the refusal of the owner of the land.

Likewise, a few cases which are recorded by the Muslim jurists in their writings could be brought to the discussion. When a forge or a mill is erected adjacent to a house and it becomes impossible for the owner of such a house to dwell therein by reason of the great quantity of smoke given off by a furnace or the bad smell made by a linseed oil factory, the owner of the house has a right to sue the owner of the forge, the mill or the factory to move out to another place. Similarly if a person tans the animal's skin in his house and thereby causes continuously a bad smell to his neighbor, the law gives a right to the neighbor (the owner/possessor) to prevent the interference of the person's act.

In relation to the discussion of private nuisance, the Islamic law of tort provides a special rule on it. It rules a person (neighbor), indeed is restrained in the right of disposal over his ownership when injury can be caused to his neighbor. Therefore, any act of a person which can interfere the right of comfortable of another should be prevented.

Thereby, the noise of pounding and hammering emanating from the fuller's shop or smith's workshop, the adjacent occupier has a right to sue such a work to be stopped. Also if a cotton ginner is erected near another house and its occupier cannot dwell therein by reason of the noise arising from it the occupier has a right to sue the cotton ginner for that private nuisance (Haydar, n.d.).

COMPARISON

If we see the judgment in the case of Malone v. Lasky which the court requires that the Plaintiff should have a legal title of such a land and also a right of occupation of the land in order for law suit. This is quite obscure

decision when we compare it to the Islamic law approach. The Plaintiff is a wife of the manager who has definitely a right of occupation in the premises. When the manager has the right of occupation, certainly his wife also has the same right to occupy with her spouse according to Islamic law perspective. At the same time, she has also at least the imperfect ownership for usufruct and also has the right of possession through the action of de factor.

When we refer to the English law of tort, it states that a person who has interest in land, means a person who possesses the land or the building on it. The person may include the owner, the tenant or the trespasser. All of them are called as occupier of the land. This is because they may control such a land or premises upon it and as a result, they have a legal right to sue another in private nuisance. In general, this approach is in the same line with the notion in the Islamic law of tort. Even though the owner, the tenant or the trespasser could be put as a possessor to the land or building but the Islamic law of tort does not recognize the trespasser as a legal possessor. Subsequently when he is an unlawful and illegal possessor, he is certainly and surely not given by the law to have a legal right to bring any case of private nuisance in the court.

In the Islamic law of tort, someone who is considered to have interest in land is either a person who has a legal title of a land, means he is the real owner of the land or such a person has a legal right of occupation, means he is incomplete owners (milk al-naqis) or he is a legal possessor of such a land like in case of lease, rent, borrow and usufruct. As such, so long as someone is as a legal owner or a legal possessor, he has according to the Islamic law of tort, the right to make a complaint against any act of private nuisance caused by another to him. The English law of tort recognizes a few parties who can do lawsuit in case of private nuisance like freeholders, licensors, licensees in exclusive occupation and lessees. Those are regarded to have interest in land even though some of them are not the rightful owner of the land. However, they have a legal right of occupation and also have a legal entitlement to use and enjoyment of such a land. At the same time, visitors, guests, lodgers and licensees without exclusive possession are not deemed to have a legal interest in the land and they are not entitled to sue against another in cases of interference under private nuisance. When it is referred to the Islamic law of tort, it is logical and reasonable to accept the approach made by the English law about those who have the right to sue in private nuisance that is those who have interest in land or those who have abode on such a land as an actual occupation. For those who have interests in land or have actual occupations they certainly have the right of ownership or possession, otherwise those who have no right of entitlement like visitors, guests and others, they are considered more or less as parties who come in and out of the land without any permanent interest of the land and they have not any right and responsibility to control, preserve and guard it.

The common law said that a person who has interest in land is called as occupier and the term of occupier is referred to the owner of the land or house where he owns it and dwells on it or to the tenant of the land or house where he only has interest to get benefit from the land or the house not owning it or to the trespasser according to a Law Dictionary but until now there is no case in which could be related to the trespasser. In the Islamic law of tort it seems that it is in the same line with the common law regarding the term of occupier which includes owner, tenant and trespasser. However, in the case which involving the trespasser he surely will not be granted by the law to bring an action to sue others in private nuisance. This is because he is deemed as an unlawful and illegal occupier of such a land or house. It is necessary to emphasize that a lawsuit which a person needs to bring to the court his position should be as a rightful and legal occupier not a trespasser. As such where the position is illegal and unlawful the court action shall be invalid. And it could be said that anything forbidden to be done is also forbidden to have the court action. This case could be analogized from a legal maxim of fiqh; ma hurima fi'lih, hurima talabih which means anything forbidden to be done is also forbidden to have the performance of it requested. It could obviously be said that the Islamic law merely gives the space to anyone for bringing legal action in private nuisance who has a legal ownership or possession to such a thing or land. This is a basic rule that a land which is owned by a rightful owner or possessor it could be unreasonable to be owned or possessed by others without the permission from him. Other than those who have a legal right for a land is regarded as a trespasser and then he has no legal right in the view of Islamic law to bring lawsuit in private nuisance.

As we have known that an occupier like a tenant can control and manage the land occupied and at the same time he in the legal term possesses the land as a result in the English law of tort a wife is not put into the term of occupier even though she abides and accompanies her husband. She is categorized as a visitor or a guest not even as a possessor. Therefore if she suffers injury

resulting from private nuisance of her neighbor, she does not have a legal right to sue the neighbor. In the Islamic law of tort it is considered that a wife is a chit-chatting mate and eternal partner for her husband. They should live together on a basis of a valid agreement or contract which is legitimatized by the rule of Islamic law. Their acts to get marriage and live together is proposed and supported by a few verses of al-Qur'an (al-Ra^{c}d, 13:38; al-Nisa', 4:3; al-Nur, 24:32). Likewise in a few hadiths of the Prophet. Even though the presence of a wife at the side of her husband is regarded as a visitor like in the decision made by the English court but according to the Islamic law their relationship is in valid regulation and rule and her presence to the life of her husband is lawful, legitimate and non-contrary to the tenets of Islamic law. As such why should she not be given a legal right to bring an action to sue another in private nuisance for injury she suffered?

Based on the cases of Newcastle-under-Lyme Corporation v. Wolstanton Ltd., Foster v. Warblington Urban District Council, Motherwell v. Motherwell, Paxhaven Holdings Ltd., v. Attorney-General, Metropolitan Properties Ltd., v. Jones, Mc. Leod v. Rub-A-Dub Car Wash (Malvern) Pty. Ltd. and Ruhan v. Water Conservation and Irrigation Commission where the Plaintiff even though they have no title of ownership to the land involved they actually have exclusively possession through, possessory right to use and to get benefit to such a land.

The Plaintiffs can maintain their court of action in private nuisance. This has been held by the court. When we refer to the position of the Islamic law of tort in this case as we have known that the term of possession denotes a legal right of control given by law to a person to take to use or to gather a thing or a land for the person's interest. It means that the possession of a land is to control to use and to get all of its benefits required by which is permitted by its owner or authority even though, the land itself is not owned by the person. So long as the use of the land under the agreement regulated between him and the owner of the land he could be regarded as under an actual occupation of the land and he is considered to have a legal authority or a statutory right to do something on the land which is under the agreement agreed between them.

At the same time, the Islamic law recognizes and approves the possession through the action of de factor for moveable or immoveable property so long as the property involved has never been owned and possessed by another. Possession through de factor is available in a few ways, viz.:

- Dead land with no one owns it
- Treasure found into the land with no one owns it
- Animals that are not owned by anyone either in the forest or in the water

Anything permitted by the Islamic law which has never been owned and possessed by anyone. Relating to the above facts if a person thereby suffers injury from his neighboring mates in any case of private nuisance, the law seemly renders a space to him for lawsuit as far as this case is concerned based on Islamic law of tort any person who has been permitted by a real owner of land to exercise in his land for instance, the person at that time has a right of possession and he has a sufficient legal right to maintain his action in private nuisance. In this case it could be said that, the theory and notion of the Western law is in the same line with the Islamic law of tort.

According to the Western law a person who parks his car for sometime would not have a right to sue another in private nuisance. This has been held by court in the aforesaid case of Vaughan v. Halifax-Dartmouth Bridge Commission. Referred to the view of Islamic law in the issue of parking a car in a parking lot it would be under imperfect ownership. This kind of ownership could be related to the right of utilization or the right of usufruct (haqq al-irtifaq). It means that any person can use and take benefit from such an immoveable property like to jointly use a main road with the public. This also includes the right of use the public parking lot. If a damage happened to a car which is parked there is the car owner does not have the right to sue the tortfeasor in private nuisance.

CONCLUSION

The researchers can say that besides this issue has been touched by the English law of tort it could also be dealt with in the perspective of Islamic law of tort. However in principle the Islamic law of tort in its discussion about private nuisance certainly gives the central idea that any interference with the enjoyment of another's land is prohibited.

In standing to make a suit by the Plaintiff in private nuisance, the authority of himself either in interest in land or in actual occupation was clearly not analyzed in depth study in the manuscripts of Muslim jurists. The discussion could however be related to the colloquy of ownership and possession. As such Muslim jurists should consider and analyze the legal developments that have taken place in modern times in different parts of the world in the area of torts, especially the rule of tort in the English and Western laws. In the light of the discussion before, it should be remembered that there many

principles and approaches existed in the Western law which are similar with the perspective of Islamic law. Unless there are a few situations which in general the Islamic law does not agree with the decision made by the judge, especially as the decision in the case of Malone v. Lasky. Meanwhile, researcher can see that the decision held by Goddard L.J. had been opposed by Stephen J. as in the case of Metropolitan Properties Ltd. v. Jones. In Islam, the variety of opinions is accepted as an evolution of law and justice. That's why there is a legal maxim which might be linked to this situation; one legal interpretation does not destroy another (al-ijtihad la yunqad bi al-ijtihad). It means that ratio decidendi from both judges may be right with their own separate reasons.

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